

The United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components, and Ammunition

LISA ARMBERGER

This article provides a critical overview and analysis of the *United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition* ('*Firearms Protocol*') and examines the barriers to ratification in order to determine a potential future for this underutilised instrument. It is demonstrated that despite valid criticism of its provisions and ratification, the *Firearms Protocol* offers substantial regulatory benefits in comparison to other instruments and is most successful in regulating the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition. This article argues that this is due to the *Firearms Protocol* being specifically adapted to transnational organised crime and particularly responsive to emerging threats and technological trends, inter alia dark web purchases and 3D-printing of firearms. It is further suggested that the relevance of the *Firearms Protocol* may increase in the future, as the recently launched *Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* will help address a number of the barriers to ratification.

Table of Contents

1. Introduction	66
2. Context and Development	68
3. Key Provisions	71
3.1. Scope	71
3.1.1. Beyond transnational organised crime	71
3.1.2. Exemptions from application	72
3.2. Offences	74
3.3. Trade and Tracing	75
3.3.1. Record-keeping	76
3.3.2. Marking	78
3.3.3. Deactivation	80

3.3.4. Trade requirements	81
3.4. International Cooperation	84
4. Ratification	86
4.1. Current Non-Party States	87
4.2. Barriers to ratification	88
4.2.1. Concerns raised during the negotiations	88
4.2.1.1. Scope of the Firearms Protocol	88
4.2.1.2. Prevention provisions	89
4.2.2. Lack of Political Will	90
4.2.2.1. Hesitation to undertake binding international obligations	90
4.2.2.2. Relevance of the Firearms Protocol and Alternative International Initiatives	92
4.2.2.3. Conflicting Domestic Interests	93
4.2.3. Lack of Understanding	93
4.2.4. Economic Concerns	95
5. Relationship to other Treaties and Reasons to Ratify	97
5.1. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA)	98
5.1.1. Nature and Scope	98
5.1.2. Enforcement	99
5.1.3. Prevention Provisions	100
5.2. International Tracing Instrument (ITI)	101
5.2.1. Nature and Scope	102
5.2.2. Enforcement	102
5.2.3. Prevention Provisions	103
5.3. Arms Trade Treaty (ATT)	103
5.3.1. Nature and Scope	104
5.3.2. Enforcement	105
5.3.3. Prevention Provisions	105
6. Conclusion and the Way Ahead	106
Bibliography	110

1. Introduction

The *United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition* (*Firearms Protocol*),¹ supplementing the United Nations Convention against Transnational Organised Crime, was the first international instrument addressing the threat of firearms on a global scale and is, to date, the only instrument in the field adapted specifically to prevent and

1 Opened for signature 31 May 2001, 2326 UNTS 206 (entered into force 3 July 2005).

combat organised crime. However, the *Firearms Protocol* has failed to garner widespread support, especially from major arms producers and exporters, within the past two decades since its opening for signature. As a result, it is often criticised as unnecessary and little attention is paid to it by international organisations, states, as well as academics. Likewise, current, independent, and critical evaluations of the *Firearms Protocol* are lacking. It seems as though the international community has forgotten about it.

This article will provide a critical overview and analysis of the legal instrument and explore the reasons for the failures to ratify, as well as examine the potential future of the *Firearms Protocol*, in order to assess whether the instrument should be reanimated or if its slow death is justified. To do so, the article will, firstly, provide some historical context and background information of the development of the *Firearms Protocol*. Secondly, the key provisions of the *Firearms Protocol* will be evaluated, thereby pointing out achievements and limitations of the requirements. In a third step, potential barriers to the ratification will be identified to provide insights into the lack of international support. Lastly, the *Firearms Protocol* will be compared and contrasted to alternative international initiatives, which will help to identify unique strengths of the *Firearms Protocol* and provide reasons for ratification or accession.

For this purpose, a variety of primary and secondary sources were consulted. The provisions of the *Firearms Protocol* itself, as well as the *travaux préparatoires*, the Legislative Guides and the Interpretative note, along with numerous additional United Nations documents and resolutions formed the basis of the most definitive arguments included in this article. Expanding upon these materials, academic critique and commentary in the form of secondary sources were also consulted and included as part of the discussion beyond the text of the *Firearms Protocol*. Additionally, the chapter on barriers to ratification draws from the structure of existing comparable analyses of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* ('*Trafficking in Persons Protocol*')² and the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations*

2 Opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003).

*Convention against Transnational Organized Crime ('Smuggling of Migrants Protocol')*³.

2. Context and Development

Before 1994, the international community had focussed upon nuclear disarmament and the prohibition of certain indiscriminate weapons.⁴ This focus of attention was potentially a consequence of the Cold War and the constant imminent threat of a nuclear disaster. After the end of the Cold War, the availability of firearms increased while their prices decreased since large quantities of surplus stocks from states formerly part of the Soviet Union were offered for sale.⁵ The international community was suddenly confronted with large-scale private actor possession of firearms. Towards the end of the 20th century, most countries had adopted national legislation to regulate small arms and light weapons, but there was no international framework facilitating their international regulation.⁶ Therefore, attempts to regulate small arms and light weapons at a global level gained considerable momentum, which is, inter alia, demonstrated by the following initiatives. In 1995, the United Nations (UN) Commission on Crime Prevention and Criminal Justice launched the UN Study on Firearms Regulation to highlight the magnitude of the problem of illicit firearms trafficking and related criminal activities, with the aim of promoting the need for an international instrument to regulate the manufacturing of and trafficking in firearms, their parts and components, and ammunition.⁷ At the same time, the Organization of American States

3 Opened for signature 15 November 2000, 2241 UNTS 480 (entered into force 28 January 2004).

4 Aaron Fellmeth, 'Part II UN Core Conventions on Transnational Organised Crime, 10 The UN Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components, and Ammunition 2001' in Pierre Hauck and Sven Peterke (eds), *International Law and Transnational Organised Crime* (2016) 199.

5 Holger Anders, 'The UN Process on Small Arms: All Is Not Lost' (2007) 37(2) *Arms Control Today*, 17, 17.

6 Fellmeth (n 4) 199.

7 James Hayes, 'The United Nations Firearms Protocol' in International Centre for Criminal Law Reform and Criminal Justice Policy (ed), *The Changing Face of International Criminal Law: Selected Papers* (2002) 127, 130–132.

(OAS) Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition⁸ were developed by the Inter-American Drug Abuse Control Commission (CICAD). In 1997, the *Inter-American Convention Against Illicit Trafficking and Production of Firearms, Ammunition, Explosives and Other Related Materials (OAS Convention)*⁹ was signed, which most of the provisions eventually included in the *Firearms Protocol* were modelled after. The commitment of the international community to counter the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition was further confirmed by the G8 summits of 1997 and 1998, where the heads of state of eight major world economies met to discuss economic and political issues, including the threat of transnational organised crime.¹⁰

Following these efforts, the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime was established by the General Assembly by its resolution 53/111 on 9 December 1998.¹¹ The Ad Hoc Committee was tasked with finalising the drafts of the Organized Crime Convention and its protocols, including the *Firearms Protocol*, and submitting them to the Assembly for adoption. The Ad Hoc Committee started working on the drafts on 19 January 1999 and held a total of twelve sessions. The *Firearms Protocol* was eventually adopted by the UN General Assembly at its 55th session in resolution 55/255 on 31 May 2001¹² and opened for signature on 2 July 2001, becoming the first legally binding instrument addressing firearms manufacturing and trafficking at a global level. It entered into force on 3 July 2005 and supplements the *UN Convention against Transnational Organized Crime ('UNTOC')*.¹³ The *Firearms Protocol* focusses on illicit manufacturing, trafficking, and offences

8 OAS, *Model Regulation for the Control of the International Movement of Firearms, their Arts and Components and Ammunition*, OAS/Ser. L/XIV.2.22, CICAD/ doc. 905/97 (5 November 1997).

