

Part Four

**LEGISLATIVE GUIDE FOR THE
IMPLEMENTATION OF THE PROTOCOL
AGAINST THE ILLICIT MANUFACTURING OF
AND TRAFFICKING IN FIREARMS,
THEIR PARTS AND COMPONENTS
AND AMMUNITION, SUPPLEMENTING
THE UNITED NATIONS CONVENTION
AGAINST TRANSNATIONAL ORGANIZED CRIME**

Contents

| | <i>Paragraphs</i> | <i>Page</i> |
|---|-------------------|-------------|
| I. Introduction | 1-12 | 401 |
| II. Scope and technical provisions of the Protocol and its relationship with the Convention | 13-23 | 405 |
| III. Definitions | 24-58 | 413 |
| A. “Firearm” | 24-43 | 413 |
| B. “Parts and components” | 44-51 | 419 |
| C. “Ammunition” | 52-58 | 422 |
| IV. Control measures | 59-165 | 425 |
| A. Introduction | 59-64 | 425 |
| B. Marking | 65-90 | 427 |
| C. Licensing or authorization systems | 91-115 | 435 |
| D. Record-keeping | 116-133 | 446 |
| E. Confiscation, seizure and disposal | 134-149 | 453 |
| F. Deactivation of firearms | 150-157 | 458 |
| G. Brokers and brokering | 158-165 | 461 |
| V. Substantive criminal law | 166-237 | 465 |
| A. Introduction | 166-180 | 465 |
| B. Illicit manufacturing | 181-200 | 474 |
| C. Illicit trafficking | 201-218 | 482 |
| D. Tampering with markings | 219-228 | 488 |
| E. Optional offences | 229-237 | 492 |
| VI. Information exchange | 238-261 | 495 |
| A. Tracing | 240-253 | 495 |
| B. Cooperation | 254-261 | 501 |

| | <i>Page</i> |
|--|-------------|
| <i>Annexes</i> | |
| I. Reporting requirements under the Firearms Protocol | 505 |
| II. Table of examples of relevant national legislation | 506 |
| III. International Criminal Police Organization | 507 |
| A. Interpol Weapons and Explosives Tracking System: sample screen | 507 |
| B. Contact information | 507 |
| IV. Canada: deactivation standards | 508 |

I. Introduction

A. Structure of the legislative guide

1. The present legislative guide for the implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/255, annex) is divided into five chapters: introduction; scope and technical provisions of the Protocol and its relationship with the Convention; definitions; control measures; substantive criminal law; and information exchange.

2. Each of the four substantive chapters is prefaced by a brief description that summarizes the main points contained in it. Within each of the four chapters, the main articles of the Protocol are described in separate sections. Each section starts by quoting the relevant provisions of the Protocol and, where appropriate, the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I) and includes the following elements: an introduction; a summary of main requirements; mandatory requirements; optional measures, including optional issues; and information resources.

3. The guide is supplemented by annexes that provide a list of the reporting requirements under the Protocol (annex I) as well as examples of relevant national legislation (annex II). Readers are encouraged to consult the annexes as appropriate. The sections entitled “Summary of main requirements” provide a checklist of the essential requirements of the article concerned.

4. The process by which the requirements of the Protocol can be fulfilled will vary from State to State. Monist systems could ratify the Protocol and incorporate its provisions into domestic law by official publication. Dualist systems would require implementing legislation.

5. In sorting out the priorities and obligations under the Protocol, the guidelines presented below should be kept in mind.

6. In establishing their priorities, drafters of national legislation should bear in mind that the provisions of the Convention and the Protocols thereto do not all have the same level of obligation. In general, provisions can be grouped into the following categories:

(a) Measures that are mandatory (either absolutely or where specified conditions have been met);

(b) Measures that States parties must consider applying or endeavour to apply;

(c) Measures that are optional.

7. Whenever the words “States are required to” are used, the reference is to a mandatory provision. Otherwise, the language used in the legislative guide is “required to consider”, which means that States are strongly asked to seriously consider adopting a certain measure and make a genuine effort to see whether it would be compatible with their legal system. For entirely optional provisions, the legislative guide employs the words “may wish to consider”. Occasionally, States “are required” to choose one or another option (e.g. as in the case of offences established in accordance with article 5 of the Convention). In that case, States are free to opt for one or the other or both options.

8. The exact nature of each provision will be discussed as it arises. As noted above, as the purpose of this guide is to promote and assist in efforts to ratify and implement the primary focus will be on provisions that are mandatory to some degree and the elements of those provisions which are particularly essential to ratification and implementation efforts. Elements that are likely to be legislative or administrative or are likely to fall within other such categories will be identified as such in general terms, but appear in the guide based on the substance of the obligation and not the nature of actions that may be required to carry it out, which may vary to some degree from one country or legal system to another. (It should be noted, however, that the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime made it clear that it saw the obligation to establish criminal offences as being primarily legislative in nature (see the interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Organized Crime Convention (A/55/383/Add.1), para. 69).)

B. Structure of the Protocol

9. The Protocol provides for a comprehensive system to control the movement of firearms, their parts and components and ammunition. Since

the specific focus is on transnational transactions, the Protocol provides for comprehensive procedures for the import, export and transit of firearms, their parts and components and ammunition. It is a reciprocal system requiring States to provide authorizations to one another before permitting shipments of firearms to leave, arrive or transit across their territory and enables law enforcement to track the legal movement of shipments to prevent theft and diversion. These standards are intended to help ensure a level of transparency to assist States parties to better target illicit transactions. Measures are also included to control manufacturing.

10. Linked to manufacturing and to the import/export/transit regime is the article dealing with marking of firearms. Both domestic and international efforts to reduce illicit trafficking rest on the ability to track and trace individual firearms. That, in turn, requires firearms to be uniquely identified. One of the law enforcement tools in the Protocol is, therefore, the marking of firearms.

11. The measures to control the legal movement of firearms are enforced through the criminalization provision in the Protocol, which requires States parties to establish criminal offences for illicit manufacturing, illicit trafficking and the illicit alteration or obliteration of markings. Recognizing that criminal offences cannot be detected or prosecuted effectively without the appropriate evidence, the Protocol contains articles requiring comprehensive record-keeping on the transnational movement of firearms, as well as the provision for exchange of information between countries involved in such transactions. The tools contained in the Convention are also critical in that regard. In particular, the articles dealing with mutual legal assistance and extradition for commission of offences covered by the Protocol will be essential tools for law enforcement.

12. The Protocol sets the minimum standard that must be dealt with in domestic law. States can legislate with respect to a broader range of weapons and impose increased or stricter measures in domestic law, if they wish, but they may not be able to get foreign cooperation with respect to the provisions that go beyond the standards set in the Protocol.

II. Scope and technical provisions of the Protocol and its relationship with the Convention

Firearms Protocol

“Article 1

“Relation with the United Nations Convention against Transnational Organized Crime

“1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

“2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

“3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.”

Organized Crime Convention

“Article 37

“Relation with protocols

“1. This Convention may be supplemented by one or more protocols.

“2. In order to become a Party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention.

“3. A State Party to this Convention is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.

“4. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.”

Firearms Protocol

“Article 2

“Statement of purpose

“The purpose of this Protocol is to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.”

“Article 4

“Scope of application

“1. This Protocol shall apply, except as otherwise stated herein, to the prevention of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and to the investigation and prosecution of offences established in accordance with article 5 of this Protocol where those offences are transnational in nature and involve an organized criminal group.

“2. This Protocol shall not apply to state-to-state transactions or to state transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations.”

“Article 18

“Entry into force

“1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

“2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.”

A. Main elements of the articles

1. Application of the Convention to the Protocol (article 1 of the Protocol and article 37 of the Convention)

13. Article 37 of the Convention and article 1 of each of the Protocols thereto together establish the basic relationship between the Convention and its Protocols. The four instruments were drafted as a group, with general provisions against transnational organized crime (e.g. extradition and mutual legal assistance) in the parent Convention and elements specific to the subject matter of the Protocols in each of the Protocols (e.g. offences established in accordance with the Protocol and provisions relating to travel and identity documents). As the Protocols are not intended to be independent treaties, to become a party to any of the Protocols, a State is required to be a State party to the parent Convention. This ensures that, in any case that arises under a Protocol to which the States concerned are parties, all of the general provisions of the Convention will also be available and applicable. Many specific provisions were drafted on that basis: the Convention contains general requirements for mutual legal assistance and other forms of international cooperation, for example, while requirements to render specific assistance such as the verification of travel documents or the tracing of a firearm are found only in the appropriate Protocols. Additional rules established by the relevant articles deal with the interpretation of similar or parallel provisions in each instrument and the application of general provisions of the Convention to the offences established in accordance with the Protocol and its other provisions.

14. Article 1 of the Protocol and article 37 of the Convention establish the following basic principles governing the relationship between the two instruments:

(a) No State can be a party to any of the Protocols unless it is also a party to the Convention (art. 37, para. 2, of the Convention). Simultaneous ratification or accession is permitted, but it is not possible for a State to be subject to any obligation under the Protocol unless it is also subject to the obligations of the Convention;

(b) The Convention and the Protocol must be interpreted together (art. 37, para. 4, of the Convention and art. 1, para. 1, of the Protocol). In interpreting the various instruments, all relevant instruments should be considered and provisions that use similar or parallel language should be given generally similar meaning. In interpreting one of the Protocols, the purpose of that Protocol must also be considered, which may modify

the meaning applied to the Convention in some cases (art. 37, para. 4, of the Convention);

(c) The provisions of the Convention apply, *mutatis mutandis*, to the Protocol (art. 1, para. 2, of the Protocol). The meaning of the phrase “*mutatis mutandis*” is clarified in the interpretative notes (A/55/383/Add.1, para. 62) as “with such modifications as circumstances require” or “with the necessary modifications”. This means that, in applying provisions of the Convention to the Protocol, minor modifications of interpretation or application may be made to take account of the circumstances that arise under the Protocol, but modifications should not be made unless they are necessary and then only to the extent that is necessary. This general rule does not apply where the drafters have specifically excluded it;

(d) Offences established in accordance with the Protocol shall also be regarded as offences established in accordance with the Convention (art. 1, para. 3, of the Protocol). This principle, which is analogous to the *mutatis mutandis* requirement, is a critical link between the Protocol and the Convention. It ensures that any offence or offences established by each State in order to criminalize illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and tampering with markings as required by article 5 of the Protocol will automatically be included in the scope of the basic provisions of the Convention governing forms of international cooperation such as extradition (art. 16) and mutual legal assistance (art. 18).¹ It also links the Protocol and the Convention by making applicable to offences established in accordance with the Protocol other mandatory provisions of the Convention. In particular, as discussed below in chapter V of the present guide, on substantive criminal law, obligations in the Convention concerning money-laundering (art. 6), liability of legal persons (art. 10), prosecution, adjudication and sanctions (art. 11), confiscation (arts. 12-14), jurisdiction (art. 15), extradition (art. 16), mutual legal assistance (art. 18), special investigative techniques (art. 20), obstruction of justice (art. 23), witness and victim protection and enhancement of cooperation (arts. 24-26), law enforcement cooperation (art. 27), training and technical assistance (arts. 29 and 30) and implementation of the Convention (art. 34), apply equally to the offences established in accordance with the Protocol. Establishing a similar link is therefore an important element of national legislation in the implementation of the Protocols;

(e) The Protocol requirements are a minimum standard. Domestic measures may be broader in scope or more severe than those required by

¹In most cases, the drafters used the phrase “offences covered by this Convention” to make this link. See, for example, article 18, paragraph 1, which sets forth the scope of the obligation to extradite offenders.

the Protocol, as long as all obligations set forth in the Protocol have been fulfilled (art. 34, para. 3, of the Convention).

2. Interpretation of the Protocol (articles 1 and 19 of the Protocol and article 37 of the Convention)

15. The interpretation of treaties is a matter for States parties. General rules for the interpretation and application of treaties are covered by the 1968 Vienna Convention on the Law of Treaties² and will not be discussed in detail in the present guide. These general rules may be amended or supplemented by rules established in individual treaties, however, and a number of specific interpretative references appear in both the Convention and the Protocol. (See, for example, article 16, paragraph 14, of the Convention, which makes the principle of non-discrimination a limit on the interpretation and application of the basic obligation to extradite offenders.) The dispute settlement provisions found in all four instruments also require negotiations, followed by arbitration, as the means of resolving any disputes over interpretation or application matters (see article 35 of the Convention and article 16 of the Protocol). Specific references will be raised in relation to the subject matter to which they apply, but there are also general interpretative provisions that apply to the Protocol. Pursuant to article 37 of the Convention and article 1 of the Protocol, elements of the Convention must be taken into consideration when interpreting the Protocol.

B. Purposes of the Protocol (article 2 of the Protocol)

16. The purpose of the Protocol is “to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition” (art. 2 of the Protocol).

C. Scope of application (article 4 of the Protocol)

17. It is essential to understand the scope of the Protocol, which is set out in article 4. Paragraph 1 of article 4 establishes the full scope of application of the Protocol and paragraph 2 then contains exclusions related to certain state- and national security-related transactions and transfers.

²United Nations, *Treaty Series*, vol. 1155, No. 18232 (also available online: <http://www.un.org/law/ilc/texts/treaties.htm>).

18. The general principle established in article 4, paragraph 1, of the Protocol is that the instrument applies to the “prevention of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition” and to the “investigation and prosecution of offences established in accordance with article 5 of this Protocol where those offences are transnational in nature and involve an organized criminal group”.

19. Article 4, paragraph 2, provides that the Protocol “shall not apply to state-to-state transactions or to state transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations”. The intention in paragraph 2 was to exclude certain transactions or transfers that involve States. The extent of the limitation turns on the interpretation of the terms “state-to-state transactions” and “state transfers”. Generally, this is left to States parties, but the drafters were concerned that the Protocol should apply to activities undertaken by States parties on a commercial basis, such as the dealings of state-owned or operated manufacturers of firearms. To clarify this, the interpretative notes indicate that the words “state-to-state transactions” refer only to transactions by States in a sovereign capacity, thereby excluding States acting in their commercial capacity.³

20. As with other provisions of the Convention and Protocols, article 34, paragraph 3, of the Convention sets a minimum standard, which States parties are free to exceed if they wish, bearing in mind that any investigation, prosecution or other procedures relating to activities that are outside the scope of the Convention or Protocol would not be covered by the various requirements to provide international cooperation.

21. It is important for drafters of national legislation to note that the provisions relating to the involvement of transnationality and organized crime do not always apply. While in general the reader should consult the legislative guide for the implementation of the Convention for details (art. 34, para. 3, of the Convention) of when those criteria apply and when they do not (see paras. 29-31 of the legislative guide to the parent Convention), it is important to emphasize that, for example, article 34,

³See the interpretative notes (A/55/383/Add.3), para. 4; see also the record of the meeting of the General Assembly at which resolution 55/255, containing the text of the Firearms Protocol, was adopted (*Official Records of the General Assembly, Fifty-fifth Session, Plenary Meetings, 101st meeting*).

paragraph 2, of the Convention specifically provides that legislatures must not incorporate elements of transnationality or organized crime into domestic offence provisions. (The only exception to this principle arises where the language of the criminalization requirement specifically incorporates one of these elements, such as in article 5, paragraph 1, of the Convention (presence of an organized criminal group). These requirements are discussed in more detail in the legislative guide for the implementation of the parent Convention.) Together, these provisions establish the principle that, while States parties should have to establish some degree of transnationality and organized crime with respect to most aspects of the Protocol, their prosecutors must not be obliged to prove either element in order to obtain a conviction for illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and tampering with markings or any other offence established by the Convention or its Protocols. In the case of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and tampering with markings, domestic offences should apply even where transnationality and the involvement of organized criminal groups does not exist or cannot be proved. As another example, the first paragraphs of the articles on extradition (art. 16) and mutual legal assistance (art. 18) of the Convention set forth certain circumstances in which one or both of these elements are to be considered satisfied. Regarding the definition of “organized criminal group”, it should be noted that, according to the interpretative notes to article 2, subparagraph (a), of the Convention (A/55/383/Add.1, para. 3):

“The *travaux préparatoires* should indicate that the words ‘in order to obtain, directly or indirectly, a financial or other material benefit’ should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members.”

D. Implementation of the articles

22. Generally, most of the articles covered in the present chapter govern the interpretation and application of the other provisions. Thus, they may provide assistance and guidance to Governments, drafters and legislators but do not themselves require specific implementation measures.

23. However, requirements that the Convention be applied, *mutatis mutandis*, to the Protocol and that offences established in accordance with the Protocol be regarded as offences established in accordance with the Convention may give rise to a need for implementing legislation. The measures required as a result of such requirements are described in detail in chapter V.

III. Definitions

A. “Firearm”

“Article 3

“Use of terms

“For the purposes of this Protocol:

“(a) ‘Firearm’ shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899;

“ . . . ”

1. Introduction

24. The definition of the term “firearm” establishes the main physical subject matter of the Protocol.

2. Summary of the main requirements

25. According to the definition in the Protocol, a firearm:

- (a) Is portable;
- (b) Is a barrelled weapon; and
- (c) Expels a projectile by the action of an explosive.

A firearm is not:

- (a) An antique; or
- (b) A replica of an antique.

3. *Mandatory requirements*

26. The term “firearm” is defined in order to establish a clear meaning for the Protocol. There is no requirement that the term be defined in domestic law, although national legislatures may find it necessary to adopt or amend legislative definitions to ensure that other legislative requirements apply to the full range of subject matter specified by the Protocol.

(a) Main elements of the article

27. The drafters of the Protocol adopted the basic definition of “firearm” as a “barrelled weapon”. Added to that, however, is qualifying language containing specific limitations, such as the exclusion of non-portable firearms and of specified antique firearms and their replicas, and language to exclude such barrelled weapons as air guns.

(i) Portability

28. By including the word “portable”, very large firearms are excluded from the definition. To clarify the meaning of “portable”, the interpretative notes indicate that “the intended meaning was to limit the definition of ‘firearm’ to firearms that could be moved or carried by one person without mechanical or other assistance” (A/55/383/Add.3, para. 3).

(ii) Action of an explosive

29. The inclusion of the phrase “by the action of an explosive” in the definition excludes weapons using another form of propulsion, such as compressed gas, to propel the projectile.

(iii) Antiques

30. In addition, the drafters found it appropriate to exclude from the application of the Protocol firearms manufactured up to and during 1899.

(iv) Replicas

31. Replicas of antique firearms are also excluded from the definition, but drafters should be aware that only functional replicas using modern firing systems (i.e. those which are actually designed to expel projectiles) need to

be considered. Non-firing replicas would only be included if they can be “readily converted” to discharge projectiles.