9 Opened for signature 11 November 1997, A-36 (entered into force 1 July 1998).

10 Hayes (n 7) 125–134.

11 UN General Assembly, *Resolution adopted by the General Assembly on 9 December 1998: Transnational organized crime*, UN Doc A/RES/53/111 (20 January 1999).

12 UN General Assembly, *Resolution adopted by the General Assembly on 31 May 2001: 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*, UN Doc A/RES/55/255 (8 June 2001).

13 Opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

regarding markings related to firearms that are transnational in nature and involve an organised criminal group.

The overarching purpose of the *Firearms 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’¹⁴. To this end, it provides a legal framework to regulate and monitor licit trade, prevent the diversion of licit firearms into the illegal market, and facilitate the investigation and prosecution of offences under the *Firearms Protocol*, inter alia, by providing technical assistance and calling upon states parties to exchange information.

However, two decades since the *Firearms Protocol* was opened for signature, it only counts 122 parties,¹⁵ with major firearms manufacturing states, such as the United States and Canada,¹⁶ failing to sign or ratify this treaty, as can be seen in the map below.

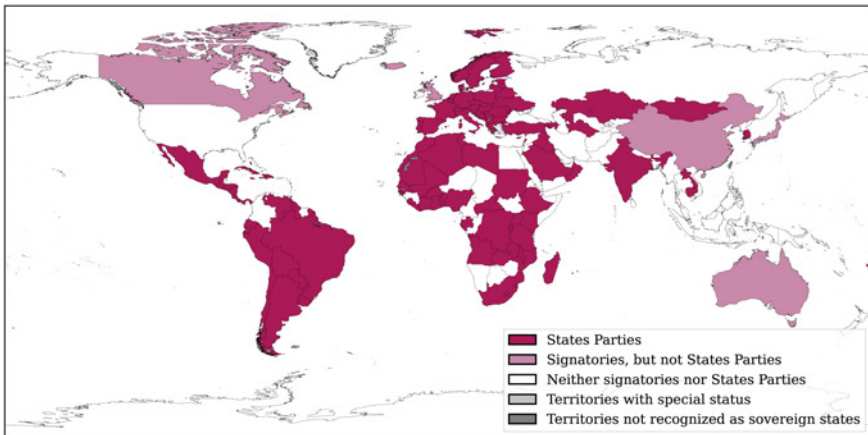


Figure 1: Ratification Status of the Firearms Protocol

¹⁴ Ibid art 2.

¹⁵ As of 31 Juli 2022; including the European Union.

¹⁶ Fellmeth (n 4) 210, 214.

3. Key Provisions

The *Firearms Protocol* is divided into four parts, namely the preamble, general provisions, prevention, and final provisions. Only the most important general and prevention provisions will be discussed in the following in order to give an overview of the content of the *Firearms Protocol* and to provide a critical analysis of its key requirements.

3.1. Scope

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.*¹⁷

3.1.1. Beyond transnational organised crime

While the final text of the article does not limit the scope to transnational organised crime, a few delegations proposed to do so during the negotiations of this article.¹⁸ This proposal was rejected by most delegations arguing that ‘in order to control trafficking in firearms, it was necessary to monitor and place restrictions on all firearms trade, in order to determine what was legal and what was not’¹⁹. In addition, some delegations expressed the concern that strictly limiting the *Firearms*

¹⁷ *Firearms Protocol*, art 4.

¹⁸ This includes the Syrian delegation; Algeria, France, Germany and the Netherlands stated that it ‘should not go beyond the mandate set forth by the General Assembly’; Colombia proposed to limit the scope to ‘illegally manufactured and traded firearms’; see UN Office on Drugs and Crime, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the protocols thereto* (2006) 625–629.

¹⁹ Such delegations included the US, UK, Sweden, Croatia, Ecuador; *Ibid*; Fellmeth (n 4) 211.

Protocol to organised crime might lead to technical difficulties.²⁰ The *Firearms Protocol* as eventually adopted applies to all – including legal – firearms manufacturing and trafficking. This was an important achievement in increasing its efficacy, as the wider application facilitates the effective prosecution of offences under the *Firearms Protocol*, which would otherwise have been impeded.

3.1.2. Exemptions from application

Article 4(2) contains two exemptions from the application of the *Firearms Protocol*, specifically state-to-state transactions and state transfers where the application would prejudice the rights of states to take action in the interest of national security consistent with the UN Charter. Regarding the former, delegations generally supported the exclusion of state-to-state transactions during the drafting process, since this limited the scope to crime control rather than arms control.²¹ Whilst there were some concerns about the meaning of the term ‘state-to-state transactions’, most delegations agreed that the term should entail transfers between governments, but not transfers by non-state organisations, including entities owned or operated by states, or individuals.²² A note included in the *travaux préparatoires* further clarifies that the term only refers to transactions in a sovereign capacity.²³ On the one hand, this exemption results in the *Firearms Protocol* neglecting the arguably most significant form of firearms transactions,²⁴ thereby potentially negatively impacting its relevance and effectiveness in tackling firearms-related crime. On the other hand, the focus upon crime control rather than arms control was

20 Such delegations being Mexico, the Republic of Korea and Turkey; UN Office on Drugs and Crime (n 18) 625.

21 UN Office on Drugs and Crime (n 18) 627.

22 Ibid.

23 Ibid 630; UN General Assembly, *Interpretative notes for the official records (travaux préparatoires) of the negotiation 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*, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 12th Session, UN Doc A/55/383/Add.3 (21 March 2001) 2.

24 Daniel Salton, ‘Starving the Dark Markets: International Injunctions as a Means to Curb Small Arms and Light Weapons Trafficking Note’ (2013) 46(1) *Connecticut Law Review* 369, 391.

paramount to the adoption of the *Firearms Protocol*, as it made the instrument less political than other initiatives and fostered compromise between the negotiating states. Without this crime control approach, the adoption of a number of provisions would have been improbable.

In relation to the second exemption, there was considerable debate about the phrase ‘for purposes of national security’ as included in the original Canadian proposal at the informal consultations held during the eighth session of the Ad Hoc Committee. Some delegations viewed it as redundant or were concerned that it would authorise transfers by individuals or non-state organisations in certain cases. During the negotiations, it was discussed that the phrase should cover situations where military forces travelled across borders with their firearms, as well as where personal protection officers and bodyguards travel with senior officers. These examples were acceptable for most delegations.²⁵ However, the wording was neither defined further nor clarified in the interpretative notes. At the eleventh session of the Ad Hoc Committee, the phrase ‘consistent with the Charter of the United Nations’ was added,²⁶ which suggests that ‘interest of national security’ refers to the right of self-defence under the UN Charter.²⁷ Nonetheless, it is unclear to what extent this added wording can be reconciled with the discussion on the provision during the informal consultations. Consequently, it remains unclear which transfers are covered by this exemption and, hence, do not fall within the scope of the *Firearms Protocol*. This uncertainty may hinder the complete and harmonised implementation of it.