(b) Implementation of the article

32. As the basic category of subject matter, the definition of “firearm” will be a critical element of domestic implementing legislation. In many cases, States will already have one or more domestic legal definitions. States that do not already have a definition in domestic law should include one that as a minimum standard complies with the definition in the Protocol.

(i) Where the domestic meaning of “firearm” is narrower than the definition in the Protocol

33. A domestic definition that does not include the full range of items included within the definition in the Protocol will require expansion in order to conform to the requirements of the Protocol. Amending the existing domestic definition to conform to or exceed those requirements would have the effect of also amending, consequentially, other domestic provisions and offences that rely on the domestic definition. Where the domestic definition is expanded, for example, other domestic laws concerning, for example, domestic crimes and licensing rules that apply to “firearms” would automatically be expanded as well. This approach has the advantage of ensuring simplicity of drafting and internal consistency in the law affecting domestic and transnational matters relating to firearms. It would, however, have policy implications beyond those required by the Protocol, which would have to be considered by each Government. If it is essential to preserve the integrity of existing rules without amendment, it would also be possible to establish definitions that are subject-specific, using language such as “For the purposes of this requirement/provision, ‘firearm’ includes/does not include . . .”, but this approach should be avoided if possible. The creation of separate definitions and schemes for implementing the Protocol and overlapping domestic policies is likely to result in confusion between the categories of firearm and the rules that apply to each, as well as inefficiencies due to parallel regulatory frameworks.

(ii) Where the domestic definition is broader than the definition in the Protocol

34. Domestic definitions that include a broader range of weapons as “firearms” will be in conformity with the Protocol provided that no

firearm covered by the Protocol is omitted, making legislative amendments unnecessary.

35. However, legislators and drafters should bear in mind that, in this case, items that are “firearms” under national law but not within the definition in the Protocol might not lead to cooperation from other States parties in tracing under the Protocol or other forms of cooperation under various provisions of the Convention itself. This is because an offence committed with respect to a weapon that is not a “firearm” as defined by the Protocol would not be an offence established in accordance with the Protocol sufficient to trigger the application of article 1, paragraph 3, of the Protocol and article 3 of the Convention. The only way the Convention would be triggered in such cases is if the offence constituted a “serious crime” and the other requirements of article 3 of the Convention were met. (See article 3 of the Convention (application) and article 2, subparagraph (b) (definition of “serious crime”), both of which apply to the Protocol, *mutatis mutandis*.)

(iii) *Where domestic definitions are based on use or intended use (e.g. military firearms)*

36. Drafters should note that the definition is based on physical or forensic characteristics associated with firearms and not with design characteristics or the intended application for which a particular firearm was designed. National definitions based on categories or using qualifying terms such as “military” or “sporting or recreational” will generally not comply with the Protocol unless they also embody the basic forensic elements in the definition. National definitions and laws that regulate military and recreational firearms differently, for example, would only be in conformity if the combination of categories covered the full range of “firearms” covered by the Protocol and if the lowest standard of regulation met the minimum standard set by the Protocol. Otherwise, amendments to the definitions and/or the substantive regulatory requirements would probably be required.

(iv) *Antiques*

37. In developing or refining their definition of “firearm”, drafters should take into consideration their current treatment of antique firearms.

38. Existing definitions that apply national law to firearms made before 1899, although stricter than what is called for by the Protocol, include all

of the firearms covered by the Protocol and would therefore be in conformity with it without amendment. Since this is a stricter standard than that applied by the Protocol, other States parties would not be obliged to provide cooperation with respect to firearms made in or prior to 1899.

39. Existing definitions that specify a later date than 1899, excluding from national law firearms made after 1899 as antiques, would not be in conformity. This would have to be addressed by amending the existing definition.

40. Another formulation that should be reviewed is one that defines antique firearms with reference to a specific number of years, as opposed to a date in time. For instance, where a country defines antique firearms as those which are 100 years old, the cut-off date would be later than 1899 and would therefore not conform to the definition in the Protocol. Even if the number of years were greater, 125 for instance, eventually the cut-off date would cease to comply with the terms of the Protocol.

(v) *Replicas*

41. Beyond the cut-off date, the Protocol does not provide any guidance with respect to the meaning of “antique firearms or their replicas”, leaving this up to national legislatures. However, the domestic laws of many States subject both antique firearms and their replicas to a lower standard of regulation on the basis that their reduced capabilities make them less dangerous and, for this reason, drafters and legislators may wish to consider applying criteria that focus on the capabilities of a replica rather than its appearance. Thus, a firearm that superficially resembles an antique firearm but has substantial added capabilities, owing to the use of technology not available at the time of the manufacture of the original, would not be considered a replica. On the other hand, a replica that must be muzzle-loaded in the same manner as the original, for example, has the same limits on cartridge power and rate-of-fire as the original and would be considered to be a replica. Drafters and legislators are advised to consult forensic or other experts on this question.

4. *Optional measures, including optional issues*

42. Consideration may be given to extending the meaning of “firearm” or the scope of implementing legislation to include larger types of military weaponry or non-firearms. It should be borne in mind, however, that such

provisions would be subject to the same considerations relating to international cooperation set out above.

5. Information resources

43. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 1, paragraph 3 (Relation with the United Nations Convention against Transnational Organized Crime)

Article 12, paragraph 4 (Information)

(b) Organized Crime Convention

Article 2, subparagraph (b) (Use of terms)

Article 3 (Scope of application)

Article 34, paragraph 3 (Implementation of the Convention)

(c) Other instruments

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article I

1997 Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition (Organization of American States)

http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc

Article 1.3

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20) <http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, preamble

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_firearms

Article 2

B. “Parts and components”

“Article 3

“Use of terms

“For the purposes of this Protocol:

“ . . .

“(b) ‘Parts and components’ shall mean any element or replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by firing a firearm;

“ . . . ”

1. *Introduction*

44. The term “parts and components” refers to one of the three categories of subject matter covered by the Protocol. Parts and components of firearms were included in the Protocol to ensure that the requirements for firearms moving across borders could not be circumvented by simply disassembling the firearms into their constituent parts. To avoid this, most of the offences established by the Protocol and its requirements, apart from marking, apply equally to parts and components. Marking parts and components was seen as impracticable and is thus not required. Devices “designed or adapted to diminish the sound caused by firing a firearm” or “silencers” are expressly included, on the basis that muffled or silenced firearms could pose an additional threat to public safety when added to a firearm.

2. Summary of main requirements

45. There are two parts to this definition:

- (a) Elements of firearms; and
- (b) One specific firearm accessory, the silencer.

3. Mandatory requirements

46. The term “parts and components” is defined in order to establish a clear meaning for the Protocol. There is no requirement that the term be defined in domestic law, although national legislatures may find it necessary to adopt or amend legislative definitions to ensure that other legislative requirements apply to the full range of subject matter specified by the Protocol.

(a) Main elements of the article

47. With respect to the first part of the definition, “elements of firearms”, the definition excludes all parts and components that are not both designed specifically for a firearm and essential to its operation. Thus, for example, a small part such as a spring or machine-screw would be excluded if that screw were a standard item used in devices other than firearms. Components or accessories, such as carrying-slings or gun cases, would also be excluded because the firearm can be operated without them. In addition to the general definition, for greater clarity, the category expressly includes the major elements of a firearm, the “barrel, frame or receiver, slide or cylinder, bolt or breech block”. The second part of the definition refers to accessories designed or adapted to diminish the sound caused by firing a firearm, commonly referred to as “silencers”.

48. It should be noted, however, that while all of the requirements and offences established by the Protocol apply to firearms, there are certain provisions that are not mandatory with respect to parts and components (e.g. marking or record-keeping). Where this is the case, the description of the provisions set out below highlight this fact.

(b) Implementation of the article

49. With respect to the items in the first part of the definition (“any element or replacement element specifically designed for a firearm and

essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block”), drafters may choose to use the general description only, relying on forensic experts to assist judicial consideration, or to include the indicative list for greater clarity. The final item listed in the definition (“any device designed or adapted to diminish the sound caused by firing a firearm”) raises a further issue. Such devices are designed for use with a firearm, but are not essential to its operation and would therefore have to be dealt with expressly in domestic legislative provisions.

4. Optional measures, including optional issues

50. It should be noted that, in countries where restrictions apply, attempts have been made to avoid the restrictions by producing and selling “kits” of parts that can easily be assembled into a finished device. Drafters may wish to consider taking the potential for this type of activity into consideration while drafting this definition. It is recommended that drafters or legislators consult domestic forensic or technical experts on these issues.

5. Information resources

51. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 8 (Marking of firearms)

(b) Organized Crime Convention

Article 34, paragraph 3 (Implementation of the Convention)

(c) Other instruments

1997 Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition (Organization of American States)

http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc

Article 1.3

C. “Ammunition”

“Article 3

“Use of terms

“For the purposes of this Protocol:

“ . . .

“(c) ‘Ammunition’ shall mean the complete round or its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorization in the respective State Party;

“ . . . ”

1. Introduction

52. The definition of “ammunition” establishes the third category of subject matter covered by the Protocol. The language of the definition recognizes that, on the one hand, transactions involving the import, export or other transfer of ammunition cannot be controlled effectively without some degree of regulation of the basic components of ammunition, since these can in some cases easily be transferred for assembly at the destination. At the same time, the regulatory burdens and other factors relating to the control of components that are inert and that do not, without assembly, constitute a risk have led most States to avoid the regulation of all components and many States to regulate only assembled cartridges. Some regulate finished ammunition and, for safety or security reasons, primers and propellants, which create additional risks of explosion or fire.

2. Summary of main requirements

53. Ammunition is:

(a) The complete round; or

(b) The complete round and its component parts, if the latter are already subject to authorization in the State party.

3. *Mandatory requirements*

54. The term “ammunition” is defined in order to establish a clear meaning for the Protocol. There is no requirement that the term be defined in domestic law, although national legislatures may find it necessary to adopt or amend legislative definitions to ensure that other legislative requirements apply to the full range of subject matter specified by the Protocol.

(a) *Main elements of the article*

55. Any reference in the Protocol to “ammunition” includes all finished or assembled types of ammunition, generally consisting of a cartridge case into which a primer, propellant and a projectile (or projectiles) have been inserted. The definition in the Protocol would require States to go beyond this and to apply the same controls to the components, if such components are already subject to legal regulation in their existing legislation.

(b) *Implementation of the article*

56. In many cases, States will already have a domestic legal definition. States that do not already have a definition in domestic law should include one that as a minimum standard complies with the definition in the Protocol. As noted above, in general the definition should refer to all finished or assembled types of ammunition. Ammunition is subject to the basic import and export requirements of the Protocol but is not required to be marked. Records of ammunition transfers are only required “where appropriate and feasible”.

4. *Optional measures, including optional issues*

57. In States where the constituent parts of ammunition are not subject to authorization requirements, drafters may wish to consult with law enforcement communities to determine whether an expansion of the domestic definition of ammunition is necessary to capture those items. Drafters should note that two major elements of ammunition, the propellants and the primers, may already be regulated or restricted as explosive materials and may therefore not require new legislation.

5. *Information resources*

58. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) *Organized Crime Convention*

Article 34, paragraph 3 (Implementation of the Convention)

(b) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article I

1997 Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition (Organization of American States)

http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc

Article 1.3

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_firearms

Article 2

IV. Control measures

A. Introduction

1. *Summary of provisions*

59. The following articles of the Protocol set out the administrative requirements needed to support the criminal offences established in accordance with the Protocol. Given the legal and constitutional differences between States, the classification of those measures as legislative, regulatory or administrative may vary to some degree. The principle, however, is that the measures must provide a sufficient basis for the related offences. They must be founded in law (see A/55/383/Add.3, para. 5) and they must be in place at the time of ratification.

60. The central policy of the Protocol is to control the cross-border movement of firearms, their parts and components and ammunition and to criminalize any transaction or transfer that does not comply with the requirements of the Protocol or that is not excluded from the scope of the Protocol (art. 4, para. 2, of the Protocol). Firearms must be uniquely marked to support identification and tracing (art. 8); systems must be established for the issuance of import and export authorizations (art. 10); and records must be kept to support later tracing, based on the information generated by marking the firearms and the issuance of authorizations (art. 7). In addition, the Protocol establishes rules for confiscation, seizure and disposal of firearms, their parts and components and ammunition that operate as an exception to the rules established for other property used or destined for use in crime by articles 12-14 of the Convention (art. 6). The Protocol also sets standards for the deactivation of firearms (art. 9) and requires States to consider measures to regulate brokers (art. 15).

61. There are five situations requiring the marking of firearms. These occur at the time of manufacture, import, transfer from government stocks, when disposal other than destruction occurs and when a firearm is deactivated. There are four activities requiring authorization: import, export, transit and manufacture.

2. *Scope of application*

62. Before proceeding to discuss the requirements for controlling marking, transfers and other transactions, it is essential to review the scope of the Protocol, which is set out in article 4. Paragraph 1 of article 4 establishes the full scope of application of the Protocol and paragraph 2 then contains exclusions related to certain state- and national security-related transactions and transfers (see paras. 17-21 for a general discussion).

63. The general principle established in article 4, paragraph 1, of the Protocol is that the instrument applies to the “prevention of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition” and “to the investigation and prosecution of offences established in accordance with article 5 of this Protocol *where those offences are transnational in nature and involve an organized criminal group*” [emphasis added]. One may ask whether the qualifiers “transnational in nature” and the involvement of “an organized criminal group” limit the application of the Protocol’s control measures. The answer is that they do not. This is because the two qualifiers apply to the investigation and prosecution of offences, but not to the prevention of the offences. The Protocol recognizes that, in order to prevent illicit trafficking and manufacturing, a State must establish a legal regime with broad application. Essentially, to identify illicit transactions, all transactions must be subject to scrutiny to determine which are legitimate and which are not. For this reason, the control measures are to be applied to all transactions apart from those excluded by article 4, paragraph 2.

64. Article 4, paragraph 2, provides that the Protocol “shall not apply to state-to-state transactions or to state transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations”. The intention in paragraph 2 was to exclude certain transactions or transfers that involve States. The extent of the limitation turns on the interpretation of the terms “state-to-state transactions” and “state transfers”. Generally, this is left to States parties, but the drafters were concerned that the Protocol should apply to activities undertaken by States parties on a commercial basis, such as the dealings of state-owned or operated firearm manufacturers. To clarify this, the interpretative notes indicate that the words “state-to-state transactions” refer only to transactions by States in a sovereign capacity, thereby excluding States acting in their commercial capacity.³

B. Marking

“Article 8

“Marking of firearms

“1. For the purpose of identifying and tracing each firearm, States Parties shall:

“(a) At the time of manufacture of each firearm, either require unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number, or maintain any alternative unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code, permitting ready identification by all States of the country of manufacture;

“(b) Require appropriate simple marking on each imported firearm, permitting identification of the country of import and, where possible, the year of import and enabling the competent authorities of that country to trace the firearm, and a unique marking, if the firearm does not bear such a marking. The requirements of this subparagraph need not be applied to temporary imports of firearms for verifiable lawful purposes;

“(c) Ensure, at the time of transfer of a firearm from government stocks to permanent civilian use, the appropriate unique marking permitting identification by all States Parties of the transferring country.

“2. States Parties shall encourage the firearms manufacturing industry to develop measures against the removal or alteration of markings.”

1. Introduction

65. Article 8 of the Protocol requires States parties to take measures to ensure that firearms that are manufactured in or imported into their jurisdictions are marked.

66. The unique marking of each firearm identifies it and forms the basis on which records are kept and firearms are traced and was, therefore, seen by many States as a core provision of the Protocol. Where a firearm is recovered in the course of illicit manufacturing or trafficking, or in some

other context, the markings can be used by that State party to search its own records and as the basis of a request for the tracing of that firearm and possibly for mutual legal assistance under the Convention. (Assistance under the Convention may also be available in other circumstances, such as recovery of a firearm in the context of a “serious crime” to which the Convention applies (arts. 2, subpara. (b), and 3) or where firearms could be considered as having been used or destined for use in an offence covered by the Convention or where they could be considered as proceeds derived from such an offence (arts. 12-14). Where the relevant States are parties to the Protocol, the offences “covered by the Convention” include those established by the Protocol itself. Under its article 3, the Convention applies to a “serious crime” if the crime is transnational in nature and involves an organized criminal group.)

67. The addition of the importing country is intended to supplement the marking affixed at the time of manufacture, under which the original country of manufacture should already be identifiable. The import marking will be particularly relevant for firearms that have been in circulation for many years as they can expedite the tracing process by identifying the last country into which the firearm was imported. An exception to the import marking requirement was created to allow States parties to reduce the regulatory burden on individuals importing or exporting personal firearms for recreational purposes and on companies that frequently import and export firearms for purposes such as maintenance and repair (art. 8, para. 1 (b), and art. 10, para. 6).

68. Since state-owned firearms may be marked differently than commercially available firearms, the Protocol makes additional provisions for the marking of firearms transferred from government stocks.

2. Summary of main requirements

69. The Protocol requires States parties to ensure appropriate markings at:
- (a) Manufacture;
 - (b) Import; and
 - (c) Transfer from government stocks to permanent civilian use.

3. *Mandatory requirements*

(a) *Main elements of the article*

(i) *Marking at manufacture (art. 8, para. 1 (a))*

70. There are three basic manufacture marking requirements. The marking must:

- (a) Uniquely identify each weapon (in conjunction with other characteristics, such as make, model, type and calibre);
- (b) Allow anyone to determine country of origin; and
- (c) Permit country of origin experts to identify the individual firearm.

71. Article 8, paragraph 1 (a), sets out two distinct options for marking, but only one of the options will be open to drafters of legislation in most cases. States that already employ the second system, which involves “any alternative unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code” are permitted to “maintain” or to continue using such a system. States that are not already using such a system, however, are obliged to limit permitted forms of marking to “unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number”. With this standard, it is important to note that the uniqueness of the marking may take into account other identifying characteristics, such as the make, model, type and calibre. The choice of additional identifying characteristics and how they are incorporated into marking systems is left to States parties. (Some guidance may be derived from the additional characteristics used by the International Criminal Police Organization (Interpol) in its Interpol Weapons and Explosives Tracing System (see annex III), which uses, in addition to serial numbers or other markings, make, model, calibre, barrel-length and number of shots as identifying characteristics, bearing in mind that some of these may not be relevant or particularly helpful for some types of firearm. For example, the number of shots is a good identifier for firearms such as revolvers where the number is fixed at manufacture, but not for many other types, which can use detachable cartridge magazines of different capacities.)