Aaron Fellmeth raises the point that the exemptions would anyway be redundant vis-à-vis the reference to organised criminal groups in Article 4(1) of the *Firearms Protocol*, unless the state itself might be considered an organised criminal group.²⁸ However, this argument does not take into account that certain obligations under the *Firearms Protocol*, in particular the trade and tracing provisions, apply to legal firearms trade as well. Therefore, the vague exemptions to the application of the *Firearms Protocol* can be regarded a considerable weakness of the instrument.

²⁵ UN Office on Drugs and Crime (n 18) 628.

²⁶ Ibid.

²⁷ Opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) art 51.

²⁸ Fellmeth (n 4) 207.

3.2. Offences

Article 5: Criminalisation

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;
- (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) Organising, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with paragraph 1 of this article.²⁹

Article 5 of the *Firearms Protocol* requires states parties to criminalise certain conduct, as stated above, in order to facilitate its enforcement. Similarly to the discussion on the scope, there was considerable debate on limiting the criminalisation provisions to acts done 'in connection with a criminal organisation'³⁰. The proposal was eventually rejected for being unnecessarily restrictive.³¹ As a consequence, the final text of the article requires the criminalisation of conduct independent of the elements of transnationality or organised crime,³² despite the scope the *Firearms Protocol* being limited to offences that are transnational in nature and involve an organised criminal group.³³ This helps prevent additional evidentiary burden for law enforcement authorities and facilitates the effective prosecution of such crimes.

Although the rejection of the proposal can be regarded a major strength of the criminalisation obligations, the provision as eventually adopted may be

29 *Firearms Protocol*, art 5.

30 UN Office on Drugs and Crime (n 18) 632.

31 *Ibid* 635.

32 UN Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 411.

33 *Firearms Protocol*, art 4(1).

considered disappointing nevertheless. In comparison to the criminalisation obligations of other instruments on organised crime, in particular the *UNTOC*,³⁴ Article 5 of the *Firearms Protocol* lacks detail and leaves much at the discretion of states parties. While Article 3 further defines the terms ‘manufacturing’ and ‘trafficking’ mentioned in Article 5, the terms included in the definitions, such as ‘import’ or ‘export’, should be interpreted consistent with domestic law and international standards.³⁵ Therefore, harmonised international criminalisation will most likely be lacking. This caution to barely intervene in domestic legal systems is a characteristic found throughout the *Firearms Protocol*. Moreover, the strengths of the *Firearms Protocol* are rather found in the areas of international trade and cooperation, hence giving it the nature of a trade agreement. However, the focus on the cross-border movement is not necessarily a weakness and is mirrored in the purpose of the *Firearms Protocol*.³⁶

Furthermore, the criminalisation requirements under the *Firearms Protocol* do not contain a clause similar to Article 5(2) of *UNTOC* stating that knowledge, intent, aim, purpose or agreement may be inferred from objective factual circumstances. As a result, it may be difficult to prove the required intent in case states do not decide to incorporate a comparable clause themselves. This might further negatively impact the effective prosecution of firearms-related crime.

3.3. Trade and Tracing

Understanding the supply of firearms is essential for developing effective prevention measures. Wendy Cukier identified three main sources of firearms used in criminal activity; the misuse of legal firearms, the illicit manufacture and trafficking of firearms, and, most importantly, the diversion of firearms through theft.³⁷ In addition to identifying the origin and gaining insights into the flow of illicit firearms, provisions on trade and tracing are essential in creating a documentary chain necessary to help the investigation and prosecution of offences under the *Firearms*

34 *UNTOC*, art 5, 6, 8, and 23.

35 UN Office on Drugs and Crime (n 32) 484.

36 *Firearms Protocol*, art 2.

37 Wendy Cukier, ‘International fire/small arms control’ (1998) 6(1) *Canadian Foreign Policy Journal* 79.

Protocol and for evidentiary purposes in criminal proceedings. Therefore, adequate marking, record-keeping, and international cooperation provisions are paramount in curbing firearms-related crime.³⁸

3.3.1. 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 authorisations, 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.*³⁹

The keeping of records is of particular importance in preventing the diversion of firearms into the illegal markets. This is, *inter alia*, demonstrated by the rejection of the proposal by some delegations to reduce the required record-keeping period to five years.⁴⁰ The majority of delegations were concerned about reducing the period, recognising that firearms were very durable and, thus needed to be traceable over long periods.⁴¹ Still, the period of ten years as included in the final text of Article 7 might potentially not cover the whole lifespan of a firearm and the article would have benefitted from more expansive record-keeping requirements. However, the inclusion of the record-keeping obligation may nonetheless be regarded a strength of the *Firearms Protocol*.

The provision would have further been improved by the incorporation of additional specifics. The article neither includes details on who or what

38 Michael Bourne, 'Transnational Trafficking in Weapons' in Philip Reichel and Jay Albanese (eds), *Handbook of Transnational Crime and Justice* (2014) 96.

39 *Firearms Protocol*, art 7.

40 These delegations were Mexico, Syria, and the US; UN Office on Drugs and Crime (n 18) 643–644.

41 *Ibid* 643.

institution shall keep the records, nor on how they should be kept. While the original Canadian proposal, for instance, required states parties to use their best efforts to computerise records, this was not included in the adopted provision since it was considered too difficult for developing countries.⁴² Likewise, the information required to be kept is not to be viewed as an exhaustive list, but rather as a minimum standard and states parties should consider collecting additional information in order to guarantee the effective tracing of firearms. Furthermore, Article 7 lacks details on the prevention of the destruction of or tampering with records,⁴³ from which the criminalisation provision would potentially have also benefitted. In contrast to other international attempts to record and trace firearms, in particular the Interpol Firearms Reference Table and the Illicit Arms Records and tracing Management System,⁴⁴ the provision of the *Firearms Protocol*, thus, provides only little guidance to states parties. It also does not arrange for a centralised database where law enforcement officers can access the records of other states parties relevant to ongoing investigations. However, improvements to the record-keeping could be made as part of future technical assistance efforts.

42 Ibid 644.

43 See also Fellmeth (n 4) 208.

44 The Interpol Firearms Reference Table is an online tool facilitating the tracing and identification of firearms. The table, inter alia, encompasses references and images of firearms, information on markings, and definitions of parts and components. Authorized users can conduct searches or make trace requests using unique identifiers of firearms. The Interpol Firearms Reference Table is part of the Illicit Arms Records and tracing Management System (iARMS). iARMS is a database containing over one million firearm records. It is divided into three components, namely The Firearm Records Module, used for international communication of lost, stolen, trafficked, and smuggled firearms, The Trace Request Module, used to facilitate international firearm trace requests, and The Statistics and Reports Module, supporting member states of INTERPOL to analyse data on firearm-related crime and tracing, and to create corresponding reports. Police services, customs agencies, border protection agencies and regulatory authorities may be granted access to the database.

3.3.2. 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.⁴⁵

Article 8 was very controversial and subject to considerable debate during the negotiations. The initial Canadian draft was much simpler than the one finally adopted, yet some delegations, most importantly the United Kingdom and the United States, called for more detailed requirements, in particular in relation to the import markings.⁴⁶ However, there were issues, inter alia, the compatibility of systems, the necessity of repeated markings, the marking of ammunition, the content of the markings, and the application of the requirements to firearms exclusively manufactured for the military, which met resistance from a number of delegations, especially from China.⁴⁷ The complexity of the issues is underlined by the fact that delegations asked for input from experts on technical issues, including the UN Panel of Governmental Experts on Small Arms, the Department of Disarmament Affairs of the UN Secretariat, relevant NGOs and the firearms manufacturing industry.⁴⁸ Due to the complicated negotiating history, the amount of detail included in the finally adopted

⁴⁵ *Firearms Protocol*, art 8.

⁴⁶ UN Office on Drugs and Crime (n 18) 649–651.

⁴⁷ *Ibid* 649–658.

⁴⁸ UN Office on Drugs and Crime (n 18) 650.

article, such as the content of markings or the marking on the time of import, is to be viewed as a major success.

Nonetheless, there would have been room for improvement. Although the marking of ammunition was discussed during the negotiations, it was not included in the adopted provision, most likely for financial reasons.⁴⁹ The marking requirement of the *Firearms Protocol* therefore only applies to firearms, not to parts and components, and ammunition. Yet, states parties are required to keep records of marking information of parts and components, and ammunition, where appropriate and feasible, under Article 7 of the *Firearms Protocol*. The practical implications of this lack of consistency are unclear and negatively impact the effective implementation of the *Firearms Protocol*, as well as the identification and the tracing of firearms. David McClean alleges that the relationship to Article 7 was given less consideration due to the lengthy process of finalising Article 8.⁵⁰ More guidance should be given to states parties on how to implement these articles in relation to each other.

Additionally, while the exemption or the application of a different standard for firearms exclusively manufactured for security or military forces were discussed,⁵¹ corresponding wording was not included in the present article. The *Firearms Protocol* benefitted from this exclusion, as the marking of firearms manufactured for the military is paramount in preventing diversion. However, the negotiating history of this issue might obscure the interpretation of Article 8(1)(c) of the *Firearms Protocol*. Since such firearms are not expressly exempted, the general marking requirements at the time of manufacture and import⁵² seem to apply. Consequently, the subparagraph (c) would place an additional obligation upon states parties to require a unique mark permitting the identification of the transferring state.⁵³ This wording was proposed by the chairman of the Ad Hoc Committee at its eleventh session, but no detailed discussion points are

49 The United States has mentioned that it is opposed to the Protocol since the regulation of ammunition would be difficult and costly according to Fellmeth (n 4) 210. While the *travaux préparatoires* do not mention the exact reason why the marking of ammunition was rejected, it can be inferred that it was considered too expensive.

50 David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (2007) 475.

51 UN Office on Drugs and Crime (n 18) 653–654.

52 *Firearms Protocol*, art 8(1)(a) and (b).

53 McClean (n 50) 476.

included in the *travaux préparatoires*. However, bearing in mind the negotiating history, it seems unlikely that consent on additional obligations was reached, when delegations had argued for simpler marking requirements for firearms exclusively manufactured for military and security forces in earlier sessions. Due to the controversy surrounding this issue, one could argue that textual interpretation might not mirror the intention of the Ad Hoc Committee. This may obscure the interpretation of the provision and lead to inconsistent implementation of the *Firearms Protocol*, thereby negatively impacting its effectiveness. More guidance on the correct implementation of Article 8 should be given to states.

Lastly, although states parties are obliged to encourage the manufacturing industry to develop measures to prevent the removal or alteration of markings,⁵⁴ the provision does not entail specifics on what such encouragement or measures should look like, thereby severely limiting the impact of this paragraph.

3.3.3. Deactivation

Article 9: Deactivation of firearms

A state party that does not recognise 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.⁵⁵

While this provision has been discussed less during negotiations and in research, it is paramount to preventing the illicit trafficking of firearms. In the past, organised criminal groups have exploited the loophole regarding

⁵⁴ *Firearms Protocol*, art 8(2).

⁵⁵ *Ibid* art 9.

deactivated firearms to evade import controls in states with tighter firearms regulation.⁵⁶ Following the transport across the border, firearms would be reactivated. While the original Canadian proposal only called for states to ‘consider taking the necessary measures to prevent the reactivating of deactivated firearms, including through criminalisation, if appropriate’, there was general support for attempting to specify an agreed standard following a proposal by the United Kingdom.⁵⁷ The ultimately adopted provision, which was drafted by the UK and mirrored its domestic practice,⁵⁸ is unique to the *Firearms Protocol* and therefore, a significant strength of the instrument that should not be underestimated.

3.3.4. Trade requirements

Article 10: General requirements for export, import and transit licensing or authorisation systems

1. Each state party shall establish or maintain an effective system of export and import licensing or authorisation, 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 authorisations 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 authorisations; 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 authorisation 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.

56 [s.n.], ‘The UN “Firearms Protocol”: Addressing the trafficking problem’ (2001) 7(6) in *Strategic Comments* 1.

57 UN Office on Drugs and Crime (n 18) 661.

58 McClean (n 50) 478.

5. Each state party shall, within available means, take such measures as may be necessary to ensure that licensing or authorisation procedures are secure and that the authenticity of licensing or authorisation 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.

Article 11: Security and preventive measures

In an effort to detect, prevent and eliminate the theft, loss or diversion of, as well as the illicit manufacturing of and trafficking in, firearms, their parts and components and ammunition, each state party shall take appropriate measures:

(a) To require the security of firearms, their parts and components and ammunition at the time of manufacture, import, export and transit through its territory; and

(b) To increase the effectiveness of import, export and transit controls, including, where appropriate, border controls, and of police and customs transborder cooperation.⁵⁹

Article 10 aims at preventing the theft and diversion of firearms, their parts and components, and ammunition while transported across borders by introducing comprehensive procedural requirements. The importance of this article was recognised by the majority of the delegations during the negotiations and there was general agreement on the necessity of import and export controls.⁶⁰ The content requirements of import and export licences and authorisations,⁶¹ which were proposed by the United States during the third session of the Ad Hoc Committee,⁶² provide important guidance to states parties to effectively implement the *Firearms Protocol*. This article, together with the marking obligation, is arguably the most significant part of the *Firearms Protocol*,⁶³ and a major selling point for ratification and accession.

Despite the importance of the provision and the inclusion of additional detail, some issues remain. Importantly, the term 'transit' is not defined in the *Firearms Protocol* despite being subject to considerable discussion. Japan noted that 'transit' requires a clear definition, which should not encompass an 'aircraft merely flying over the territory of the state party; a ship making innocent passage through territorial waters; [an] aircraft in

59 *Firearms Protocol*, art 10, 11.