72. Where the alternative of geometric symbols is employed, the marking has to be sufficient to indicate clearly to law enforcement officials in any State party the country of manufacture in order to permit a request to that

country to trace the firearm. It must also be sufficient to enable the experts in the country of manufacture to trace the firearm's source. The term "user-friendly" is intended to mean that the marking must be easily recognizable as marking and that characters or symbols used should be easy to read and transmit from one country to another to ensure that the international tracing process is both feasible and accurate.

(ii) *Marking on import (art. 8, para. 1 (b))*

73. Article 8, paragraph 1 (b), requires the marking of each imported firearm with additional information. The content of such markings must enable later identification of the country of import and, where possible, the year of import.

74. Another marking may also have to be applied in addition to the import mark. Where the firearm does not already have a manufacturing mark that complies with the basic marking requirements set forth in article 8, paragraph 1 (a), such a mark must also be placed on the imported firearm. This may be necessary where the firearm is imported from a country that is not a State party to the Protocol or where the firearm was manufactured without markings prior to the entry into force of the Protocol. Such additional markings must be affixed to all "imported firearms", which means that the process must generally be complete at the time the firearm is actually imported. The Protocol does not specify whether the importer or exporter should be required to affix such additional markings or at what stage of the process this must be done, leaving those decisions to the discretion of national legislatures.

75. Legislators must generally require import markings to all imported firearms, but are permitted to make an exception for firearms imported temporarily for a "verifiable lawful purpose" (see also article 10, paragraph 6, of the Protocol, regarding simplified import/export procedures in such cases).

(iii) *Marking on transfer from government stocks to "permanent civilian use" (art. 8, para. 1 (c))*

76. In order to conform to article 8, paragraph 1 (c), firearms transferred from government stocks to permanent civilian use must meet the same basic marking requirements of unique identification. If not already marked

sufficiently to permit the identification of the transferring country by all States, the firearms must be so marked at the time of transfer.

77. It should be noted here that this requirement does not apply to confiscated firearms that re-enter the civilian market. Firearms of this type are subject to specific marking requirements set forth in article 6, paragraph 2.

(b) Implementation of the article

78. The language used in article 8 assumes that States parties will impose requirements on those who manufacture, import or export firearms to affix the necessary markings, with one exception. Article 8, paragraph 1 (c), which deals with marking firearms upon transfer from government stocks to permanent civilian use, uses language intended to allow States parties either to mark the firearms themselves or to enforce requirements that some involved party do so (“States Parties shall . . . ensure . . . the appropriate unique marking”).

79. In most States, implementation of the marking requirements is likely to involve a combination of legislative, regulatory, delegated legislative and administrative measures. The delegation of legislative powers to officials may be particularly useful in areas where frequent adjustments may be needed to take account of technical developments, provided that these are founded in law.

80. For example, where basic requirements to mark items and offences for failing to mark them would normally be established by legislatures in statutory provisions, the authority to promulgate detailed specifications as to what the marking should consist of and how it should be done could be delegated to officials, provided that rules, specifications or other regulatory provisions are duly made, properly drafted and published. This approach maintains the rule of law and principle of legality, while still allowing for technical adjustments to the requirements as new marking techniques are developed and as different items that require marking are encountered. It should be noted, however, that changes or amendments must be made using the same procedures. (In the case of marking requirements, for example, legislatures might establish a basic requirement to mark firearms and an offence for non-compliance and then delegate to an official the power to impose and amend regulatory requirements setting standards for such things as what markings should consist of, where they should be placed on each type of firearm and the specific methods that should be used to create

the actual marking. The interpretative notes specify that any “other measures” used in relation to offences established in accordance with the Protocol presuppose the existence of a law (A/55/383/Add.3, para. 5.)

81. In the case of import markings, the person who should be required to affix the markings is not specified, leaving legislators the option of imposing the requirement on the manufacturer, exporter or importer. Since the exporter is generally outside the jurisdiction of the legislature, legislation imposing the requirement on exporters would generally take the form of a provision prohibiting the entry of firearms unless appropriately marked prior to entry. Imposing the requirement on importers, who are within the jurisdiction of the legislature, would take the form of a requirement to mark appropriately at some time immediately after importation and an offence of not having done so within a set period of time. A combination of these two formulations may also be adopted, placing the onus on the importer to ensure markings are applied, but leaving the implementing provision flexible enough to allow the marking to be applied by the importer or the exporter.

82. As for the content of the marking, the language of the provision permits the name of the country to be printed out in full or a symbol to be used to identify the country, as long as this symbol is familiar enough to permit “identification of the country of import”. In States that require proof markings to certify the safety of firearms, for instance, these proof markings can be used as the import mark if they satisfy the requirements of the provision.

83. Regarding transfers from government stocks to permanent civilian use, the provision requires States parties to “ensure [that] . . . the appropriate unique marking” is present. States parties could fulfil this obligation by imposing this requirement on officials responsible for the disposal of firearms using administrative directives, or on outside actors such as the recipients, which would entail the use of legislation, including a requirement to mark and an offence of failing to do so.

4. Optional measures, including optional issues

84. The standards set by the Protocol are intended as minimum standards for marking and States are free to establish or maintain requirements that go beyond those of the Protocol, subject to the potential limits on cooperation found in the Protocol and the Convention. From a policy standpoint,

periodic review of domestic marking standards may be advisable to take account of new technical developments in marking and identifying firearms as they emerge and are taken up by law enforcement agencies and industry. (Article 8, paragraph 2, of the Protocol calls on States parties to encourage firearms manufacturers to develop precautions against the removal of markings.)

85. A number of options are available for legislatures seeking marking requirements that exceed those of the Protocol but that would make marking more reliable and useful in combating illicit manufacturing and trafficking. Legislative standards could be used to ensure an adequate degree of permanency and resistance to tampering. In the case of the most commonly used method, that of stamping numbers or characters into metallic parts, for example, this might involve the pressures used, the depth to which characters must be stamped, the size of the mark, the location of the mark or the nature of the parts into which they are stamped. Provisions specifying the form of markings and where they should be placed on each type of firearm could also be considered. To the extent that such standardization is feasible, it would simplify the recognition and reading of markings by law enforcement, customs and other officials, reducing errors as well as the need for specialized training. The reduction of errors would also improve the quality and reliability of the records kept pursuant to article 7 and might lower costs associated with ratifying and implementing the Protocol. Legislators may wish to consider consulting forensic experts and manufacturers to determine what requirements are feasible and how appropriate standards could be formulated and established.

86. Legislators and drafters may wish to specify more clearly the time at which firearms must be marked, providing more precision to the phrase “at the time of manufacture”. For instance, requiring the marking of the firearm at the time of assembly and the receiver and/or barrel at the time of its manufacture would address the problem of the diversion and trafficking of disassembled firearms. For similar reasons, legislators and drafters may wish to consider establishing specific requirements designating which firearm parts and components must be marked, in order to defeat attempts to create untraceable firearms by marking some part or component that can easily be removed or exchanged. Most States that have dealt with this problem require that the “frame/receiver” of the firearm, to which all of the other parts and components are attached, be marked. Some require the marking of the barrel instead of or in addition to the frame.

87. In relation to import marking, the feasibility of imposing the same standards on imported firearms as those produced under domestic regulations may have to be taken into consideration.

88. As regards firearms transferred from government stocks to permanent civilian use, the content of markings is not specified in detail and legislators, drafters and forensic experts should consider the likely use of the information in tracing and the nature of markings that are placed on types of firearm produced for state use and likely to be transferred later into private hands. If the firearms do not meet the requirements of article 8, paragraph 1 (a), legislators should consider requiring the application of markings that would meet this standard.

89. States that wish to impose marking requirements for some parts and components or markings such as “headstamps” or package markings that partially identify cartridges or ammunition batches are free to do so, but this is not required by the Protocol. Where a State’s domestic marking requirements go beyond those set in the Protocol, drafters may wish to expand the appropriate illicit manufacturing offences to cover the additional situations, bearing in mind that the investigation, prosecution or other procedures relating to activities that are outside the scope of the Convention or Protocol would not be covered by the various requirements to provide international cooperation.

5. *Information resources*

90. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) *Firearms Protocol*

Article 3, subparagraphs (d) (iii) and (e) (Use of terms)

Article 4 (Scope of application)

Article 5, paragraphs 1 (a), (b) and (c) (Criminalization)

Article 6, paragraph 2 (Confiscation, seizure and disposal)

Article 7 (Record-keeping)

Article 10, paragraph 6 (General requirements for export, import and transit licensing or authorization systems)

Article 12, paragraph 4 (Information)

(b) *Organized Crime Convention*

Article 18 (Mutual legal assistance)

Article 34, paragraph 3 (Implementation of the Convention)

(c) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article VI

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section II

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects
Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001 (A/CONF.192/15),

chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_firearms

Articles 5 and 9

C. Licensing or authorization systems

“Article 10

“General requirements for export, import and transit licensing or authorization systems

“1. Each State Party shall establish or maintain an effective system of export and import licensing or authorization, as well as of measures on international transit, for the transfer of firearms, their parts and components and ammunition.

“2. Before issuing export licences or authorizations for shipments of firearms, their parts and components and ammunition, each State Party shall verify:

“(a) That the importing States have issued import licences or authorizations;

and

“(b) That, without prejudice to bilateral or multilateral agreements or arrangements favouring landlocked States, the transit States have, at a minimum, given notice in writing, prior to shipment, that they have no objection to the transit.

“3. The export and import licence or authorization and accompanying documentation together shall contain information that, at a minimum, shall include the place and the date of issuance, the date of expiration, the country of export, the country of import, the final recipient, a description and the quantity of the firearms, their parts and components and ammunition and, whenever there is transit, the countries of transit. The information contained in the import licence must be provided in advance to the transit States.

“4. The importing State Party shall, upon request, inform the exporting State Party of the receipt of the dispatched shipment of firearms, their parts and components or ammunition.

“5. Each State Party shall, within available means, take such measures as may be necessary to ensure that licensing or authorization procedures are secure and that the authenticity of licensing or authorization documents can be verified or validated.

“6. States Parties may adopt simplified procedures for the temporary import and export and the transit of firearms, their parts and components and ammunition for verifiable lawful purposes such as hunting, sport shooting, evaluation, exhibitions or repairs.”

1. Introduction

91. Article 10 of the Protocol requires States parties to take measures to implement a comprehensive system to control the import, export and transit movement of firearms, their parts and components and ammunition. The system underscores the central principle underlying the Protocol, that firearms and related items cannot be imported or exported without the awareness and consent of all States involved and that cases in which this is not complied with attract criminal investigation, prosecution and punishment.

2. *Summary of main requirements*

92. The Protocol requires States parties:

(a) To establish a system to ensure that firearms are not exported to or through countries that have not authorized the transfer (art. 10, paras. 2 and 4);

(b) To ensure that the content of the documents used for legal import and export is sufficient to support the offence of trafficking (art. 10, para. 3); and

(c) To enhance the accountability and security associated with the import and export system (art. 10, para. 5).

93. The Protocol also allows States parties to adopt a simplified procedure for private individuals to temporarily import or export small numbers of firearms for recreational purposes (art. 10, para. 6). (It should also be noted that additional import markings need not be affixed where firearms are imported temporarily for a “verifiable lawful purpose” under article 8, paragraph 1 (b).)

3. *Mandatory requirements*

(a) *Main elements of the article*

94. Article 10, paragraph 1, contains the basic requirement to establish measures that control transactions or transfers that involve import, export or transit. There is no obligation to deal with activities of a purely domestic nature.

95. Article 10, paragraph 2, requires that, prior to allowing the export of firearms, each State party ascertain that the proposed State of import has licensed or authorized the import and that any transit States have indicated in writing that they are aware of the transit and do not object. The means by which the exporting State would be notified by transit and destination States are not specified and it is likely that, in most cases, the burden of establishing the necessary approvals will fall on the private parties involved. Either the exporter, the importer or both will be required to obtain the necessary documents from the transit and destination countries and convey them to the authorities from whom the export permit is sought.

96. There is no automatic requirement to provide direct notification or verification of documents or transfers, but importing States are required to

inform exporting States of the receipt of an authorized shipment if this is requested (art. 10, para. 4). More generally, States parties are required to ensure that procedures are secure and that licensing or authorization documents can be verified or validated (art. 10, para. 5).

97. Article 10, paragraph 3, and article 7 together set out basic minimum requirements for import and export documentation. Essentially, documents must include the following: the markings applied to the firearms in accordance with article 8; the dates of issuance and expiry of licences or authorizations; the place of issue of permits or authorizations; the countries involved, including countries of import, export and final destination, and any countries of transit; a description of the articles imported or exported; and the quantities of articles imported or exported.

98. Article 10, paragraph 6, allows (but does not require) States parties to create a partial exception to the otherwise applicable licence or authorization requirements, where importation is temporary and for verifiable lawful purposes, such as recreational use.

(b) Implementation of the article

99. In most States, statutory provisions will be required to establish the basic licensing or authorization framework set out in paragraphs 1 and 2 of article 10. Where import/export control regimes already exist, legislation may be needed to extend them to firearms, their parts and components and ammunition and to any specific requirements of the Protocol that are not already covered. It will generally be important to place the licence or authorization process on a clear legal basis, both to ensure compliance and because failure to comply with any aspect of the process will be a criminal offence.

100. Generally, legislative measures will also be needed to ensure that officials have the necessary authority to consider and issue or refuse to issue the necessary import, export and, if required, transit documents. This may be done either by creating new offices or by amending legislation to expand the roles of existing officials. Power to revoke the import, export and transit documents and a process for appealing refusal to issue or revocation should also be provided for.

101. In determining the actual scope of the discretion to be delegated to officials, there are several points to take into account. Generally, broad

discretion facilitates transfers, but may also create opportunities for corruption or other activities that are inconsistent with the Protocol or with whatever national policy criteria are established for the issuance or refusal of permits. The actual drafting can simply require officials to take specific criteria into consideration in making decisions or, if the criteria are sufficiently clear, can simply prohibit the issuance of the requested documents if certain criteria are not met. The latter approach is commonly the case for linkages to domestic controls. For example, officials may simply be prohibited from allowing the import of a firearm unless whatever domestic licensing procedures are needed to lawfully possess it after import have been commenced or completed.

102. To ensure that importing and transit countries are notified of proposed or pending transfers, it will be necessary to establish channels of communication. It is left to implementing States parties to determine, however, whether it will be the State party or the exporter who will be responsible for acquiring the required authorizations from the importer and transit States or if it will be a combination of the two, that is, the exporter obtains the authorization from the importer (via the importer) and the exporting State contacts the transit country to confirm that it has no objection to the transaction.

103. Setting out a form to process import and export transactions will also be needed to gather the information required by article 10, paragraph 3. The types of form that may be needed to implement various elements of the Protocol include the following:

(a) One or more application forms for those seeking the issuance of licences. These serve as the basic obligation to provide necessary information about the transaction. If a legally prescribed form is used, the omission of any of the information required on the face of an application form means that the partially completed form would not constitute a formally valid application for the required permit or authorization. Such an application could not lawfully be considered by decision makers and the refusal to do so would not be a matter of discretion nor a decision that could be appealed to an administrative tribunal or the general courts. If providing false or misleading information is also criminalized, then the completion of the document would also form the basis of a prosecution. The prescription and design of a form that clearly sets out the information requirements helps to establish the mental element of such offences. A warning about the offence and the liability to prosecution would also help to enhance deterrence and establish intent if added to the form itself. Since the policy criteria for

allowing firearms to be exported or imported are likely to be different, separate forms for those applying to import or export may be appropriate;

(b) A formal licence or authorization to import or export firearms, parts and components and ammunition. This is necessary both for conformity with article 10 and to support the illicit trafficking offence relating to import and export without such documents (arts. 5, para. 1 (b), and 3, subpara. (e)). Generally, this permit will serve as proof to domestic officials that the import or export has been approved and, in the case of an import permit, will certify to the exporting Government that the import has been approved. The permit may also serve as the basis for notification and consideration of transit States, if any, under article 10, paragraph 2 (b). Depending on any additional information sought and the structure of national laws and record-keeping systems, separate forms could be established for complete firearms, their parts and components, and for ammunition, or a single unified form could be used. Either the form itself or the information it contains will ultimately become the record kept pursuant to article 7 and serve as the basis for later attempts to trace the firearms involved and to provide assistance to other States in doing so under article 12, paragraph 4. The development of forms that incorporate elements making them difficult to forge, alter or otherwise falsify would also support conformity with the security requirements of article 10, paragraph 5;

(c) The Protocol is silent with respect to the use of electronic forms or the use of telecommunications to transmit forms or other information between States. This leaves open the possibility of using such technologies, provided that adequate security is maintained and the States involved have the necessary capacity. Electronic media should be capable of producing authentic printed documents when needed. (This is not expressly dealt with in the Protocol, but it is an express requirement for the forms used in general requests for mutual legal assistance under the Convention (see art. 18, para. 14, of the Convention; see also the legislative guide for the implementation of the Convention, paras. 450-499));

(d) Forms seeking and granting approval of transit shipments may also be required. Article 10, paragraph 2 (b), bars the issuance of a licence or authorization if the proposed transfer is through a transit State and that State has not been notified and given its approval in writing. This could be done on an ad hoc basis, but States that seek to standardize procedures and reduce unnecessary discretion or that handle relatively large volumes of transit shipments may wish to establish standard and legally binding forms for making application and authorizing transit shipments. The legal prescription of such forms would give greater reassurance to countries whose licensing decisions are contingent on such approvals, in particular if

supported by some mechanism that permits speedy verification of the form. Such measures may also increase the degree of security as required by article 10, paragraph 5, and reduce costs.

104. To comply with the requirement that the importing State must be able to confirm shipment receipt (art. 10, para. 4), it may be necessary to designate a specific official for this purpose.

105. Validation on request is the minimum required for conformity with article 10, paragraph 5, but a system under which States designated as transit or importing States on an export licence application are automatically notified may also be implemented. States may require production of original documentation or certified copies of original documentation. The notification may be conducted by the single point of contact required under article 13, paragraph 2, of the Protocol or another official. If the official designated as the single point of contact is not the authority who will verify or validate forms and confirm the receipt of actual transfers, the contact point should be prepared to identify the appropriate official and legislative or administrative provisions should allow for the establishment of direct channels of communication where possible. (It should be noted that other points of contact are established under the Convention and Protocol. Generally, central authorities established pursuant to article 18, paragraph 13, of the Convention and points of contact designated under article 13, paragraph 2, of the Protocol will be departments or agencies responsible for law enforcement or prosecutorial functions. Authorities who would process and verify firearm import and export transfers, on the other hand, may be more likely to be customs control agencies or in some cases agencies responsible for security or defence matters.)

106. Should the legislature choose to create a partial exception to the otherwise applicable licence or authorization requirements where importation is temporary and for verifiable lawful purposes such as recreational use in accordance with article 10, paragraph 6, adjustments would have to be made to the substantive and procedural provisions governing the issuance of licences or authorizations.

4. Other measures, including optional issues

107. The information required by articles 7 and 10 of the Protocol is essential to conformity with the Protocol, but those provisions represent a minimum standard and it is also open to States to include additional

requirements if they wish, bearing in mind that the investigation, prosecution or other procedures relating to activities that are outside the scope of the Convention or Protocol will not be covered by the various requirements to provide international cooperation.

108. The Protocol does not require restrictions on firearms for the purposes of domestic controls nor does it contain import and export criteria for security or arms control purposes. Where these do exist in a State, however, drafters should ensure that legislation implementing the Protocol is not inconsistent with the policies or legislation in those areas and that administrative measures are coherent. The Protocol operates primarily through the authorization of transactions and transfers and links between measures in the Protocol and other measures would generally take the form of legislative or administrative criteria applied to structure or limit the discretion of officials charged with deciding whether to issue the required import or export authorizations. Some examples of the linkages that should be considered include the following:

(a) The denial of licences or authorizations to persons or groups known to be engaged in domestic or transnational criminal activities or who have previous records of such criminal involvement;

(b) The denial of licences or authorizations where the proposed manufacture, transaction or transfer raises domestic crime concerns of any kind;

(c) The denial of licences or authorizations in cases where legal requirements for domestic licensing or other controls have not been met. (For example, officials could be given the discretion or obligation to refuse an import permit without proof that the firearms are being imported to a dealer or individual owner licensed under domestic law or re-exported in accordance with the Protocol);

(d) The denial of licences or authorizations in cases where the intended destination or other factors suggest that the items will be used in or contribute to an ongoing or potential insurgency or armed conflict. (See, for example, the Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20, annex, appendix), section III, paragraph 2 (b), which lists substantive criteria such as ongoing or potential conflict and the potential use in suppressing human rights as reasons why export should not be permitted);

(e) The denial of licences or authorizations where some extrinsic international legal obligation, such as another treaty or an embargo imposed by the Security Council of the United Nations would be breached or

infringed if the manufacture, transaction or transfer was permitted to take place. (Apart from legal obligations imposed by the Security Council, such obligations could arise from other bilateral or regional treaties, such as the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials);⁴

(f) The denial of licences or authorizations in cases where the proposed manufacture, transaction or transfer raises national security concerns for the State party itself, such as transfers to potential enemies or enemies of the country's allies.

109. The Protocol imposes no requirement for internal consultations or deliberations prior to any decision to issue or refuse a licence or authorization, but in developing legislation establishing the necessary powers, legislators may wish to ensure that the various significant interests within the Government are taken into account. Specific agencies or interests may vary from State to State, but in most cases where firearms or related items are under consideration relevant interests will include those of departments or agencies responsible for crime control, import/export regulation, trade interests and taxation, national security and international political considerations (embargoes). An inter-agency group could be established to operationalize this consultation process.

110. There is also no express requirement in the Protocol for States parties to establish or prescribe separate forms to accompany actual shipments of firearms, their parts and components or ammunition, although the basic content requirements for export and import licences or authorizations are also applied to "accompanying documentation" by article 10, paragraph 3. Most systems of export and import control include requirements that copies or parallel documents must be sent both with a shipment and separately and that these must provide detailed specifications of what each shipment contains, so that the accuracy of the documents and content of the shipment can be cross-checked for tampering or diversion between source and destination. Such systems could be implemented either by ensuring that copies of the export and import permits are transmitted from customs agencies in the source and destination countries both with the shipment and separately in advance, or by prescribing separate documents containing the same basic information to accompany the shipments, so that the shipment itself can be checked against the documents upon arrival and prior to its release to the

⁴United Nations, *Treaty Series*, vol. 2029, No. 35005.

importer. This could also be supported by the use of electronic forms and means of transmission, where the necessary technical infrastructure is present. (As noted above, the corresponding provision of article 18, paragraph 14, of the Convention requires that electronic forms be able to produce written documents when needed, an important factor for ensuring accurate transmission to States parties that do not use electronic forms (see also the legislative guide for the implementation of the Convention, paras. 450-499).)

111. While the Protocol requires only that transit countries not object to the movement of firearms, their parts and components and ammunition across their territory, States may wish to consider developing a licence or authorization permitting transit movements in order to promote consistency and to deter the production of false documentation. The creation of such forms promotes security.

112. Article 15, paragraph 1 (c), of the Protocol, which is not mandatory, invites States parties to require the disclosure and identity of the brokers, if any, involved in a particular transaction or transfer on the relevant import and export documents. Requiring disclosure of the involvement and identities of brokers on the licences or authorizations that may be established in accordance with article 10 may require ensuring that the legislative authority to create those documents themselves is broad enough to encompass additional requirements for brokered transactions or transfers. Adding brokerage activities to licences or authorizations will generally require that they be added to application forms as well.

113. Another element that drafters and legislators may wish to consider deals with the simplified procedures for temporary import or export that States may adopt pursuant to article 10, paragraph 6. Legislation establishing simplified procedures for temporary import or export for verifiable lawful purposes such as hunting, sport shooting, evaluation, exhibitions or repairs could involve creating a parallel set of forms (e.g. application and permit forms) and issuance criteria and procedures, or of expansions or adjustments to the principal forms to permit them to be used for this purpose. It could also involve expedited procedures, such as allowing the issuance of licences by control officers at border points when items actually cross borders or at the point of shipment or receipt once in a country.

114. To ensure the integrity of domestic controls and the tracing of firearms under the Protocol, drafters creating simplified procedures for temporary import and export should ensure that basic information that identifies the firearms and importer or exporter is recorded. In addition, drafters may

wish to consider provisions limiting the duration for which temporarily imported firearms could remain in the country and safeguards to ensure that firearms imported temporarily are re-exported back to the State of origin. Exporting to a State other than the State from which the firearms were temporarily imported could either be made an offence or included within the general trafficking offences. Legislators could also require evidence that the transaction is for a verifiable, lawful purpose. In this context, for example, a hunting licence may be required as evidence to prove that an individual is exporting/importing a firearm for the purpose of hunting.

5. *Information resources*

115. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 3, subparagraph *(e)* (Use of terms)

Article 4 (Scope of application)

Article 5, paragraph 1 *(b)* (Criminalization)

Article 7 (Record-keeping)

Article 8, paragraph 1 *(b)* (Marking of firearms)

Article 11, subparagraph *(a)* (Security and preventive measures)

Article 13, paragraph 2 (Cooperation)

Article 15 (Brokers and brokering)

(b) Organized Crime Convention

Article 18 (Mutual legal assistance)

Article 34, paragraph 3 (Implementation of the Convention)

(c) Other instruments

1997 Inter-American Convention against the Illicit Manufacturing of
and Trafficking in Firearms, Ammunition, Explosives, and Other
Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article IX

1997 Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition (Organization of American States)

http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc
Chapters I-III

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>
Annex, appendix, section III

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001* (A/CONF.192/15),

chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_firearms
Article 5

2002 Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW) of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies

<http://www.wassenaar.org/>

D. Record-keeping

“Article 7

“Record-keeping

“Each State Party shall ensure the maintenance, for not less than ten years, of information in relation to firearms and, where appropriate and feasible, their parts and components and ammunition that is necessary to trace and identify those firearms and, where appropriate and feasible, their parts and components and

ammunition which are illicitly manufactured or trafficked and to prevent and detect such activities. Such information shall include:

“(a) The appropriate markings required by article 8 of this Protocol;

“(b) In cases involving international transactions in firearms, their parts and components and ammunition, the issuance and expiration dates of the appropriate licences or authorizations, the country of export, the country of import, the transit countries, where appropriate, and the final recipient and the description and quantity of the articles.”

1. Introduction

116. The basic record-keeping obligation of the Protocol, set forth in article 7, is to ensure that records are kept that are sufficient to ensure that firearms can later be traced. “Tracing” is itself defined as the “systematic tracking” of firearms from manufacturer to purchaser in article 3, subparagraph (f).

2. Summary of main requirements

117. The Protocol requires States parties:

(a) To maintain records in relation to firearms for at least 10 years; and

(b) To maintain records containing the markings on firearms and the details associated with the international movement of firearms.

118. States parties are also required to keep records on parts and components, but only where this is “appropriate and feasible”.

3. Mandatory requirements

(a) Main elements of the article

119. Article 7 specifies that records must be kept for 10 years. Since no single commencement date for the 10-year period is specified, the time would start with each event that the record in question documents: either manufacture or a specific transaction or transfer (import, export or transit). The 10-year duration is the minimum required, but records may be kept longer.

120. Records must be kept with respect to complete “firearms”, but are only required to be kept for parts and components and ammunition “where appropriate and feasible”. Generally, the drafters considered such records to be desirable, but recognized that keeping detailed records, especially of individual parts and components, would create technical problems associated with unique marking and entail a major commitment of resources that would not be available in most countries.

121. Article 7 contains two specifications, one of which applies to all firearms that are present in the State party concerned (subpara. (a)) and the other only to firearms also involved in international transactions (subpara. (b)). The fundamental record-keeping requirement applicable to all firearms set forth in subparagraph (a) is simply that the record must contain “the appropriate markings” required by the Protocol. Paragraph 1 (a) of article 8 then requires that such markings include the “name of the manufacturer, the country or place of manufacture and the serial number”. Alternatively, States already using such systems may continue to employ “unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code, permitting ready identification by all States of the country of manufacture”. A basic record, therefore, must be created for each firearm at the time of manufacture or import (if the firearm was not uniquely marked at manufacture) documenting which of the two marking systems applies to the firearm and documenting all of the required information applicable to that system.

122. In addition to the information that identifies each firearm, additional records are required by article 7 (b) for firearms that are the subject of international transactions. Together with article 10, paragraph 3, article 7, subparagraph (b), determines the information to be included in import/export documentation. Generally, that information will include sufficient information to allow the countries involved in the transaction to identify other involved countries, the individual importer and exporter, the items for which they sought the import/export documentation, as well as the validity period for the licence or authorization. The “final recipient” must be identified, whether or not it is a party to the immediate transaction itself. The requirement that the “description and quantity” of the articles involved be documented will mean, in the case of complete firearms, the same information listed in article 7, subparagraph (a).

(b) Implementation of the article

123. The formulation of the requirement to “ensure the maintenance of [records]” is intended to include the two basic record-keeping systems at

present in use in many countries. Some States use systems in which records are kept in a centralized location by the State using information collected by it (e.g. from inspections) or supplied by those engaged in manufacturing or transferring firearms (e.g. on licence application forms). Other States use systems in which those engaged in manufacturing or transferring firearms are themselves required to create and retain records, which must then be made available when needed for tracing and, in many cases, for routine inspection.

124. There is no requirement that the records be computerized, but the use of automated record-keeping, where feasible, will assist countries in meeting their obligations to respond promptly to tracing requests as required by article 12, paragraph 4.

125. As a practical matter, it should be noted that the basic requirement to include only the manufacturer, place and country of manufacture and a serial number may not be sufficient to uniquely identify a firearm in a record, as firearms of different types (e.g. a rifle and a handgun made by the same manufacturer) may carry the same serial number. Other characteristics such as make, model and type are therefore also relevant in this context. It is recommended that domestic forensic experts be consulted with respect to the exact formulation, bearing in mind that the basic requirement of both article 7 (record-keeping) and article 8 is identification and tracing, which both require that information be sufficient to identify each firearm to the exclusion of all others. (As noted above, some guidance may be derived from the additional characteristics used by Interpol in its Interpol Weapons and Explosives Tracing System, which uses, in addition to serial numbers or other markings, make, model, calibre, barrel-length and number of discharges as identifying characteristics, bearing in mind that some of these may not be relevant or particularly helpful for some types of firearm. For example, the number of shots is a good identifier for firearms such as revolvers where this is fixed at manufacture, but not for many other types that can use detachable cartridge magazines of different capacities.)

126. While article 7 makes no general provision for the creation of records with respect to firearms that have been destroyed, article 6, paragraph 2, does require the creation of records where illicitly manufactured or trafficked firearms or ammunition that have been confiscated are disposed of.

127. Article 10, paragraph 6, allows for “simplified procedures” with respect to firearms, parts and components or ammunition temporarily imported or exported, which may involve record-keeping requirements that

differ from those applied to transactions of a permanent nature. Care should be taken, however, to formulate such procedures in a way that does not undermine the basic policies of the Protocol. There should, for instance, be a time limit associated with “temporary imports”. If a transaction takes place within this limited time frame, the keeping of records for the full 10 years required by article 7 would be unnecessary, but only if the firearms are re-exported to the same country from which they were temporarily imported in the first place. In such a case, later tracing would not disclose the temporary export and re-import, but would still locate the firearm within the appropriate country. If re-export to third countries is permitted, however, then unless full records are kept for the required 10-year period, re-export to a third country effectively creates an onward transaction that cannot be traced in the future. Therefore, to ensure that the option for simplified procedures for temporary imports does not create an obstacle to tracing, domestic law should require that records be kept until the re-export of the firearm is confirmed. Alternatively, such cases could be made subject to the full record-keeping requirements to ensure that the firearms can later be traced.

4. Optional measures, including optional issues

(a) Offences

128. Generally, States that intend to keep the records themselves will wish to consider legislative offences and requirements intended to ensure the fidelity of the information provided to them. States that require others to keep the necessary records, on the other hand, will wish to consider offences and other requirements that ensure that the records are in fact kept, that they are accurate and that they are made available when necessary for tracing or other investigative measures. In the latter system it will also generally be necessary to ensure that the punishment for non-compliance with the record-keeping requirements is the same as for illicit manufacturing and/or trafficking, to prevent offenders from simply destroying records to avoid greater liability for the principal offences established in accordance with the Protocol.

(b) Length of time records are to be kept

129. Article 7 specifies that records must be kept for 10 years, but it is clear that this is a minimum period (art. 7, subpara. (a), of the Protocol and art. 34, para. 3, of the Convention) and that States are free to impose longer

periods if they wish. Given the durability of firearms, legislators and drafters may wish to consider this approach, where feasible.

(c) Destroyed and deactivated firearms

130. The deactivation standards set by article 9 of the Protocol are intended to ensure that deactivated firearms are not restored to function as firearms after previous records of them have been destroyed. As an additional safeguard against illicit reactivation, however, legislators could consider requiring records to be kept of destroyed or deactivated firearms for 10 years after the date of destruction or deactivation. Although the Protocol does not expressly require this, it would assist in the tracing of firearms that had been reactivated.

(d) Parts and components

131. Some countries will wish to consider requiring the maintenance of records for parts and components to ensure that record-keeping requirements cannot be avoided simply by transferring entire firearms in a disassembled condition. At the same time, consideration ought to be given to the administrative and commercial burden of having to create records for each individual component. One way of striking an appropriate balance is to limit the requirement to specific major components, such as the barrel, frame or both, or whichever component is marked in accordance with article 8.

(e) Brokering

132. If information about brokering activities is required for inclusion in licences or authorizations, it may also be appropriate to incorporate it into the records required by article 7 of the Protocol.

5. Information resources

133. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) *Firearms Protocol*

Article 3, subparagraph (f) (Use of terms)

Article 4 (Scope of application)

Article 6, paragraph 2 (Confiscation, seizure and disposal)

Article 8, paragraph 1 (Marking of firearms)

Article 9 (Deactivation of firearms)

Article 10, paragraph 3 (General requirements for export, import and transit licensing or authorization systems)

Article 12, paragraph 4 (Information)

Article 13, paragraph 2 (Cooperation)

Article 15 (Brokers and brokering)

(b) *Organized Crime Convention*

Article 34, paragraph 3

(c) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article XI

1997 Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition (Organization of American States)

http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc

Chapter IV

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section II

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects
Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001 (A/CONF.192/15), chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_firearms

Article 9

E. Confiscation, seizure and disposal

“Article 6

“Confiscation, seizure and disposal

“1. Without prejudice to article 12 of the Convention, States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of firearms, their parts and components and ammunition that have been illicitly manufactured or trafficked.

“2. States Parties shall adopt, within their domestic legal systems, such measures as may be necessary to prevent illicitly manufactured and trafficked firearms, parts and components and ammunition from falling into the hands of unauthorized persons by seizing and destroying such firearms, their parts and components and ammunition unless other disposal has been officially authorized, provided that the firearms have been marked and the methods of disposal of those firearms and ammunition have been recorded.”

1. Introduction

134. Although the issues of confiscation and seizure are addressed in the Convention (arts. 12-14 of the Convention, see also the legislative guide for the implementation of the Convention, paras. 287-340), there are two fundamental reasons for modifying this process when the subject matter of the confiscation is firearms, parts, components or ammunition covered by the Protocol. Firstly, the dangerous nature of items covered by the Protocol may require additional security precautions to ensure that they do not fall

into the wrong hands before, during or after the seizure and confiscation process. Secondly, whereas the basic policy of the Convention is that confiscated property should be sold to the benefit of the confiscating State party, or for purposes such as sharing with other States parties or for the payment of compensation or restitution to victims of crime (art. 14), the dangerousness of the items covered by the Protocol favours a policy of destruction, with other forms of disposal only permissible where additional precautions are taken.

2. Summary of main requirements

135. To comply with this article, States parties must:

(a) Adopt measures to confiscate firearms and related items that have been illicitly manufactured or trafficked;

(b) Seize and destroy those firearms and related items unless another form of disposal is state-sanctioned; and

(c) Record any form of state-sanctioned disposal other than destruction and mark the firearms as appropriate.

3. Mandatory requirements

(a) Main elements of the article

136. Article 6 of the Protocol must be read and interpreted together with articles 12-14 of the Convention, which apply to the seizure, confiscation and disposal of property that is either proceeds of crime or used or destined for use in crime. This will generally include illicitly manufactured and/or trafficked firearms, their parts and components and ammunition.

137. To the extent that illicitly manufactured or trafficked firearms are considered to have been either property “derived” from these offences or “used or destined for use” in such offences, they become subject to articles 12 and 13 of the Convention, which require States parties to ensure that laws enabling confiscation are in place and to actually seek confiscation by the appropriate authority when this is requested by another State party.

138. The rules for disposal established by article 14 of the Convention are then modified by the Protocol. As noted above, the key distinction is that the policy governing firearms favours destruction, whereas the policy for

other proceeds and instrumentalities assumes that these will be sold and the proceeds returned to the confiscating State or used for other purposes. For that reason, an exception to the rules of the Convention is specified for firearms in article 6, paragraph 2, of the Protocol. This requires legal measures to ensure destruction “unless other disposal has been officially authorized, provided that the firearms have been marked and the methods of disposal of those firearms and ammunition have been recorded”.