60 UN Office on Drugs and Crime (n 18) 667.

61 *Ibid* 665.

62 *Ibid* 666.

63 Hayes (n 7) 128, 134.

transit through an airport of the state party; or a ship in transit through the seaport of the State Party⁶⁴. South Korea, Australia and the Netherlands supported this call for clarification,⁶⁵ as did a working group at the seventh session of the Ad Hoc Committee.⁶⁶ Still, a definition was not included in the ultimately adopted version of the *Firearms Protocol*, thereby negatively impacting the effective implementation of this provision. Likewise, while paragraph (6) contains a non-exhaustive list of examples, the vague phrase ‘for verifiable lawful purposes’ is not fully defined.

In addition, Article 10 would have benefitted from a further institutionalisation of the import and export controls, including making the receipt reporting as outlined in paragraph (4) compulsory,⁶⁷ or incorporating procedural requirements for the re-export of firearms, their parts and components, and ammunition, as discussed during the negotiations.⁶⁸ Likewise, paragraph (5) lacks specifics on what ‘measures as may be necessary to ensure that licensing or authorisation procedures are secure and that the authenticity of licensing or authorisation documents can be verified or validated’ exactly entail in practice and gives little guidance to states. Additional detail would be necessary to ensure the effective implementation of this paragraph.

Moreover, Article 11 provides little to no guidance to states parties and leaves the nature of the required measures at their discretion. Specifying such measures, inter alia, by incorporating agreed upon security standards, would have been favourable. Each of these additions would have strengthened the provisions and further prevented the diversion of firearms, their parts and components, and ammunition in transit.

64 UN Office on Drugs and Crime (n 18) 666.

65 Ibid 668.

66 Ibid 669.

67 Fellmeth (n 4) 209.

68 The United States proposed a paragraph requiring states parties to obtain written consent by the exporting state before authorising the re-export, retransfer, trans-shipment or other disposition not included in the original export licence. This proposal was supported by the Holy See, Italy, the Philippines, and Turkey, but objected by China, Pakistan and the Republic of Korea. The Netherlands suggested approval only in cases where exporting countries explicitly requested it and Nigeria proposed that re-exporting states should submit written explanations containing the reason for and the destination of the re-export. The proposal to regulate re-export was eventually rejected for its implications for the sovereignty of states parties; see UN Office on Drugs and Crime (n 18) 668–670.

Lastly, it should be noted that the efficacy of the framework on international transactions strongly depends upon the wide-spread ratification and implementation of the *Firearms Protocol*. As the procedural requirements under Article 10 prevent theft and diversion and increase the risk for organised criminal groups to be detected, the groups may attempt to circumvent these provisions by moving their illicit activities to states where such procedural requirements are not in place. Avoiding the transaction controls may, however, become more difficult if more states become party to and effectively implement the *Firearms Protocol*, thereby ensuring a comprehensive application of its obligations.

3.4. International Cooperation

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 authorised 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) *Organised 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 organised 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 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.⁶⁹

The obligations to exchange information are arguably the strongest part of the *Firearms Protocol*, for they are exceptionally comprehensive, in particular when recognising that they supplement and apply in addition to the cooperation requirements of the *UNTOC*.⁷⁰ The inclusion of ‘case-specific information’ promotes close and customised cooperation between states parties, which sets the *Firearms Protocol* apart from other comparable instruments and facilitates the detection and prevention of offences under Article 5. Similarly, the paragraph on cooperating in tracing is central to preventing the diversion of firearms, their parts and components, and ammunition.

69 *Firearms Protocol*, art 12, 13.

70 States must be parties to the *UNTOC* in order to be able to become party of the *Firearms Protocol*. Therefore, the provisions of the *UNTOC*, including the most important cooperation requirements as stated in Articles 18, 26, 27, and 28, also apply to all States Parties of the *Firearms Protocol*.

Notwithstanding the mandatory nature of the Article 12, the inclusion of the savings clause ‘consistent with their respective domestic legal and administrative systems’⁷¹ might bar the effective implementation of the article and full disclosure of information. David McClean points out that this might particularly apply to disclosing sources of information.⁷²

Whilst the information-sharing requirements are rather detailed, Article 13 offers little guidance to states parties. It merely entails a general call for cooperation in paragraph (1) and while paragraph (3) requires states parties to cooperate with manufacturers, dealers, importers, exporters, brokers and commercial carriers, no guidance is given on what ‘support and cooperation’ shall entail in practice. This is a missed opportunity to improve the *Firearms Protocol* by ensuring the effective cooperation with the private sector, thus facilitating the prosecution of firearms-related crime. Additionally, in contrast to the *UNTOC*, the *Firearms Protocol* neither outlines how to make cooperation requests, nor the content of such requests, although it would make sense if the procedures described in Article 18 of the *UNTOC* also applied to the *Firearms Protocol*, since it is to be interpreted together with the main instrument.⁷³

4. Ratification

Throughout the past two decades, the *Firearms Protocol* has only garnered the support of 122 Parties,⁷⁴ making it the least ratified of the four instruments on organised crime. However, wide-spread ratification is essential to the effective implementation of the *Firearms Protocol*. Despite it providing substantial leeway regarding the details of its implementation, the ratification will arguably be the first step in accepting and complying with the requirements therein.⁷⁵ Harald Koh, for instance, suggested that the compliance with international obligations may stem from the

71 *Firearms Protocol*, art 12(2).

72 McClean (n 50) 489.

73 *Firearms Protocol*, art 1(1).

74 As of 31 July 2022, including the European Union.

75 Andreas Schloenhardt and Ellen Bevan, ‘To Ratify or Not to Ratify? Exploring the Barriers to Wider Ratification of the Trafficking in Persons Protocol’ (2011) 9 *New Zealand Yearbook of International Law*, 626, 167.

normalisation of these obligations via the interaction between states,⁷⁶ which further underlines the role of widespread ratification. Likewise, a number of provisions, especially the transfer system, depends upon the widespread ratification and implementation in order to prevent organised criminal groups from circumventing the controls to be set in place by states parties. The following chapter analyses the current states parties and potential barriers to ratification, in order to explain the reservations of non-party states and assist wider ratification. It should be noted that the analysis might not in fact reflect the actual barriers to ratification by certain non-party states and only draws upon the concerns raised in the *travaux préparatoires*, as well as academic commentary. The reasoning may also not be generalised to apply to all non-party states.

4.1. Current Non-Party States

As stated above, the *Firearms Protocol* has failed to garner widespread international support and currently only counts 122 parties. It should be noted that the ratification is only an option for states parties to the *UNTOC*, which is in turn only possible for territories recognised as sovereign states within the UN system, thereby excluding states such as Kosovo and Taiwan. Yet, there are currently 190 states parties to the *UNTOC*,⁷⁷ meaning that 68 states parties to the *UNTOC* have failed to become party to the *Firearms Protocol*.