(b) Implementation of the article

139. In order to make possible the confiscation of firearms and related items, it will generally be necessary to establish powers to search for and seize such items and to seek the order of a court declaring them to be forfeited or confiscated. For conformity with the Protocol, those powers should be linked to suspicion or other grounds for believing that an offence established in accordance with the Protocol has been or is about to be committed and that the items are either evidence of this or that they are themselves the subject matter of the offence involved. Such powers would generally be consistent with national legislation that implements the seizure and forfeiture provisions of the Convention, although some States apply more expedited procedures to allow firearms to be seized quickly on account of the safety or security risks that may arise if there are procedural delays.

140. In requiring the establishment of powers to “enable” confiscation, article 6, paragraph 1, does not specifically mention search and seizure (this is, however, covered by article 12, paragraph 2, of the Convention), and does not, therefore, discuss procedural safeguards for seizure. Article 6, paragraph 1, requires measures that enable confiscation if items “have been illicitly manufactured or trafficked”, but drafters and legislators should consider a lower standard for the initial seizure of the items, since this will in many cases be done as an investigative measure before illicit manufacturing or trafficking can be fully proved. Seizure may also be necessary in some cases as an urgent measure to prevent weapons from being exported illegally or falling into illicit domestic circulation or use.

141. In many cases, States may already have search, seizure and confiscation provisions that apply specifically to firearms. Where such provisions exist, it will only be necessary to consider whether they require amendment to conform to the Protocol. They must apply to “firearms, their parts and components and ammunition” and must be available for all of the offences

set forth in the Protocol, some of which may not have been covered by pre-existing legislation. Regardless, drafters should ensure consistency with any existing search and seizure rules.

142. States that have enabled search, seizure and confiscation of a more general class of property based on links to any offence “covered by the Convention” in implementing article 12 of the Convention will not need to make more specific provision for firearm-related property, provided it is clear that the general class includes all firearms, parts and components and ammunition covered by the Protocol.

143. Legal measures to implement the general rule of destruction of firearms could include the following:

(a) The establishment of powers to authorize disposal other than by destruction and setting appropriate limits on cases where a decision maker could give such an authorization. In this context, legislation could include examples of authorized means of disposal such as for scientific, historical or forensic purposes;

(b) Legislative or administrative criteria for the issuance or refusal of an authorization to dispose by means other than destruction. This must include the two requirements set out in article 6, paragraph 2, that the firearms must have been marked and that a record be kept of how they were disposed of. Other criteria could also be established in accordance with domestic policy assessments.

4. Optional measures, including optional issues

144. States that do not have general powers to search for, seize and seek the forfeiture of firearms and related items might consider extending the new powers created to meet the requirements of the Protocol to include firearms associated with all offences and not just those covered by the Convention and the Protocol.

145. To enforce a policy favouring destruction of seized firearms and related items, legislation establishing criminal offences to deter the theft or diversion of seized firearms, their parts and components and ammunition could be established (e.g. offences of misleading or misinforming decision makers).

146. Legislative or other standards ensuring the adequacy of destruction could also be developed. Generally, this will entail, at a minimum, the deactivation standards established by article 9 of the Protocol. More generally, methods such as crushing, cutting into small pieces and melting are commonly used.⁵ As a practical matter, it is important to ensure the security of destruction processes, to ensure that firearms, parts, components or ammunition are not illicitly diverted prior to destruction.

147. The creation of records of destruction sufficient to support later attempts to trace the firearms involved could also be required (see optional requirements for record-keeping above).

148. Standards for marking seized firearms that are retained and not destroyed could also be established.

5. *Information resources*

149. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 3, subparagraphs *(a)*, *(b)* and *(c)* (Use of terms)

Article 4 (Scope of application)

Article 7 (Record-keeping)

Article 8, paragraph 1 *(c)* (Marking of firearms)

(b) Organized Crime Convention

Article 12 (Confiscation and seizure)

Article 13 (International cooperation for purposes of confiscation)

Article 14 (Disposal of confiscated proceeds of crime or property)

Article 34, paragraph 3 (Implementation of the Convention)

⁵An extensive examination of the practical methods of destruction and related matters can be found in the report of the Secretary-General of 15 November 2000 on methods of destruction of small arms, light weapons, ammunition and explosives (S/2000/1092) (<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/747/29/PDF/N0074729.pdf?OpenElement>).

(c) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article VII

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section IV

2000 Report of the Secretary-General on methods of destruction of small arms, light weapons, ammunition and explosives (S/2000/1092)

<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/747/29/PDF/N0074729.pdf?OpenElement>

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001* (A/CONF.192/15), chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_firearms

Articles 5 and 11

F. Deactivation of firearms

“Article 9

“Deactivation of firearms

“A State Party that does not recognize a deactivated firearm as a firearm in accordance with its domestic law shall take the necessary measures, including the establishment of specific offences if appropriate, to prevent the illicit reactivation of deactivated firearms, consistent with the following general principles of deactivation:

“(a) All essential parts of a deactivated firearm are to be rendered permanently inoperable and incapable of removal, replacement or modification in a manner that would permit the firearm to be reactivated in any way;

“(b) Arrangements are to be made for deactivation measures to be verified, where appropriate, by a competent authority to ensure that the modifications made to a firearm render it permanently inoperable;

“(c) Verification by a competent authority is to include a certificate or record attesting to the deactivation of the firearm or a clearly visible mark to that effect stamped on the firearm.”

1. Introduction

150. Drafters defining “firearm” and determining the scope of subject matter to which domestic laws apply face the technical challenge of including items that represent a threat of actual use as firearms, while not extending legislative measures to firearms that have been permanently deactivated. Many countries accomplish this by limiting the basic definition of “firearm” to devices that are capable of actually being used as such and excluding deactivated firearms. This in turn raises the threat that firearms will be deactivated in some way that results in their being excluded from domestic and international control mechanisms, but that can be reversed after they have been transferred to an illicit destination. To defeat this, article 9 sets out technical standards intended to ensure that any deactivation that results in a firearm no longer being treated or recorded as such must also be essentially irreversible.

2. Summary of main requirements

151. States parties that allow deactivation of firearms and subject those firearms to fewer controls are required to take action to prevent their reactivation.

3. Mandatory requirements

(a) Main elements of the article

152. There are three limiting factors associated with the article. Firstly, the article is applicable only to those States parties which do not treat deactivated firearms as firearms. Secondly, while the principle of preventing the

reactivation of deactivated firearms is mandatory, the creation of offences and the requirement for the verification of deactivated firearms is only required if it is determined to be appropriate by the State party. Thirdly, the specific provisions of sub-paragraphs (a)-(c) are essentially advisory and not prescriptive, stating “general principles” to guide implementation.

(b) Implementation of the article

153. There are several ways to approach the issue of deactivation: deactivation can be determined in accordance with specific criteria established by jurisprudence, by legislation or by delegated legislation. Once criteria for assessing deactivation are established, authority will then generally be delegated to a specific official to determine whether each firearm has been deactivated adequately. In formulating legislative provisions, consideration may be given to the circumstances in which deactivated status may have to be determined. These may range from cases where an administrative determination is sought in order to establish that a former firearm is not subject to the restrictions imposed by domestic legislation or the Protocol to cases where legal or factual deactivation is an issue in criminal prosecutions for trafficking or domestic firearms offences.

154. In drafting legislation, definitions of “firearm” may be worded in such a way as to exclude firearms that are not able to function or that meet specific deactivation criteria, or separate definitions of “deactivated firearm” may be created, an approach taken by some civil law countries. Generally, the technical nature of the subject matter and the need to make adjustments to keep pace with new types of criminal reactivation method favour an administrative or delegated legislative approach for setting technical standards, where this is feasible. An example of this approach is provided in annex IV.

4. Optional measures, including optional issues

155. To ensure that deactivated firearms are traceable if they are illicitly reactivated, States may wish to consider retaining records of deactivated firearms.

156. States may also wish to consider having the import/export system in article 10 extend to deactivated firearms. This will avoid the possibility of deactivated firearms being exported without a record (e.g. as ornaments)

and reactivated in the importing country without adequate records documenting the transaction.

5. *Information resources*

157. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) *Firearms Protocol*

Article 3, subparagraph (a) (Use of terms)

Article 4 (Scope of application)

(b) *Organized Crime Convention*

Article 34, paragraph 3 (Implementation of the Convention)

(c) *Other instruments*

2000 Organization for Security and Cooperation in Europe document
on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section IV

G. **Brokers and brokering**

"Article 15

"Brokers and brokering

"1. With a view to preventing and combating illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, States Parties that have not yet done so shall consider establishing a system for regulating the activities of those who engage in brokering. Such a system could include one or more measures such as:

"(a) Requiring registration of brokers operating within their territory;

"(b) Requiring licensing or authorization of brokering; or

“(c) Requiring disclosure on import and export licences or authorizations, or accompanying documents, of the names and locations of brokers involved in the transaction.

“2. States Parties that have established a system of authorization regarding brokering as set forth in paragraph 1 of this article are encouraged to include information on brokers and brokering in their exchanges of information under article 12 of this Protocol and to retain records regarding brokers and brokering in accordance with article 7 of this Protocol.”

1. Introduction

158. Article 15 is intended to encourage States to begin considering how to broaden controls to capture all activity in relation to the movement of firearms, their parts and components and ammunition. Since brokers can often play a pivotal role in arranging shipments of firearms and related items, increasing the transparency associated with the involvement of brokers in such transactions can result in increased information to feed investigations and tracing efforts.

2. Summary of main requirements

159. States parties are required to consider establishing a system for regulating the activities of brokering.

160. Although provision is made in the Protocol for brokering, legislative or other measures to control or regulate it are not mandatory. Thus, it is ultimately left to States parties to decide whether to adopt legislation or not, with some basic guidance furnished in article 15 of the Protocol.

3. Mandatory requirements

161. Article 15 is not mandatory.

4. Optional measures, including optional issues

(a) Main elements of the article

162. Brokering, which is not defined in the Protocol, generally refers to activities that involve the arranging of transactions or transfers of firearms,

parts and components and/or ammunition by persons or companies that are not direct parties to the transactions (e.g. as vendor or purchaser) and do not usually come into direct contact with or possession of the actual items. Often they operate from countries that may not be directly involved, which raises numerous jurisdictional issues. The term “broker” is intended to cover more than simply customs brokers.

163. Three models, or a combination thereof, are contemplated for the control of brokers in article 15. Firstly, States parties could require the brokers themselves to be registered, ensuring that basic scrutiny could be applied to their business operations and providing a strong compliance mechanism (deregistration), should illicit activities be disclosed. Secondly, States parties could require that each transaction or transfer undertaken by each broker be licensed separately. Generally, this model generates more information and scrutiny of the ongoing activities of brokers, but also imposes a greater regulatory burden on both the States parties and the businesses involved. Thirdly, States parties could require disclosure of the involvement and identities of brokers on the licences or authorizations that must be issued in conformity with article 10 of the Protocol.

(b) Implementation of the article

164. Should legislators choose to implement controls on brokering activities, the method of implementation will depend on which of the three models is chosen.

5. Information resources

165. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 3, subparagraphs (a), (b) and (c) (Use of terms)

Article 10, paragraph 3 (General requirements for export, import and transit licensing or authorization systems)

(b) *Organized Crime Convention*

Article 34, paragraph 3 (Implementation of the Convention)

(c) *Other instruments*

2000 Organization for Security and Cooperation in Europe document
on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>
Annex, appendix, section III

2001 Programme of Action to Prevent, Combat and Eradicate the
Illicit Trade in Small Arms and Light Weapons in All its Aspects
*Report of the United Nations Conference on the Illicit Trade in Small
Arms and Light Weapons in All Its Aspects, New York, 9-20 July
2001* (A/CONF.192/15), chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other
Related Materials in the Southern African Development Commu-
nity Region

[http://www.sadc.int/index.php?lang=english&path=legal/protocols/
&page=p_firearms](http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_firearms)

Article 5

2003 Elements for Effective Legislation on Arms Brokering of the
Wassenaar Arrangement on Export Controls for Conventional
Arms and Dual-Use Goods and Technologies

<http://www.wassenaar.org/>

V. Substantive criminal law

A. Introduction

1. Summary of offences

166. Article 5 of the Protocol establishes a series of offences relating to the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition. Generally, these are intended to ensure that States parties establish a legal framework within which legitimate manufacturing and transfer of firearms can be conducted and which will allow illicit transactions to be identified to facilitate the prosecution and punishment of offenders.

167. The Protocol requires the criminalization of the following three groups of offences involving “illicit manufacturing”, “illicit trafficking” and tampering with firearm markings:

- (a) Illicit manufacturing (three offences):
 - (i) Any manufacturing or assembly of firearms without marking;
 - (ii) Any manufacturing or assembly from illicit (trafficked) parts and components; and
 - (iii) Any manufacturing or assembly without legal permit or authorization;
- (b) Illicit trafficking (two offences):
 - (i) Any transnational transfer without legal authorization; and
 - (ii) Any transnational transfer if firearms are not marked;
- (c) Removing or altering serial numbers or other markings (one offence).

168. The basic requirements to establish criminal offences are found in article 5 of the Protocol, but the actual content of the various offences depends on other provisions. The content of the “central” offences of illicit manufacturing and illicit trafficking are themselves terms defined in article 3.

The defined terms “firearm”, “parts and components” and “ammunition” must also be consulted in drafting domestic legislation. Specific elements of the central offences are also linked to the other obligations under the Protocol concerning marking and the issuance of authorizations or licences to import or export.

169. The basic conducts of illicit manufacturing and trafficking can be seen as the “central” offences established by the Protocol. Each of these is in fact a group of related offences, the details of which are set out in the appropriate definition section. Illicit manufacturing, for example, includes three individual offences dealing with the assembly of firearms from parts and components that have themselves been trafficked (art. 3, subpara. (d) (i)); manufacturing without meeting the licensing or authorization requirements established by locally applicable laws or requirements (subpara. (d) (ii)); and manufacturing without placing identification markings which meet the requirements of article 8 of the Protocol on each firearm (subpara. (d) (iii)).

170. Similarly, the offence of illicit trafficking includes two specific offences dealing with various kinds of transfers of firearms, their parts and components and ammunition, including import, delivery, sale and other kinds of transfers without authorization (art. 3, subpara. (e)), or, in the case of firearms, if they have not been appropriately marked (art. 3, subpara. (e)).

171. It is important to note that some of the offences apply only to conduct with respect to firearms. These include the offence defined in article 3, subparagraph (d) (iii); the offence of trafficking in unmarked firearms, which is one of the offences defined in article 3, subparagraph (e); and the offences of tampering with markings, established by article 5, paragraph 1 (c). These offences relate to the markings required by article 8. Since article 8 requires only the marking of “firearms” because of the technical and other difficulties associated with the unique marking of parts, components and ammunition, these offences also apply only to firearms, although drafters in States that do require some form of marking for parts, components or ammunition may wish to consider a corresponding expansion of the relevant offence provisions.

172. In addition to the five central offences noted above, article 5, paragraph 1 (c), establishes a further group of offences criminalizing a list of activities that render the markings on a firearm unintelligible or inaccurate, making it impossible to uniquely identify the firearm or trace it against past

records created using the original marking. These generally support the policy of ensuring that firearms can be identified and traced. These offences apply to all conduct that involves tampering with the markings at any time after the manufacturing or assembly process is complete, with the exception of cases where markings are altered or added pursuant to some legal authority.

2. Application of mandatory provisions of the parent Convention to the Protocol

173. In establishing the offences required by the Protocols, it is important to bear in mind that each Protocol must be read in conjunction with the parent Convention. As set forth in chapter II, the provisions of the Convention apply to the Protocol, *mutatis mutandis*, and among States parties to the Protocol the offences established pursuant to the Protocol are to be considered offences established by the Convention. Application of these provisions creates an obligation upon States parties, *inter alia*, to take the following measures with respect to the offences established by the Protocol, the implementation of which is discussed in greater detail in the legislative guide for the implementation of the parent Convention:

(a) *Money-laundering*. States parties must criminalize the laundering of the proceeds of a comprehensive range of trafficking offences;⁶

(b) *Liability of legal persons*. Liability for offences must be established both for “natural” or biological persons and for “legal” persons such as corporations;⁷

(c) *Offences must be “criminal” offences (except for legal persons)*. Each of the offence provisions in the Convention and the Protocol state that offences must be established as offences in criminal law. This principle applies unless the accused is a legal person, in which case the offence may be a criminal, civil or administrative offence;⁸

(d) *Sanctions*. Sanctions adopted in domestic law must take into account and should be proportionate to the gravity of the offences;⁹

⁶Article 6 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 77-162.

⁷Article 10 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 240-260.

⁸Articles 5, 6, 8 and 23 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 48-209.

⁹Article 11, paragraph 1, of the Convention; see also the legislative guide for the implementation of the Convention, paras. 261-286.

(e) *Presence of defendants.* States parties are to take appropriate measures in accordance with domestic law and with due regard to the rights of the defence to ensure that conditions of release do not jeopardize the ability to bring about the defendant's presence at subsequent criminal proceedings;¹⁰

(f) *Parole or early release.* The gravity of offences established in accordance with the Protocol shall be taken into account when considering the possibility of early release or parole of convicted persons;¹¹

(g) *Statute of limitations.* Appropriately long statutes of limitations should be provided for with respect to such offences;¹²

(h) *Asset confiscation.* To the greatest extent possible, tracing, freezing and confiscation of the proceeds and instrumentalities of these offences should be provided for in domestic cases and in aid of other States parties;¹³

(i) *Jurisdiction.* The Convention requires States parties to establish jurisdiction to investigate, prosecute and punish all offences established by the Convention and any Protocols to which the State in question is a party. Jurisdiction must be established over all offences committed within the territorial jurisdiction of the State, including its marine vessels and aircraft. If the national legislation prohibits the extradition of its own nationals, jurisdiction must also be established over offences committed by such nationals anywhere in the world to permit the State to meet its obligation under the Convention to prosecute offenders who cannot be extradited on request owing to nationality. The Convention also encourages the establishment of jurisdiction in other circumstances, such as all cases where the nationals of a State are either victims or offenders, but does not require this;¹⁴

(j) *Extradition.* The obligations of the parent Convention require States parties to, inter alia, treat offences established in accordance with the Protocol as extraditable offences under their treaties and laws and to submit

¹⁰Article 11, paragraph 3, of the Convention; see also the legislative guide for the implementation of the Convention, paras. 261-286.

¹¹Article 11, paragraph 4, of the Convention; see also the legislative guide for the implementation of the Convention, paras. 261-286.

¹²Article 11, paragraph 5, of the Convention; see also the legislative guide for the implementation of the Convention, paras. 261-286.

¹³Articles 12-14 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 287-340.

¹⁴Article 15, paragraph 1, of the Convention (mandatory jurisdiction); article 15, paragraph 2 (optional jurisdiction); and article 16, paragraph 10 (obligation to prosecute where no extradition due to nationality of offender); see also the discussion of jurisdictional issues in paras. 210-239, of the legislative guide for the implementation of the Convention.

to competent authorities such offence for domestic prosecution where extradition has been refused on grounds of nationality;¹⁵

(k) *Mutual legal assistance.* Mutual legal assistance shall be afforded to other States parties in investigations, prosecutions and judicial proceedings for such offences; numerous specific provisions of article 18 of the parent Convention apply;¹⁶

(l) *Special investigative techniques.* Special investigative techniques shall be provided for to combat such offences, in particular controlled delivery if permitted by basic principles of the domestic legal system of the State party concerned, and, where deemed appropriate, other techniques such as electronic surveillance and undercover operations;¹⁷

(m) *Obstruction of justice.* Obstruction of justice must be criminalized when carried out with respect to offences established in accordance with the Protocol;¹⁸

(n) *Protection of victims and witnesses.* Witnesses and victims are to be protected from potential retaliation or intimidation under the provisions of articles 24 and 25 of the Convention;¹⁹

(o) *Cooperation of offenders.* Article 26 of the Convention requires the taking of appropriate measures to encourage those involved in organized crime to cooperate with or assist competent authorities. The actual measures are not specified, but in many States they include the enactment of provisions whereby offenders who cooperate may be excused from liability or have otherwise applicable punishments mitigated. Some States possess sufficient discretion in prosecution and sentencing to allow this to be done without legislative authority, but where such discretion does not exist, legislation that creates specific offences, establishes mandatory minimum punishments or sets out procedures for prosecution may require adjustment, if the legislature decides to use mitigation or immunity provisions to implement article 26. This could be done by establishing a general rule, or on an offence-by-offence basis, as desired;²⁰

¹⁵Article 16 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 394-449.

¹⁶Article 18 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 450-499.

¹⁷Article 20 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 384-393.

¹⁸Article 23 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 195-209.

¹⁹See also the legislative guide for the implementation of the Convention, paras. 341-383.

²⁰Article 26 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 341-383.

(p) *Law enforcement cooperation and training and technical assistance.* Channels of communication and police-to-police cooperation shall be provided for with respect to the offences established in accordance with the Protocol under article 27 of the Convention; and training and technical assistance under articles 29 and 30.²¹

3. *Other general considerations in legislating domestic criminal trafficking offences*

174. In addition to the above measures that must be provided for with respect to offences established in accordance with the Protocol, the Convention and the Protocol contain specific requirements that are to be taken into account when drafting legislation to implement the criminal offences established by the Protocol, in particular:

(a) *Non-inclusion of transnationality in domestic offences.* As noted in part one, the element of transnationality is one of the criteria for applying the Convention and Protocols (art. 3 of the Convention), but transnationality must not be required as a proof in a domestic prosecution. For this reason, transnationality is not required as an element of domestic offences. The exception to this principle is any offence that expressly requires transnationality as an element of the offence;

(b) *Non-inclusion of “organized criminal group” in domestic offences.* As with transnationality, above, the involvement of an “organized criminal group” must not be required as a proof in a domestic prosecution. Thus, the offences established in accordance with the Protocol should apply equally, regardless of whether the offence was committed by an individual, or was committed by individuals associated with an organized criminal group, and regardless of whether this can be proved or not;²²

(c) *Criminalization may use “legislative and other measures”, but must be founded in law.* Both the Convention and the Protocol refer to criminalization using “such legislative or other measures as may be necessary” in recognition that a combination of measures may be needed in some countries. The drafters were concerned, however, that the rule of law generally requires that criminal offences be prescribed by law and the reference to “other measures” was not intended to require or permit

²¹See also the legislative guide for the implementation of the Convention, paras. 500-511.

²²See article 34, paragraph 2, of the Convention and the interpretative notes (A/55/383/Add.1), para. 59.

criminalization without legislation. The interpretative notes therefore provide that other measures are additional to and “presuppose the existence of a law”;²³

(d) *Only intentional conduct need be criminalized.* All of the criminalization requirements of the Convention and Protocols require that the conduct of each offence must be criminalized only if committed intentionally. Thus, conduct that involves lower standards such as negligence need not be criminalized. Such conduct could, however, be made a crime under the provisions of article 34, paragraph 3, of the Convention, which expressly allows measures that are “more strict or severe” than the minimum crimes that are required. Drafters should also note that the element of intention refers only to the conduct or action that constitutes each criminal offence and should not be taken as a requirement to excuse cases in particular where persons may have been ignorant or unaware of the law that constituted the offence;

(e) *Description of offences.* As with all the requirements of the Convention and Protocols, drafters should consider the meaning of the offence provisions and not simply incorporate the literal language of the Protocols verbatim. In drafting the domestic offences, the language used should be such that it will be interpreted by domestic courts and other competent authorities in a manner consistent with the meaning of the Protocol and the apparent intentions of its drafters. In some cases, the intended meanings have been clarified by the interpretative notes;²⁴

(f) *Provisions of the Convention apply to the Protocol, mutatis mutandis, and should be interpreted together.* As noted in the preceding segment of the present guide, article 1 of the Protocol and article 37 of the Convention govern the relationship between the Protocol and the Convention. They provide that the Protocol must be read as supplementary to the Convention and interpreted together with it. All offences established under the Protocol are also considered offences established in accordance with the Convention, and provisions of the Convention apply to the Protocol,

²³The same principle is applied separately to the Convention and all of its Protocols; see the interpretative notes (A/55/383/Add.1), paras. 9, 69 and 91, and (A/55/383/Add.3), para. 5; see also article 15 of the International Covenant on Civil and Political Rights.

²⁴The formal *travaux préparatoires* for the Convention and its Protocols have not yet been published. Recognizing that this would take some time and seeking to ensure that legislative drafters would have access to the interpretative notes during the early years of the instruments, the Ad Hoc Committee drafted and agreed on the language for interpretative notes on many of the more critical issues during its final sessions. These were submitted to the General Assembly along with the finalized texts of the instruments and can now be found in addenda to a report of the Ad Hoc Committee. Interpretative notes on the Convention and first two Protocols are contained in document A/55/383/Add.1 and interpretative notes on the Firearms Protocol are contained in document A/55/383/Add.3.

mutatis mutandis.²⁵ For this reason, drafters developing legislation that implements the Protocol are also advised to consult the Convention and national laws that implement it as a matter of general principle. For example, terminology that is common to the Convention and a Protocol should not be interpreted in one instrument in a way that is inconsistent with its interpretation in the other.

4. Basic principles established by the Protocol

175. Additional general principles established by the Protocol should also be considered.

(a) Scope of offences established by the Protocol

176. Article 4 of the Protocol states that the instrument applies to the “prevention of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition” and “to the investigation and prosecution of the offences contained in the instrument *where those offences are transnational in nature and involve an organized criminal group*” [emphasis added]. One may ask how the qualifier “transnational in nature” and the involvement of an “organized criminal group” affect the creation of the offences. As noted above, the general principle in formulating criminal offences established by the Convention and Protocols under domestic law is that elements of transnationality and the involvement of organized criminal groups must not be made elements of the domestic offence (art. 34, para. 2, of the Convention, applicable to the Protocol, mutatis mutandis, by art. 1, para. 2, of the Protocol).

(b) Exception

177. Article 4, paragraph 2, provides that the Protocol “shall not apply to state-to-state transactions or to state transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations”. The intention in drafting this paragraph was to exclude certain transactions or transfers that involve States. The extent of the limitation

²⁵The term “mutatis mutandis” should be interpreted to mean “with the necessary modifications” or “with such modifications as the circumstances require” (see A/55/383/Add.1, para. 26). Similar notes were also adopted with respect to the other two Protocols.

turns on the interpretation of the terms “state-to-state transactions” and “state transfers”. The interpretative notes indicate that the words “state-to-state transactions” refer only to transactions by States in a sovereign capacity. This would therefore not include States acting in their commercial capacity.²⁶

(c) *Firearms, their parts and components and ammunition*

178. The Protocol refers repeatedly to “firearms, their parts and components *and* ammunition” [emphasis added] because this is the language of General Assembly resolution 53/111 (para. 10), pursuant to which the Protocol was negotiated. In drafting domestic offence provisions, however, drafters should carefully consider whether a conjunctive (“and”) or a disjunctive (“or”) construction should be used, having regard to the legislative context set by the Convention, the Protocol and relevant domestic legislation. In formulating criminal offence provisions, the disjunctive will generally be more appropriate. For example, the intention in requiring States parties to criminalize the “illicit manufacturing of firearms, their parts and components and ammunition” was to require criminalization of illicitly manufacturing *any* of those elements. If incorporated verbatim into a domestic offence provision, the use of the conjunctive “and” could have the effect of requiring proof that an accused person had illicitly manufactured *all* of them (i.e. at least one item in each of the four groups), which was not the intention. This analysis applies to the criminalization requirements of article 5, paragraph 1 (a) and (b), and to the interpretation of article 3, subparagraphs (d) and (e). The issue does not arise with respect to those offences which apply only to firearms (see art. 3, subparagraph (d) (iii)).

(d) *Attempts to commit*

179. States parties are required to criminalize attempts to commit the offences established in accordance with the Protocol. The *travaux préparatoires* should elaborate on this by indicating that references to attempting to commit the offences are understood in some countries to include both acts perpetrated in preparation for a criminal offence and those carried out in an unsuccessful attempt to commit the offence, where those acts are also culpable or punishable under domestic law (A/55/383/Add.3, para. 6). The

²⁶See the interpretative notes (A/55/383/Add.3), para. 4; see also the record of the meeting of the General Assembly at which resolution 55/255, containing the text of the Protocol, was adopted (*Official Records of the General Assembly, Fifty-fifth Session, Plenary Meetings*, 101st meeting).

Protocol also requires the criminalization of organizing, directing, aiding, abetting, facilitating or counselling.

5. *Optional offences*

180. To supplement the mandatory offences, States may wish to consider additional offences that are set out in section E, Optional offences, of this chapter, bearing in mind that the investigation, prosecution or other procedures relating to activities that are outside the scope of the Convention or Protocol will not be covered by the various requirements to provide international cooperation.

B. *Illicit manufacturing*

“Article 5

“Criminalization

“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct, when committed intentionally:

“(a) Illicit manufacturing of firearms, their parts and components and ammunition;

“ ...

“2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct:

“(a) Subject to the basic concepts of its legal system, attempting to commit or participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

“(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with paragraph 1 of this article.”

“Article 3

“Use of terms

“For the purposes of this Protocol:

“ . . .

“(d) ‘Illicit manufacturing’ shall mean the manufacturing or assembly of firearms, their parts and components or ammunition:

- “(i) From parts and components illicitly trafficked;
- “(ii) Without a licence or authorization from a competent authority of the State Party where the manufacture or assembly takes place; or
- “(iii) Without marking the firearms at the time of manufacture, in accordance with article 8 of this Protocol;

Licensing or authorization of the manufacture of parts and components shall be in accordance with domestic law;

“ . . . ”

1. Introduction

181. Article 5, with its three offences for illicit manufacturing, is intended to ensure that all stages of the manufacturing process from raw materials to finished firearms are included. More specifically, the intent of the first offence—manufacture or assembly from illicit parts and components—is to ensure that the basic import, export and tracing requirements of the Protocol will not be circumvented by manufacturing all of the parts and components of a firearm and carrying out exports before assembly into the finished product. The second offence ensures that the manufacturing of the firearms will not take place covertly since a competent authority must authorize the activity. The intent of the third offence is to ensure that the manufacturing process includes markings sufficient for tracing.

2. Summary of main requirements

182. The basic obligation to criminalize illicit manufacturing is expanded by the definition of “illicit manufacturing” to encompass the requirement for States parties to adopt the following three distinct but related offences:

- (a) Manufacture or assembly from illicit parts and components;
- (b) Unlicensed or unauthorized manufacture or assembly; and
- (c) Manufacture or assembly of firearms without marking.

3. *Mandatory requirements*

(a) *Main elements of the article*

(i) *Offence of manufacture or assembly from illicit parts and components*

183. There are several issues to consider in the implementation of this illicit manufacturing offence.

184. Firstly, the scope of the offence must be clearly understood. Since the term “parts and components” is defined in the Protocol as “any element or replacement element specifically designed for a firearm and essential to its operation”, the term is limited to items falling within the ambit of the definition. As such, the term does not apply to parts and components of anything other than firearms; to very basic components (such as springs and machine-screws) that are not exclusive to firearms and items that, while they may be exclusive to firearms, are not essential to their operation; or to raw materials.

185. Secondly, since one of the elements of this illicit manufacturing offence is that the parts and components must themselves have been “illicitly trafficked”, it may be advisable to include in any domestic criminal offence provision language specifying the meaning of “illicitly trafficked” and making some provision for different ways in which this element can be proved in a criminal prosecution. In this context, the meaning of “illicitly trafficked” should be consistent with the meaning accorded to that term in the Protocol.

186. Thirdly, given the transnational nature of this offence,²⁷ a provision should be considered to the effect that criminal proof with respect to the same parts and components in any other domestic or foreign legal proceeding can be recognized by a court as meeting this requirement. It should be noted that in cases where a criminal conviction is recognized, there

²⁷As noted above and in article 34, paragraph 2, of the Convention, the offences of illicit manufacture need not necessarily involve transnationality insofar as the actual manufacturing or assembly are concerned. However, the offence of manufacture using illicitly trafficked parts and components does require an element of transnationality insofar as the parts and components are concerned because the definition of “illicit trafficking” requires that a national border have been crossed. The manufacture of firearms by one person from parts illicitly trafficked by another would still be an offence under the Protocol, provided that the illicit manufacture was intentional, which would generally require some degree of knowledge that the parts and components had been illicitly trafficked.

should be no requirement that the same accused persons have been involved. It should also be possible to convict a person of illegal manufacture on the basis that the parts and components were illicitly trafficked by someone in another jurisdiction, assuming, of course, that the manufacturer had knowledge, actual or constructive, that the parts had been trafficked.

187. Finally, the offence should generally extend to cases where the parts and components were illicitly trafficked at any time in the past, whether or not that transaction or transfer actually ended with the person now accused of assembling them. Subsequent transactions or transfers by persons unaware of the illicit origin of the parts and components should not effectively legitimize them or immunize those who subsequently assemble them. There should be two exceptions to this principle. The first is that parts and components that have been trafficked, confiscated and disposed of other than by destruction under article 6 of the Protocol should not form the basis of an illicit manufacturing offence. The second is where the manufacturer was genuinely unaware of the illicit origin or history of the parts and components.

188. In systems that recognize the defence of mistake-of-fact, that defence would exclude such cases, and such defences are expressly permitted by article 11, paragraph 6, of the Convention if they already exist in domestic law. Systems that do not recognize the defence may find it necessary to incorporate equivalent limits into the offence provision. In either case, the general policy of the Protocol is that manufacturers should not be permitted to assume that parts and components are derived from a legitimate source without making reasonable inquiries. To achieve this, language including within the offence cases of “wilful blindness”, in which the accused ignored evidence of illegality or avoided making obvious inquiries that would have disclosed it, could be considered. This would not necessarily be inconsistent with the basic standard of intentional conduct set by article 5, paragraph 1. Effectively, in such a case, the accused would be convicted of having intentionally assembled firearms while being wilfully blind as to the origin of the parts and components.

(ii) *Offence of unlicensed or unauthorized manufacture or assembly*

189. While article 10 of the Protocol requires the establishment of licences or authorizations to import and export, there is no parallel requirement for the licensing of manufacture or assembly. Article 3, subparagraph (d) (ii),

effectively creates such a requirement, however, by making the failure to have such a licence or authorization an element of the offence. Licence or authorization requirements need only be imposed on the manufacturing and assembly of firearms and ammunition. This is because article 3, subparagraph (d), specifies that licensing or authorizations for the manufacture or assembly of parts and components “shall be in accordance with national law”. The effect is that countries may impose manufacturing licences or authorizations for the making of parts and components, but are not required to do so.

190. Licensing offences should generally be drafted in conformity with the corresponding licence requirements, taking into account provisions made for such things as issuance and validity period. For example, offence provisions should extend to manufacturing or assembly not only where no licence had been issued, but where licences had expired or did not extend to some or all of the activities that took place. The offences should also include cases where the individual or legal persons who manufactured or assembled were not those actually licensed to do so and cases where the types or quantities of firearms produced were not authorized by the licence.

191. The reference to issuance by a “competent authority” of the State party involved refers to any official who is empowered to consider and issue licences or authorizations under the laws of that State party. Effectively, this would include regional, provincial or state officials in federal systems where such officials are made responsible for licensing matters by provisions of the national constitution or by the delegation of powers by the federal or national Government. The Protocol does not seek to establish federal licensing powers in States parties where this is a matter of regional, provincial or state responsibility.

(iii) *Offences of manufacture or assembly of firearms without marking*

192. The third offence of illicit manufacturing required by the Protocol consists of any manufacture or assembly of firearms that does not include the marking of the firearms in conformity with one of the two options for marking set out in article 8, paragraph 1 (a). The offence should include any case where a firearm is manufactured or assembled either without markings of any kind or with markings that do not meet the requirements of article 8 governing content and uniqueness.

193. Drafters formulating this offence provision should note that the Protocol does not require the marking of parts and components or ammunition and the offence provision therefore need only criminalize the manufacture or assembly of firearms without marking. At the same time, drafters in States that require some degree of marking of parts, components or ammunition may also wish to consider criminalizing manufacture of those items without marking, bearing in mind that offences that go beyond the scope of the Protocol are expressly authorized by article 34, paragraph 3, of the Convention, but would not invoke the various obligations to provide international cooperation under the Convention or Protocol.

194. Legislation establishing this offence should clearly specify the time at which firearms must be marked. The Protocol obligation is to criminalize the “manufacture or assembly” of firearms without marking “at the time of manufacture”. This suggests that not only complete “firearms” need be marked, but also that firearms that are complete but not yet assembled must be marked as well. It is also consistent with the practice of many manufacturers, which is to mark a major component, such as the “frame or receiver”, at or near the completion of its manufacture and then to assemble the firearm by adding the smaller, unmarked parts and components at a later stage. This defeats attempts to create untraceable firearms by marking only smaller, easily interchangeable parts and supports additional audit or record-keeping requirements for manufacturers if these are imposed.