Interestingly, the ratification of the *Firearms Protocol* does not correlate with the level of development of states, contrary to the ratification of the *Trafficking in Persons Protocol* and the *Smuggling of Migrants Protocol*.⁷⁸ Western and some of the most developed Asian countries, often major firearms manufacturers and exporters with considerable political influence, make up a significant number of non-party states. As such Canada, China, Israel, Japan, Russia, South Korea, and – potentially most importantly –

76 Ibid 166, quoting Harold Koh, 1998 *Frankel Lecture: Bringing international law home* (1998) 626.

77 As of 31 July 2022, including the European Union.

78 See Schloenhardt and Bevan (n 75) 161–184; see also Andreas Schloenhardt and Hamish MacDonald, 'Barriers to Ratification of the United Nations Protocol Against the Smuggling of Migrants' (2017) 7 *Asian Journal of International Law* 13, 13–38.

the United States are all non-party states.⁷⁹ Their lack of ratification reduces the radius of application and indirectly the number of firearms that fall under the provisions, thus negatively affecting the relevance of the instrument.

Due to the unique composition of the non-party states, the analysis of the reasons for the wide failure of ratification is exceptionally important, as it might provide new insights into failures of states to ratify international agreements.

4.2. Barriers to ratification

4.2.1. Concerns raised during the negotiations

The *Firearms Protocol* proved very difficult to negotiate and was subject to prolonged deliberation, which is evident from the fact that in contrast to the other three organised crime instruments, which were adopted on 15 November 2000, the *Firearms Protocol* was adopted on 31 May 2001, over half a year later. This suggests that the topics included were highly controversial and could not be discussed sufficiently to reach consensus within the available time frame.⁸⁰ Therefore, the issues that were subject to particularly lengthy debate might provide insights into the reasons states failed to ratify or accede to the *Firearms Protocol*.

4.2.1.1. Scope of the Firearms Protocol

Especially the scope of the *Firearms Protocol* was extensively discussed due to conflicting views of the delegations and even the compromise reflected in the ultimately adopted article was not able to reconcile the interests of all delegations. Some claimed that the *Firearms Protocol* either went too far or not far enough. On the one hand, delegations, inter alia, Colombia, Benin, and Nigeria,⁸¹ argued that the requirements should apply to all transactions and had reservations about the exemptions stated in

79 Fellmeth (n 4) 210, 214.

80 Patrick Pintaske, *Das Palermo-Übereinkommen und sein Einfluss auf das deutsche Strafrecht: Eine Untersuchung der UN-Konvention gegen grenzüberschreitende organisierte Kriminalität und ihrer Zusatzprotokolle* (2014) 318.

81 UN Office on Drugs and Crime (n 18) 629.

Article 4(2). On the other hand, other delegations indicated that the scope was too broad. For instance, Syria and Colombia proposed to limit the scope to illegally manufactured and trafficked firearms,⁸² and the delegations of Algeria, France, Germany and the Netherlands stated, to a similar effect, that the scope 'should not go beyond the mandate set forth by the General Assembly'⁸³. In a similar way, the United Kingdom was not satisfied with the exemptions being as restrictive as eventually agreed upon, claiming that the *Firearms Protocol* would not apply to transfers by, to, from or on behalf of states,⁸⁴ despite being in favour of broadening the scope to include legal firearms trade.⁸⁵ Additionally, the delegations of China, Egypt, Pakistan and Saudi Arabia would have preferred firearms exclusively manufactured for military or security forces to be exempted from the application. China, furthermore, stated that it would have severe difficulties implementing the *Firearms Protocol* without some language to that effect.⁸⁶ The scope, in particular the question on firearms of military and security forces, was only resolved on the very last day of the negotiations and almost prevented the adoption of the *Firearms Protocol*,⁸⁷ thereby demonstrating the controversy surrounding this provision.

4.2.1.2. Prevention provisions

Moreover, there was some concern regarding the prevention provisions, in particular the marking requirements, of the *Firearms Protocol*. While the marking at the time of manufacture was generally agreed upon, there was considerable debate regarding the marking at the time of import, which was opposed by France and China.⁸⁸ There was further disagreement regarding the content of the markings. Many delegations suggested including additional information, inter alia, the model number and the year of manufacture, which was eventually rejected as to not overload the provision.⁸⁹ However, some delegations called for simpler markings, including China, which proposed the exclusion of the name of the

82 UN Office on Drugs and Crime (n 18) 625–626.

83 Ibid 625.

84 [s.n.], 'The UN "Firearms Protocol": Addressing the trafficking problem' (n 53) 2.

85 UN Office on Drugs and Crime (n 18) 625.

86 Ibid 628.

87 McClean (n 50) 463.

88 UN Office on Drugs and Crime (n 18) 651.

89 Ibid 650.

manufacturer.⁹⁰ In addition, the marking requirement was subject to a similar debate as the scope regarding the inclusion of a separate marking standard for firearms exclusively manufactured for military and security forces, which was ultimately also rejected.⁹¹ Whilst consensus was eventually reached, the provision was not able to meet the diverging expectations of all negotiating states.

4.2.2. Lack of Political Will

Furthermore, the lack of political will is potentially the most prominent reason why states fail to sign or ratify the *Firearms Protocol*. Some commentators have suggested that this was illustrated during the negotiations by delegations watering down the clear language of the *Firearms Protocol*, and that some of the stronger elements of the provisions were only advocated for because of the ‘cynical’ thinking that China would not agree to the final terms due to its restrictive stance during the negotiations.⁹² Three explanations for the lack of political will can be identified, namely the reluctance by some states to take on the binding international obligations of the *Firearms Protocol*, its relevance as perceived by states, especially in relation to alternative international initiatives, and conflicting domestic interests.

4.2.2.1. Hesitation to undertake binding international obligations

States may not ratify the *Firearms Protocol* as a way of not undertaking binding international obligations. As pointed out in comparable analyses in relation to the *Trafficking in Persons Protocol* and *Smuggling of Migrants Protocol*, constructivist theory of state behaviour suggests that states are less inclined to ratify the *Firearms Protocol* if they do not agree with its requirements or do not deem the issue ‘worthy of legislative response’⁹³. In accordance with this theory, the reluctance to ratify may stem from states

90 Ibid.

91 Ibid 653–654.

92 Anis Bajrektarevic, ‘The Justice–Home Affairs Diplomacy: The Palermo Convention, Ten Years After – Towards The Universal Criminal Justice’ (2011) 3(1) *Geopolitics, History, and International Relations* 119, 152.

93 Schloenhardt and Bevan (n 75) 177; Schloenhardt and MacDonald (n 78) 35.

fearing that the *Firearms Protocol* might interfere with state sovereignty. This concern is evident, for instance, from the Mexican proposal during the first session of the Ad Hoc Committee to include an article on sovereignty, which was ultimately deleted since the *UNTOC* already contained substantially similar language.⁹⁴ Despite this concern, it should be noted that the *Firearms Protocol* generally takes an unobtrusive approach⁹⁵ and leaves much at the discretion of states parties.

Furthermore, states may simply be opposed to the binding nature of the *Firearms Protocol*.⁹⁶ The considerable involvement of states, including non-party states, in non-legally binding initiatives such as the Wassenaar Arrangement⁹⁷ and the *Programme of Action (PoA)*⁹⁸ suggests that states may not be reluctant to addressing the offences under the *Firearms Protocol*, but would prefer to do so on a non-binding basis. Although there are some non-party states that have since ratified the Arms Trade Treaty, which is also a legally binding instrument addressing the issue at a global level, other states, including Russia and the United States, thus far solely support non-binding international initiatives.

Additionally, states may not ratify the *Firearms Protocol*, as they do not perceive the issue as requiring a coordinated international response. Holger Anders argues that the limited political will is rooted in the misconception that states already consider their standards sufficient, since they often lack measures for full accountability, which, among other reasons, fosters the undetected diversion of firearms.⁹⁹ This fallacy might

94 UN Office on Drugs and Crime (n 18) 727, 728.

95 Neil Boister, *An Introduction to Transnational Criminal Law* (2nd ed, 2018) 217.

96 Schloenhardt and Bevan (n 75) 175; Schloenhardt and MacDonald (n 78) 35.

97 The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies was established in 1995. It aims at contributing to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations. The Wassenaar Arrangement has 42 participating states as of 5 September 2021 that undertake certain export and reporting requirements. The instrument is politically binding.

98 UN, *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, UN Doc A/CONF.192/15 (20 July 2001); Under the *Programme of Action*, short *PoA*, governments agreed to improve national legislation on small arms, import and export controls, and stockpile management, and to engage in international cooperation. The *PoA* is discussed in more detail in Chapter 5.

99 Anders (n 5) 19.

also be the reason why states often argue that agreed upon trade standards are neither necessary nor advisable.¹⁰⁰ This misconception might hence hamper the ratification of the *Firearms Protocol*.

4.2.2.2. Relevance of the Firearms Protocol and Alternative International Initiatives

Another explanation for the lack of political will may be that non-party states perceive the *Firearms Protocol* as irrelevant, especially in relation to alternative international initiatives.

The perception of the *Firearms Protocol* may be affected by how effectively it is implemented by states parties. The full implementation of the *Firearms Protocol* has often been criticised as too slow¹⁰¹ and barred by a lack of detailed enforcement measures provided.¹⁰² In a report on the implementation of the *Firearms Protocol* that was submitted to the Conference of the Parties to the Organized Crime Convention in 2006 and updated in 2008, severe gaps in compliance with the criminalisation requirements in relation to the different marking offences were pointed out. Additionally, numerous states parties indicated that they were still in the process of amending their legislation.¹⁰³ Similarly, in 2012, the Conference of the Parties felt it necessary to urge states parties to 'harmonise their national legislation in a manner consistent with the Protocol'¹⁰⁴. This underlines the slow implementation of the obligations

100 Fellmeth (n 4) 210.

101 Ibid 215.

102 Salton (n 24) 391.

103 UN, Conference of the Parties to the United Nations Convention against Transnational Organised Crime, *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: Analytical report of the Secretariat*, UN Doc CTOC/COP/2006/8 (16 August 2006); UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *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: consolidated information received from States: Report of the Secretariat*, UN Doc CTOC/COP/2006/8/Rev.1 (12 August 2008).

104 UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its sixth session, held in Vienna from 15 to 19 October 2012*, UN Doc CTOC/COP/2012/15 (5 November 2012) Res 6/2.

even in the years after the *Firearms Protocol* had entered into force, when its momentum was arguably still at its highest.

Furthermore, some states might consider the *Firearms Protocol* unnecessary, arguing that most of its provisions are already covered by alternative international initiatives and that these initiatives are sufficient in the fight against illicit flow of firearms, their parts and components, and ammunition.¹⁰⁵ This point will be further discussed in chapter 5.

4.2.2.3. Conflicting Domestic Interests

In addition, the opposition to the *Firearms Protocol* might stem from non-party states pursuing conflicting domestic interests. The United States, for instance, has repeatedly expressed concern regarding regulations of private gun ownership considering their constitutional right to bear arms. They further voiced the apprehension that the *Firearms Protocol* would prevent supporting rebel groups fighting oppressive regimes by providing firearms.¹⁰⁶ Germany, likewise, reported that constitutional issues had hampered the implementation of the provisions of the *Firearms Protocol*¹⁰⁷, which may have been a factor in its delayed ratification by Germany. Similar domestic issues might, therefore, deter non-party states from ratifying the *Firearms Protocol*.

4.2.3. Lack of Understanding

States may lack an understanding of the obligations required under the *Firearms Protocol*, which may result from a lack of guidance within its provisions. According to the normative theory of state compliance with international rules, states are more inclined to ratify international agreements which obligations are clear and sufficiently detailed.¹⁰⁸ This issue might, thus, prevent non-party states that do not fully understand

¹⁰⁵ Fellmeth (n 4) 2010.

¹⁰⁶ Ibid.

¹⁰⁷ UN, Conference of the Parties to the UNTOC, *Analytical report of the Secretariat* (n 103) 15; UN, Conference of the Parties to the UNTOC, *Report of the Secretariat* (n 103) 15.

¹⁰⁸ Schloenhardt and Bevan (n 75) 171, quoting Anne Gallagher *The International Law of Human Trafficking* (Cambridge University Press, 2010) 464, and Oona A Hathaway, 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1958; see also Schloenhardt and MacDonald (n 78) 34.

the requirements and the threats being addressed from ratifying the *Firearms Protocol*.

The *Firearms Protocol* provides little guidance on the implementation of several complex requirements. This issue might be rooted in the unobtrusive approach taken by the drafters of the *Firearms Protocol* in trying to balance combatting and preventing transnational organised crime and national sovereignty of states.¹⁰⁹ For this reason, several provisions do not expressly specify how or what states should regulate. General statements calling for states to ‘adopt measures as may be necessary’¹¹⁰ can undermine the usefulness of the *Firearms Protocol* and prevent its effective implementation. Similarly, there is a lack of clarity in several articles. Most eminently, the term ‘transit’ is never defined in the *Firearms Protocol* despite such definition being requested repeatedly during negotiations. The marking requirements were also considered too vague by some delegations.¹¹¹ In addition, the marking provision does not consider the marking of ammunition, which is, however, included in the record-keeping obligation and might, thus, prevent a consistent implementation. Furthermore, Article 7 does not specify the method of record-keeping and Article 11 barely entails any specifics on additional security measures at all. Therefore, States may not fully understand the obligations they would be undertaking, which might deter them from signing the *Firearms Protocol*.

Moreover, and although it is certainly not a human rights or humanitarian law instrument, the *Firearms Protocol* touches upon obligations stemming from these legal fields, thereby rendering it difficult and confusing for states to reconcile its requirements with conflicting undertakings. The *Firearms Protocol*, for instance, requires states parties to criminalise ‘counselling’ of illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition as well as of falsifying or illicitly obliterating, removing or altering the markings on firearms.¹¹² However, this requirement might violate certain interpretations of the human right to freedom of expression. It may be argued that to reconcile these

¹⁰⁹ Salton (n 23) 390.

¹¹⁰ See for instance in *Firearms Protocol*, art 5, 6, and 10.

¹¹¹ Benin and Nigeria, for instance, requested report of the Ad Hoc Committee on its twelfth session to indicate their reservations on Article 8 due to the vague marking requirements; UN Office on Drugs and Crime (n 18) 657.