195. Paragraph 1 (a) of article 8 sets out two distinct options for marking, but only one of the options will be open to drafters of legislation in most cases. States that already employ “any alternative unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code” are permitted to “maintain” or to continue using such a system. Those States will require offence provisions that exclude cases where this system is used instead of or in addition to the first option. States that are not already using such a system, however, are obliged to limit permitted forms of marking to “unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number” (see also paras. 65-90 above). The corresponding domestic offence should either criminalize the failure to meet this standard expressly or make reference to the corresponding requirement in national laws that reflect the standard set by the Protocol.

(b) Implementation of the article

196. The three distinct but related offences can be implemented either as a single unified offence of illicit manufacturing, using a format similar to

that employed by article 3, subparagraph (d), or by adopting three distinct offences. The latter approach may offer the advantage of more specific, straightforward offences that simplify the laying and prosecution of criminal charges in most systems and are more likely to meet basic constitutional standards for the clarity and specificity of criminal offence provisions where these apply. This approach may also lend itself to further additions or amendments if required or desired in the future. The drafting of a unified offence provision, on the other hand, may make it less likely that gaps or inconsistencies between offences will arise and drafters developing specific individual offences should take precautions to avoid this. In either case, the offence should either criminalize the failure to meet the required standard and set out that standard in detail or else make reference to the corresponding requirement in national laws.

4. Optional measures, including optional issues

197. It is open to States to adopt a broader (“more strict or severe”) standard for “illicit manufacturing” in support of their domestic offences (art. 34, para. 3, of the Convention). It should be noted, however, that in cases that involve manufacturing that is illicit by domestic law but does not fall within the ambit of the provisions of the Protocol, investigators might not be able to avail themselves of the cooperation provisions in the Protocol and the Convention.

198. Within the general standard of intent, legislators might consider whether lower standards are appropriate for some specific elements of offences. Those who manufacture or assemble firearms, for example, could be required to avoid wilful blindness or exercise some standard of diligence in determining whether parts and components they use have been illicitly trafficked by someone else.

199. As noted above, drafters in countries that extend marking requirements beyond the scope of the Protocol—for example, to include some degree of marking of parts, components or ammunition—should consider a corresponding expansion of the offence provisions.

5. Information resources

200. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) *Firearms Protocol*

Article 1, paragraph 3 (Relation with the United Nations Convention against Transnational Organized Crime)

Article 3, subparagraphs (a), (b), (c), (d) and (e) (Use of terms)

Article 4 (Scope of application)

Article 7 (Record-keeping)

Article 8 (Marking of firearms)

Article 10 (General requirements for export, import and transit licensing or authorization systems)

Article 12, paragraph 4 (Information)

(b) *Organized Crime Convention*

Article 11 (Prosecution, adjudication and sanctions)

Article 18 (Mutual legal assistance)

Article 34, paragraph 3 (Implementation of the Convention)

(c) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article IV

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section II

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects

Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001 (A/CONF.192/15), chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_firearms

Article 5

C. Illicit trafficking

“Article 5

“Criminalization

“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct, when committed intentionally:

“ ...

“(b) Illicit trafficking in firearms, their parts and components and ammunition;

“(c) Falsifying or illicitly obliterating, removing or altering the marking(s) on firearms required by article 8 of this Protocol.

“2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct:

“(a) Subject to the basic concepts of its legal system, attempting to commit or participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

“(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with paragraph 1 of this article.”

“Article 3

“Use of terms

“For the purposes of this Protocol:

“ . . .

“(e) ‘Illicit trafficking’ shall mean the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorize it in accordance with the

terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol;

“ . . . ”

1. Introduction

201. The two offences relating to illicit trafficking are intended to increase transparency associated with the cross-border movement of firearms and related items. The first offence is intended to ensure that firearms and related items are sent to and through States only if the latter have agreed to receive the shipments. The system adopted in the Protocol creates this reciprocal approval process and has the effect of implicating more than just States parties to the Protocol. The reason for this is that a State party that is the exporting State will require authorizations from the importing and transit States even if the latter are not States parties to the Protocol. The intent of the second offence is to ensure that the movement of firearms is only authorized if the firearms have markings sufficient for tracing.

2. Summary of main requirements

202. The basic obligation to criminalize illicit trafficking in article 5, paragraph (1) (b), of the Protocol is expanded by the definition of illicit trafficking in article 3, subparagraph (e), to encompass a series of distinct elements (import, export, etc.) and two distinct offences:

(a) Specified conduct (importing, etc.) with respect to firearms where any of the States parties concerned (import, export or transit States) has not authorized the conduct in accordance with the Protocol;

(b) Specified conduct (importing, etc.) with respect to firearms that are not marked in accordance with article 8.

3. Mandatory requirements

(a) Main elements of the article

(i) *Offence of illicit trafficking where States parties concerned have not authorized the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts or components or ammunition*

203. In this first part of the illicit trafficking offence the requirement is to criminalize cases involving the specified conduct, if there is movement of

firearms, parts and components or ammunition “from or across the territory of one State Party to that of another State Party”.

204. What constitutes “import” and “export” should generally be consistent with existing national law and international standards. One issue is whether importation occurs at the instant firearms, parts and components or ammunition physically enter the territory of the State party concerned or whether they can be physically in a country temporarily prior to later “importation” or in transit en route to another country without triggering import requirements or offences. Generally, international practice and article 10 of the Protocol allow for some forms of limited entry, at least for “transit” purposes, which is not considered to be importation and for which suitable security precautions are required.

(ii) Offence of trafficking unmarked firearms

205. In the second part of the illicit trafficking offence, the requirement is to criminalize cases involving the specified elements discussed above, if there is movement of firearms and “the firearms are not marked in accordance with article 8”.

206. The applicable requirements would depend on the firearms involved: the marking requirements of article 8, paragraph 1 (a), would apply to all firearms (all having been “manufactured” at some point) and the requirements of article 8, paragraph 1 (b), would apply to all firearms being imported. The requirements of article 8, paragraph 1 (c), would also apply in the case of firearms that had been transferred at some previous time from government stocks to permanent civilian use.

207. Drafters should also consider that any firearm on which the marking had been falsified, illicitly obliterated, removed or altered contrary to the offence established in accordance with article 5, paragraph 1 (c), of the Protocol would no longer be “marked in accordance with article 8 of this Protocol” and should ensure that trafficking in such firearms falls within the ambit of the offence of trafficking unmarked firearms.

208. It should also be noted that, as an offence in relation to the marking of firearms, the offence of trafficking unmarked firearms is required to apply only to firearms and not to parts and components or ammunition.

(b) *Implementation of the article*

209. The distinct but related offences can be implemented either as a single unified offence of illicit trafficking, using a format similar to that employed by article 3, subparagraph (e), or by adopting two or more distinct offences. As with the offences of illicit manufacture above, the latter approach may offer the advantage of more specific, straightforward offences that simplify the laying and prosecution of criminal charges in most systems and are more likely to meet basic constitutional standards for the clarity and specificity of criminal offence provisions where these apply. This approach may also lend itself to further amendments or additions if required or desired in the future. The drafting of a unified offence provision, on the other hand, may make it less likely that gaps or inconsistencies between offences will arise, however, and drafters developing specific individual offences should take precautions to avoid this. In either case, the offences should either criminalize the failure to meet the required standard and set out that standard in detail or make reference to the corresponding requirement in national laws.

210. Drafters have several options for formulating the necessary offence provisions:

(a) The creation of separate offences for each of the prohibited forms of conduct;

(b) The creation of several offences involving conduct grouped by other characteristics (e.g. creating groups for import-export offences); or

(c) The creation of two offences dealing with unauthorized actions and with unmarked firearms, each of which includes all of the listed prohibited forms of conduct.

211. In drafting the offence provision, care should be taken to criminalize not only cases where any form of licence or authorization from a State party is completely lacking, but also cases in which some form of authorization existed but did not cover the actions that actually occurred in their entirety. Transfers or other trafficking actions that might exceed authorizations include cases where licences were not validly issued or had expired, where conditions precedent for the activity on which the licence was contingent had not been met and cases where they did not extend to the types or quantities of firearms, parts and components or ammunition involved.

212. Drafters should also note that more than one “authorization” must be raised to avoid liability for the offence. All of the “States Parties

concerned” must have authorized the transfer or other trafficking act, which will generally include the countries of export, import and, where appropriate, any countries of transit.

213. It should further be noted that, to be valid, the authorization to undertake a particular act must have come from a State party entitled to authorize the action in question. Thus, for example, a licence to import firearms must have come from the State party into which the firearms were actually imported.

214. Articles 5, paragraph 1 (*b*), and 3, subparagraph (*e*), require the criminalization of any import or export where the countries of export, import and, where applicable, transit have not authorized the transfer. Article 10 then sets out the conditions under which the necessary permits or authorizations should be issued and the contents of various documents for the purpose of creating the records needed to trace transactions or firearms. Article 10, paragraph 6, allows (but does not require) States parties to create a partial exception to the otherwise applicable permit or authorization requirements, where importation is temporary and for verifiable lawful purposes such as recreational use. Should the legislature choose to create such an exception, it will be necessary to ensure that the offences relating to importation without the necessary permits or authorizations incorporate parallel exceptions. Drafters should ensure that in any case where a court concludes that firearms were imported for purposes that did not fall within the exclusion, the principal offence of trafficking would apply.

215. Articles 5, paragraph 1 (*b*), and 3, subparagraph (*e*), also require the criminalization of importing firearms not marked in accordance with the requirements of article 8. An exclusion exists to this general rule. The requirement to affix markings when firearms are imported need not be applied to firearms imported temporarily for a “verifiable lawful purpose”. This is intended to allow States parties to reduce the regulatory burden on individuals importing or exporting personal firearms for recreational purposes and on companies that frequently import and export firearms for purposes such as maintenance and repair (see also art. 10, para. 6, on this point). Where a Government chooses to apply this exclusion, a parallel exclusion should be incorporated into the offence of trafficking without the necessary markings. In this case, importing without the necessary basic markings would still be an offence, but importing without the additional markings required by article 8, paragraph 1 (*b*), would not be, if the import was temporary and for a verifiable lawful purpose.

4. *Optional measures, including optional issues*

216. It is open to States to adopt a broader (“more strict or severe”) standard for “illicit trafficking” in support of their domestic offences (see art. 34, para. 3, of the Convention). It should be noted, however, that in cases involving trafficking that is illicit by domestic law but does not fall within the ambit of the provisions of the Protocol, investigators might not be able to avail themselves of the cooperation provisions in the Protocol and the Convention. Within the general standard of intent, legislators might also wish to consider whether lower standards are appropriate for some specific elements of offences.

217. Legislators and drafters may wish to consider making specific provision for the use of foreign documents, such as import, export or transit licences, as proof that the necessary authorizations were given, bearing in mind that the actual names and format of such documents are likely to vary from one State party to another and that the language chosen should ensure that the legislation will support the production of evidence of foreign authorization regardless of its format.

5. *Information resources*

218. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 1, paragraph 3 (Relation with the United Nations Convention against Transnational Organized Crime)

Article 3, subparagraphs (a), (b), (c), (d) and (e) (Use of terms)

Article 4 (Scope of application)

Article 7 (Record-keeping)

Article 8 (Marking of firearms)

Article 10 (General requirements for export, import and transit licensing or authorization systems)

Article 12, paragraph 4 (Information)

(b) *Organized Crime Convention*

Article 11 (Prosecution, adjudication and sanctions)

Article 18 (Mutual legal assistance)

Article 34, paragraph 3 (Implementation of the Convention)

(c) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article IV

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section III

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects
Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001 (A/CONF.192/15), chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_firearms

Article 5

D. Tampering with markings

“Article 5

“Criminalization

“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct, when committed intentionally:

“ ...

“(c) Falsifying or illicitly obliterating, removing or altering the marking(s) on firearms required by article 8 of this Protocol.

“2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct:

“(a) Subject to the basic concepts of its legal system, attempting to commit or participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

“(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with paragraph 1 of this article.”

1. Introduction

219. Offenders seeking to frustrate efforts to identify and trace firearms used or intended for use in criminal offences, including trafficking, frequently attempt to remove or alter unique markings or to render them impossible to read. For this reason, many States with previously established legislation requiring firearms to be marked have also established offences relating to tampering with such markings and article 5, paragraph 1 (c), of the Protocol contains the requirement for all States parties to implement such an offence.

2. Summary of main requirements

220. This offence includes:

(a) Any case where a firearm is marked at manufacture with markings that meet the requirements, but that are false in relation to any records that would subsequently be used to trace the firearm;

(b) The full range of methods devised by offenders to prevent the successful reading of markings.

3. Mandatory requirements

(a) Main elements of the article

221. The inclusion of the word “falsifying” in paragraph 1 (c) is intended to create an offence that supplements the offence of illicit manufacturing.

It includes any case where a firearm is marked at manufacture with markings that meet the requirements, but that are false in relation to any records that would subsequently be used to trace the firearm. Thus, for example, knowingly marking a firearm with the same number as another firearm would fall within the manufacturing offence (arts. 5, para. 1 (a), and 3, subpara. (d) (iii)), whereas affixing a marking that was unique but that gave a false country or place of manufacture or was inconsistent with records kept by the manufacturer or information transmitted to state records for later use in tracing would fall within the tampering offence.

222. The terms “obliterating, removing or altering” markings are intended to cover the full range of methods devised by offenders to prevent the successful reading of markings. Generally, prosecution of such offences will be supported by evidence from a law enforcement or forensic expert to the effect that this has taken place.

223. The terms “obliterating, removing or altering” markings are qualified with the term “illicitly” to ensure that States parties may make provision for legal alteration of markings if they wish. In some systems, firearms acquired or disposed of by military forces or other state entities are re-marked, for example. Since this would be an exception to an offence prescribed by law, such an exemption would, if established, generally also require the use of a legislative provision.

(b) Implementation of the article

224. The exact formulation of the offences of manufacture without marking and falsification of markings may vary, but drafters should ensure that the full range of conduct is covered and that there are no gaps between the two.

225. For offences of “obliterating, removing or altering” markings, drafters may wish to consult with experts regarding the selection of terminology that will ensure that the legislation is interpreted so as to cover the full range of methods used by offenders. Generally, the evidence of forensic experts identifying firearms and establishing tampering with the markings will be based on a visual, physical, chemical or radiological examination of the firearm and legislators may wish to include language ensuring that expert testimony is admissible.

226. Drafters and legislators developing exceptions for the legal alteration of markings should bear in mind the need to ensure that re-marked firearms

can still be traced, either by setting standards that ensure that the original marking is not made unreadable (e.g. by simply adding further markings to the original) or by ensuring that records are made of the re-marking that would link the new and old identification of the firearm, should it later be necessary to trace it.

4. *Optional measures, including optional issues*

227. The nature of firearm markings, most of which are deeply imprinted into one or more of the major metallic parts of each firearm, make removal, alteration or obliteration difficult to accomplish without rendering the firearm itself unusable or dangerous to any future users. This results in large numbers of unsuccessful attempts and in cases where markings are superficially removed but can still be made legible by chemical or radiological methods. Article 5, paragraph 2 (a), requires the criminalization of attempts where this is consistent with the basic concepts of the legal system of the country concerned. Where separate criminalization of attempts per se is not possible, drafters and legislators could consider making attempts part of the actual conduct prohibited. (An example of such a provision is “anyone who removes or attempts to remove a marking”.) Alternatively, other actions could be prohibited if done for the purpose of removal, alteration and so on. (An example of this formulation is “anyone who files, grinds, stamps or does anything to the marking on a firearm for the purpose of obliterating, removing, altering the marking”.) Further, since forensic experts often “restore” markings using chemical etching or other methods, the language chosen for offence provisions should ensure that the fact that a forensic expert was subsequently able to read the marking or restore it to a form in which it could be read did not constitute evidence that the marking had not, in fact, been removed, altered or obliterated.

5. *Information resources*

228. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) *Firearms Protocol*

Article 1, paragraph 3 (Relation with the United Nations Convention against Transnational Organized Crime)

Article 3, subparagraphs (a), (b), (c), (d) and (e) (Use of terms)

Article 4 (Scope of application)

Article 7 (Record-keeping)

Article 8 (Marking of firearms)

Article 10 (General requirements for export, import and transit licensing or authorization systems)

Article 12, paragraph 4 (Information)

(b) Organized Crime Convention

Article 11 (Prosecution, adjudication and sanctions)

Article 18 (Mutual legal assistance)

Article 34, paragraph 3 (Implementation of the Convention)

E. Optional offences

229. Depending on the state of a country's existing laws and the methods chosen to implement the record-keeping, marking, licensing and other requirements of the Protocol, Governments may wish to consider adopting further offences in several areas, although this is not required (art. 34, para. 3, of the Convention), bearing in mind that the investigation, prosecution or other procedures relating to activities that are outside the scope of the Convention or Protocol will not be covered by the various requirements to provide international cooperation.

1. Record-keeping

230. Where a State chooses to require the parties who transfer firearms to keep the records needed for subsequent tracing, for example, it may wish to consider offences relating to the failure to keep records and the falsification and destruction of records, whereas States that choose to have the records kept by a state agency would wish to consider offences relating to the failure to report transactions or giving of false, inaccurate or incomplete information and similar conduct.

231. Generally, punishments specified for these offences should seek to ensure that the same punishments are applied as for the basic offences of

illicit manufacture and illicit trafficking in order to ensure that offenders cannot avoid harsher sanctions simply by failing to keep or destroying the records needed to establish that criminal conduct has taken place.

2. *Marking*

232. States that wish to impose marking requirements for some parts and components or markings such as “headstamps” or package markings, which partially identify cartridges or ammunition batches, will also wish to consider the corresponding offence of illicit manufacture for such items.

233. If additional standards are set for the form, content, placement or other characteristics of marking on firearms, offences could be established for failure to meet those standards.

3. *Licences*

234. Consideration may also be given to establishing offences for the giving of false or misleading information likely to unduly influence the judgement of the officials responsible for deciding whether to issue the required licence or authorization needed to complete an import or export transfer. Such offences could be further expanded by including material non-disclosure to cover cases in which accurate but incomplete information was given. States will also want to consider offences relating to the falsification or misuse of such documents. Such offences could also be supported by offences dealing with the possession or use of fraudulent licences.²⁸

235. States parties may opt for a simplified procedure distinct from the licensing and authorization system set out in article 10, paragraph 6, for temporary transactions (import, export and transit movement). While States parties may limit their legislative intervention to provide for a simple exclusion of such cases, they may also, in addition, opt for the creation of

²⁸Offences in relation to the falsification or misuse of documents and the verification of documents such as passports were incorporated into the other two Protocols, but not into the Firearms Protocol, as a result in part of lack of time during the negotiations and in part because of the greater range of documents used by various States to control the import and export of firearms. For examples, drafters may find it useful to consider national legislation that implements articles 6, 12 and 13 of the Protocol against the Smuggling of Migrants by Land, Sea and Air and articles 12 and 13 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, as well as the relevant portions of the legislative guides for the implementation of those Protocols.

a simplified permit or authorization system along with an associated offence for cases where the simplified permit or authorization was not obtained. The limitation of the exception established by paragraph 6 of article 10 extends only to “temporary” imports, which requires that time limits be established. This in turn requires either the establishment of a further offence of not re-exporting within the time limit. Finally, if separate applications and permits are established for this process, any offences relating to the giving of false or misleading information should be expanded to include the additional forms.

4. Deactivated firearms

236. In addition to setting technical standards, article 9 encourages States that do not consider deactivated weapons to be “firearms” for purposes of domestic controls to establish criminal offences to punish and deter attempts at reactivation.

5. Brokering

237. Should a State adopt a regime for brokering, it may also wish to create an associated offence for illicit brokering. Alternatively, if a State requires disclosure of a broker as part of the import/export licensing/authorization process, offences relating to providing false or misleading information on licence application forms could include an offence for failing to provide required information about brokerage activities.

VI. Information exchange

238. Articles 12 and 13 of the Protocol establish a framework for cooperation that supplements the more general provisions of the Convention.

239. While some of the legislative requirements dealing with cooperation may have been met by legislation implementing the more general provisions of the Convention, several provisions of the Protocol require the exchange of information relating specifically to firearms, their parts and components and ammunition. These may or may not require the adoption of legislative or other measures prior to ratification of the Protocol.

A. Tracing

“Article 12

“Information

“1. Without prejudice to articles 27 and 28 of the Convention, States Parties shall exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant case-specific information on matters such as authorized producers, dealers, importers, exporters and, whenever possible, carriers of firearms, their parts and components and ammunition.

“2. Without prejudice to articles 27 and 28 of the Convention, States Parties shall exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information on matters such as:

“(a) Organized criminal groups known to take part or suspected of taking part in the illicit manufacturing of or trafficking in firearms, their parts and components and ammunition;

“(b) The means of concealment used in the illicit manufacturing of or trafficking in firearms, their parts and components and ammunition and ways of detecting them;

“(c) Methods and means, points of dispatch and destination and routes customarily used by organized criminal groups engaged in illicit trafficking in firearms, their parts and components and ammunition; and

“(d) Legislative experiences and practices and measures to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

“3. States Parties shall provide to or share with each other, as appropriate, relevant scientific and technological information useful to law enforcement authorities in order to enhance each other’s abilities to prevent, detect and investigate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and to prosecute the persons involved in those illicit activities.

“4. States Parties shall cooperate in the tracing of firearms, their parts and components and ammunition that may have been illicitly manufactured or trafficked. Such cooperation shall include the provision of prompt responses to requests for assistance in tracing such firearms, their parts and components and ammunition, within available means.

“5. Subject to the basic concepts of its legal system or any international agreements, each State Party shall guarantee the confidentiality of and comply with any restrictions on the use of information that it receives from another State Party pursuant to this article, including proprietary information pertaining to commercial transactions, if requested to do so by the State Party providing the information. If such confidentiality cannot be maintained, the State Party that provided the information shall be notified prior to its disclosure.”

“Article 3

“Use of terms

“For the purposes of this Protocol:

“ . . .

“(f) ‘Tracing’ shall mean the systematic tracking of firearms and, where possible, their parts and components and ammunition from manufacturer to purchaser for the purpose of assisting the competent authorities of States Parties in detecting, investigating and analysing illicit manufacturing and illicit trafficking.”

1. Introduction

240. A key requirement of the Protocol is that the information accumulated from the markings required to be placed on each firearm (art. 8) and the information that must be provided and kept concerning manufacture and international transactions (arts. 7 and 10) must be made available for the purpose of tracing firearms to determine whether they have been illicitly manufactured or trafficked and, if so, to support investigation and prosecution of the offenders involved.

2. Summary of main requirements

241. The Protocol requires States parties to provide tracing assistance in any case where the items involved “may have” been illicitly manufactured or trafficked, which means that requests based on the suspicion of the requesting State party must be responded to.

3. Mandatory requirements

(a) Main elements of the article

242. Article 12, paragraph 4, requires cooperation not only in tracing firearms, but also their parts and components and ammunition. The definition of “tracing” in article 3, subparagraph (f), on the other hand, refers to the tracing of firearms, and “where possible” their parts and components and ammunition. Article 8 requires only the marking of firearms, and article 7 requires the keeping of records in relation to firearms and “where appropriate and feasible” their parts and components and ammunition. For these reasons, there is an obligation in article 12, paragraph 4, for States parties to “cooperate” in tracing parts and components and ammunition, but the exact extent of such cooperation is not specified and is limited by the definition of tracing in article 2, subparagraph (f), to providing such cooperation only where this is possible.

243. In addition, article 12, paragraph 4, limits the actual delivery of assistance to such assistance as is “within available means”. Since this would have to be determined on a case-by-case basis having regard to the availability of resources and the demand placed on those resources by the individual request, it should not be reflected in legislation. Where it is feasible for a State to develop a computer-based system, the storage and retrieval of information will generally be easier if a centralized state-operated system is used.

244. Recognizing the sensitivity of some information, the Protocol contains the obligation for a State party to whom information is given not to transmit that information on to other States or otherwise disclose it. These obligations apply only when the State party that provides the information actually requests confidentiality. The article also recognizes that in some cases confidentiality cannot be guaranteed or maintained, usually because the requesting State party has procedural protections (many of which are entrenched and enforceable constitutional rights) that require that prosecutors disclose potentially exculpatory information, or in some systems all relevant information, to accused persons prior to trial. The requirement in the Protocol is that the notification must reach the State party that provided the information prior to any disclosure.

(b) Implementation of the article

245. In some States, the cooperation requirements found in article 12 may be met by administrative instructions to ensure that requests are received and that the necessary information is obtained and provided to the requesting State party. In most States, however, legislation will be needed to place the handling of tracing requests on a formal legal basis consistent with the handling of other formal and informal legal assistance matters. Legislative and administrative measures should ensure that any element of the records kept under article 7 can be located and transmitted to a requesting State party, provided that enough information is given to locate the records concerned.

246. As with other areas of information exchange, the primary need for legislative powers, if any are needed at all, will be powers and safeguards to reconcile the exchanges with any applicable confidentiality, privacy or similar protections. In most countries and for most of the other information envisaged under article 12, paragraphs 2 and 3, this issue may not arise, because the nature of the information itself makes it unlikely to be subject to such protections to begin with. Information about legislative experiences and most scientific or technological information, for example, may well be in the public domain and therefore able to be shared or exchanged without legal authority of any kind.

247. Drafters, however, will want to ensure that exceptions are created to any legislation that protects the privacy or confidentiality of information about firearms, transactions or the parties involved allowing this information to be provided on request. A further and related legislative requirement may be needed to require the keeping of requests confidential (requested

State) and to shield information that is provided and for which confidentiality is requested from disclosure, subject to constitutional requirements. Some of these measures may be implemented jointly with article 18, paragraphs 19 and 20, of the Convention or may already fall within the ambit of measures taken to implement those paragraphs.

248. Where a fundamental obligation to disclose information to the defence exists, it is likely that exceptions, if they can be made at all, will require specific legislative authority and appropriate safeguards to ensure that the rights of accused persons are not unduly compromised if disclosure is limited or to establish formulae for limiting the manner or content of disclosure in ways which protect basic rights, while avoiding or minimizing any harm that might arise from the disclosure itself. Whether or not legislative measures are needed to protect confidentiality or establish a framework for disclosure will depend to some degree on the nature of existing domestic constitutional, legal and other requirements, the effects of any other applicable international agreements and the implementation of articles 18, paragraphs 4 and 5 (protection of information shared voluntarily), and 19 and 20 (protection of information transmitted pursuant to legal assistance requested under article 18) of the Convention. It is likely that, in most cases, the legislative measures taken under article 18 of the Convention can either be applied directly to the Protocol or could form the basis of parallel provisions. The administration of such provisions may differ, depending on whether the same agencies are used to deal with requests under the Convention and Protocol or not.

249. The Protocol requires that officials who are legally obliged to disclose information provide advance notification of the disclosure. Legislative or administrative requirements should ensure that this is transmitted to the office or agency responsible for cooperation under article 13, paragraph 2, of the Protocol so that it can in turn be transmitted back to the State party that provided the information required by article 12, paragraph 5.

250. In addition to articles 12-14 (proceeds and other crime-related property) and article 18 (mutual legal assistance) of the Convention, other general requirements for cooperation are also found in its articles 27-29. Generally, legislators should consider the (past or pending) implementation of these provisions when developing measures to implement the corresponding provisions of the Protocol, both to ensure consistency and coherence in the delivery of assistance and cooperation and to determine whether it is feasible to implement the various requirements using the same legislative provisions and/or administrative structures.

4. Optional measures, including optional issues

251. The Protocol does not require either the keeping of records of internal transfers or the tracing of a firearm while within a country. As with other provisions of the Convention and Protocol, however, this is a minimum standard and it is open to States parties that do create and keep records of domestic possession and transfer to provide such information voluntarily as part of a tracing request.

252. Legislators may also wish to consider amendments to legislation governing cooperation with organizations such as Interpol, the Customs Cooperation Council (also known as the World Customs Organization) and their regional counterparts to expand the network of sources for tracing assistance.

5. Information resources

253. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 3, subparagraphs (a), (b), (c), (d) and (e) (Use of terms)

Article 4 (Scope of application)

Article 7 (Record-keeping)

Article 8 (Marking of firearms)

Article 10, paragraphs 2 and 4 (General requirements for export, import, and transit licensing or authorization systems)

(b) Organized Crime Convention

Article 12 (Confiscation and seizure)

Article 13 (International cooperation for purposes of confiscation)

Article 14 (Disposal of confiscated proceeds of crime or property)

Article 18 (Mutual legal assistance)

Article 27 (Law enforcement cooperation)

Article 28 (Collection, exchange and analysis of information on the nature of organized crime)

Article 34, paragraph 3 (Implementation of the Convention)

(c) Other instruments

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article XIII

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section III

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects
Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001 (A/CONF.192/15), chapter IV, paragraph 24, sections II and III

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_firearms

Articles 15 and 16

B. Cooperation

“Article 13

“Cooperation

“1. States Parties shall cooperate at the bilateral, regional and international levels to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

“2. Without prejudice to article 18, paragraph 13, of the Convention, each State Party shall identify a national body or a single point of contact to act as liaison between it and other States Parties on matters relating to this Protocol.

“3. States Parties shall seek the support and cooperation of manufacturers, dealers, importers, exporters, brokers and commercial carriers of firearms, their parts and components and ammunition to prevent and detect the illicit activities referred to in paragraph 1 of this article.”

1. Introduction

254. In dealing with the specialized subject matter of the Protocol, drafters of the instrument recognized that it would, in some cases, be more effective to channel some forms of cooperation through specialized agencies, in addition to the “central authority” designated under article 18, paragraph 13, of the Organized Crime Convention to handle formal requests for mutual legal assistance.

2. Summary of main requirements

255. States parties are required to have a single point of contact to act as liaison with other countries on matters related to the Protocol.

3. Mandatory requirements

(a) Main elements of the article

256. A central feature of article 13 requires the establishment of a national body or single point of contact to receive requests or notifications concerning “matters relating to this Protocol”. The interpretative notes indicate that the reference to “matters relating to this Protocol” in this article was included in order to take into account the fact that, for matters relating to the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, some States parties might find it necessary to establish different authorities than those responsible for dealing with mutual legal assistance matters under article 18 of the Convention.

(b) *Implementation of the article*

257. In implementing these provisions at the legislative and administrative levels, Governments should consider the extent to which various forms of cooperation should be directed through central authorities for purposes of mutual legal assistance under article 18 of the Convention, other law enforcement channels under article 27 of the Convention or a more specialized mechanism established under article 13, paragraph 2, of the Protocol. One important consideration in this regard is the nature of existing cooperation channels and the extent to which various forms of tracing, identification or other firearm-related information require formal channels of communication; whether evidence admissible at trial is required such that formal mutual legal assistance channels must be utilized; or where informal and faster sharing could be used.

258. There is no obligation to establish a separate or distinct office or body for the purpose of providing cooperation in cases arising from the Protocol, only to formally decide which body will be responsible for requests under the Protocol and to “identify” such a body. Where such a body is established, however, legislation may be needed to do so. In cases where a new unit is created within an existing law enforcement or customs agency, the need for legislation will depend on whether this is authorized by existing authorities or not.

259. It should be noted as well that the single point of contact can act as a point of entry to direct queries to the appropriate agency or can be an office with subject matter expertise. In addition, the single point of contact does not have to be the sole office within a State able to speak to issues related to the Protocol.

260. As with article 12, countries should ensure that article 13 is consistent with domestic privacy legislation.

4. *Information resources*

261. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) *Firearms Protocol*

Article 3, subparagraphs (a), (b), (c), (d) and (e) (Use of terms)

Article 4 (Scope of application)

Article 8, paragraph 2 (Marking of firearms)

(b) *Organized Crime Convention*

Article 18, paragraph 13 (Mutual legal assistance)

Article 27 (Law enforcement cooperation)

Article 34, paragraph 3 (Implementation of the Convention)

(c) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of
and Trafficking in Firearms, Ammunition, Explosives, and Other
Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article XIV

1997 Model Regulations for the Control of the International Move-
ment of Firearms, their Parts and Components and Ammunition
(Organization of American States)

[http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/
Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc](http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc)

Chapter IV

2000 Organization for Security and Cooperation in Europe document
on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section III

2001 Programme of Action to Prevent, Combat and Eradicate the
Illicit Trade in Small Arms and Light Weapons in All its Aspects
*Report of the United Nations Conference on the Illicit Trade in Small
Arms and Light Weapons in All Its Aspects, New York, 9-20 July
2001* (A/CONF.192/15), chapter IV, paragraph 24, sections II
and III

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_firearms

Article 15

Annex I. Reporting requirements under the Firearms Protocol

The following is a list of the notifications that States parties are required to make to the Secretary-General of the United Nations:

Article 16. Settlement of disputes

“4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.”

Article 17 . Signature, ratification, acceptance, approval and accession

“3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

“4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one Member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.”

Article 19 . Amendment

“1. After the expiry of five years from the entry into force of this Protocol, a State Party may propose an amendment and file it with the Secretary-General of the

United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the meeting of the Conference of the Parties.”

“4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.”

Article 20 . Denunciation

“1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.”

Annex II. Table of examples of relevant national legislation

States parties preparing legislation in relation to the provisions of the Firearms Protocol may wish to refer for further guidance, inter alia, to the legislation presented below.

Canada

Firearms Act 1995, c. 39, An Act respecting firearms and other weapons
[Assented to on 5 December 1995]

(<http://laws.justice.gc.ca/en/F-11.6/58586.html>)

United States of America

Gun Control Act (title 18, United States Code, chapter 44)

National Firearms Act (title 26, United States Code, chapter 53)

Arms Export Control Act (title 22, United States Code, § 2778)/title 18, United States Code, § 1715 (Non-mailable firearms)

Code of Federal Regulations (CFR)

27 C.F.R. Part 47

27 C.F.R. Part 178

27 C.F.R. Part 179

27 C.F.R. Part 25

(All the regulations listed above are available at http://www.atf.gov/pub/fire-explo_pub/2000_ref.htm)

Annex III. International Criminal Police Organization

A. Interpol Weapons and Explosives Tracking System: sample screen

B. Contact information

International Criminal Police Organization (Interpol)

General Secretariat

200, quai Charles de Gaulle

69006 Lyons

France

Facsimile: +(33) (4) 72 44 71 63

Annex IV. Canada: deactivation standards

Deactivation involves the removal of parts or portions of parts from a firearm, and the addition of pins and welds so that the firearm can no longer chamber or fire ammunition.

1. Deactivation of Small Arms of Calibre 20 mm or Less

a. Semi-automatic, Full Automatic, Selective Fire, and Converted Firearms

1. A hardened steel blind pin of bore diameter or larger must be force fitted through the barrel at the chamber, and where practical, simultaneously through the frame or receiver, to prevent chambering of ammunition. Furthermore, the blind pin must be welded in place so that the exposed end of the pin is completely covered by weld. This strength and hardness of the weld must be similar to that of the metal used in the construction of the firearm. In the case of firearms having calibres greater than 12.7mm (.5 inch), the pin need not be larger in diameter than 12.7mm. In the case of multi-barrelled firearms, all barrels must be pinned, using as many pins as necessary to block all chambers.
2. The barrel must be welded to the frame or receiver to prevent replacement.
3. The breech face or portion of the breech bolt which supports the cartridge must be removed or drilled out to a diameter at least as large as the base of the cartridge, so that the bolt can no longer support the cartridge.
4. The receiver must be welded closed to prevent replacement of the breech bolt.
5. In the case of firearms designed to support full-automatic fire, the trigger mechanism must be rendered unusable. Any trigger mechanism part or component which is necessary for full-automatic fire must be destroyed by cutting or grinding and welded in place to prevent replacement.

b. Rifles, Shotguns and Handguns Other Than Revolvers

1. The barrel, bolt and frame or receiver must be modified as in 1.a.
2. The bolt, if present as a separate piece, must be welded to the frame or receiver to prevent replacement.

c. Revolvers, Revolving Rifles and Shotguns, and Cap and Ball Revolvers

1. The barrel and cylinder must be blocked by a hardened steel pin of bore diameter which traverses the entire length of the barrel and cylinder. The pin must be welded in place at the muzzle, barrel/cylinder gap and except for muzzle-loading firearms, at the breech end of the frame. The strength and hardness of the welds must be similar to that of the firearm.

d. Black Powder Rifles and Shotguns

1. The barrel must be blocked immediately forward of the flash hole using a blind pin in the manner described in paragraph 1.c.1.
2. The flash hole must be welded closed. In the case of percussion guns, the nipple may be welded closed and then welded to the barrel to prevent replacement.

e. Magazines

1. The magazine follower must be welded to the interior of the magazine to prevent loading of ammunition.
2. The body of the magazine must be welded to the frame or receiver to prevent removal or replacement.

2. Firearms of Unusual Design or Construction

- a. Allowances may be made for variations of the procedures outlined in 1.a. to e. if the firearm is made of unusual substances or is of an unusual design. However, any variation in the procedure must accomplish the same goals as the original procedures.