¹¹² *Firearms Protocol*, art 5(2)(b).

conflicting obligations, counselling will have to be interpreted to only entail acts connected to a criminal conspiracy or concrete action by the counselling party.¹¹³ Yet, neither the *Firearms Protocol* nor its accompanying documents provide details on the implementation of the criminalisation of counselling. In addition, Belgium noted that the scope of the *Firearms Protocol* might violate the Geneva conventions in relation to the rules of conflict and asked for a savings clause in relation to international humanitarian law, in particular with regards to domestic armed conflict.¹¹⁴ This proposal was, however, not given much consideration, eventually rejected and included as reservation to the *Firearms Protocol* by Belgium. From this, it is evident that states may not know how to balance the *Firearms Protocol* and already existing international obligations, hence discouraging them to become party to it.

4.2.4. Economic Concerns

Many states may be hesitant to ratify the *Firearms Protocol* due to economic, financial, and institutional considerations.¹¹⁵ This encompasses, on the one hand, states that do not have the necessary resources to comply with the provisions of the *Firearms Protocol* and on the other hand, states that would have the necessary financial means, but are major arms manufacturers or exporters and therefore concerned about losing profit should the *Firearms Protocol* apply.

Some non-party states may lack the necessary financial or institutional resources to implement the obligations under the *Firearms Protocol*. Many of its aspects will require amendments to the existing domestic law, as well as investments in relation to its enforcement, inter alia, in technical equipment and training. Furthermore, states may not have the institutional capacity required to undertake the obligations under the *Firearms Protocol*, including border control, cooperation requests, or, more generally, developing effective prevention measures without guidance.¹¹⁶ Other states may have an economic interest in the firearms business and

113 Fellmeth (n 4) 208.

114 UN Office on Drugs and Crime (n 18) 625.

115 Pierre Hauck and Sven Peterke, 'Organized crime and gang violence in national and international law' (2010) 92(878) *International Review of the Red Cross* 407, 424.

116 See also Schloenhardt and MacDonald (n 78) 31.

therefore be deterred by the considerable investment of resources that would be required. This is evident from the fact that numerous major arms-manufacturing and exporting states, including Canada, China, Israel, Japan, Russia, South Korea and the United States, have not signed or ratified the *Firearms Protocol*.¹¹⁷ Several states have disclosed their financial concerns during the negotiations, in particular in relation to the marking provision. Pakistan and South Africa, for instance, pointed out the importance of inexpensive marking measures,¹¹⁸ while Finland submitted a paper on the financial issues potentially caused by the requirement to mark all imported firearms.¹¹⁹ Some delegations, likewise, expressed concern that the 'systematic tracking'¹²⁰ of firearms in general may be too expensive.¹²¹ Similarly, the United States argued that regulating ammunition would be too costly.¹²² The financial commitment related to the obligations under the *Firearms Protocol* might therefore prevent states with a lack of resources or economic interest in the manufacture of and trafficking in firearms, their parts and components, and ammunition from becoming party to the *Firearms Protocol*.

Financial limitations are, however, taken into account in the text of some provisions by including phrasing such as 'to the greatest extent possible'¹²³ and 'within available means'¹²⁴, and by requiring states to cooperate with each other and relevant international organisations in relation to training and technical assistance, including financial and material assistance.¹²⁵ Similarly, the *UNTOC* expressly calls upon states to enhance their cooperation with developing countries, including providing financial and material assistance.¹²⁶

117 Fellmeth (n 4) 210, 214.

118 UN Office on Drugs and Crime (n 18) 650–651.

119 *Ibid* 652.

120 *Firearms Protocol*, art 3(f).

121 UN Office on Drugs and Crime (n 18) 619.

122 Fellmeth (n 4) 210.

123 *Firearms Protocol*, art 6(1).

124 *Ibid* art 10(5) and 12(4).

125 *Ibid* art 14.

126 *UNTOC*, art 30; see also Schloenhardt and Bevan (n 75) 170 and Schloenhardt and MacDonald (n 78) 32.

5. Relationship to other Treaties and Reasons to Ratify

The reason most often given by states and commentators for the failure to ratify the *Firearms Protocol* is that it is simply unnecessary and that existing obligations under international law are sufficient to curb the illicit flow of firearms, their parts and components, and ammunition.¹²⁷ Although most non-party states do in fact already comply with some of the substantive provisions contained in the *Firearms Protocol* either due to international agreements, including those mentioned in this chapter, or due to having independently adopted corresponding legislation, only a small number of non-party states comply with the *Firearms Protocol* in its entirety.

Despite this misperception, the *Firearms Protocol* is still of great significance, and for good reason.¹²⁸ Whilst there are other instruments addressing similar issues, it has often been commented that a major benefit and reason for ratification was that the *Firearms Protocol* was the only legally binding instrument regulating firearms manufacture and trafficking. However, since the adoption of the *Arms Trade Treaty (ATT)* on 2 April 2013, this no longer remains true. That the *Firearms Protocol* must have additional benefits not covered by other treaties can also be inferred from the increase in states parties since that date, as 23 states and the European Union have become party to it thereafter.¹²⁹

In addition, the nature of the UN approach to firearms regulation should be taken into account. The UN approach is a complementary one, based upon the notion that different instruments should not be considered in isolation, and together form the basis for a comprehensive international framework on small arms and light weapons. This means that the ratification of multiple instruments, including the *Firearms Protocol*, may be essential to effectively prevent and combat illicit flow of firearms, their parts and components, and ammunition.

¹²⁷ Fellmeth (n 4) 210.

¹²⁸ Pintaske (n 80) 319.

¹²⁹ In 2013: Austria, Czechia, Dominica, Ecuador, Guinea-Bissau, Iraq, Liechtenstein, Ukraine, Venezuela; in 2014: Angola, Barbados, European Union, Ghana, Sierra Leone; in 2015: Denmark, South Korea; in 2017: Fiji; in 2018: Bolivia; in 2019: France, Palau; in 2020: Bolivia; in 2021: Comoros, Germany; as of 31 July in 2022: Luxembourg.

This chapter analyses the strengths of the *Firearms Protocol* by comparing and contrasting the provisions of alternative international initiatives, namely the *PoA*, the *International Tracing Instrument (ITI)*, and the *ATT* with the provisions of the *Firearms Protocol* as outlined in chapter 3. Moreover, the importance of ratification of the *Firearms Protocol* is discussed.

5.1. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA)

The *PoA* may be the most prominent cause for the negative perception of the *Firearms Protocol*, in particular regarding the years after the *Firearms Protocol* was adopted, as the negotiations to the *PoA* had overshadowed those of the *Firearms Protocol*. The *PoA* was adopted in July 2001 during the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, which convened in 1999, and therefore was negotiated parallel to the *Firearms Protocol*. Although the *PoA* recognises the efforts of the *Firearms Protocol*,¹³⁰ the preamble of the *PoA* states that the UN is convinced of the ‘need for a global commitment to a comprehensive approach to promote [...] the prevention, reduction and eradication of the illicit trade in small arms and light weapons’¹³¹. The inclusion of this phrase, despite the *Firearms Protocol* already having been adopted and being a legally binding instrument, demonstrates that states did not perceive the *Firearms Protocol* as able to fulfil its purpose and only allocated a supplementary role to it, thereby rendering it unnecessary in the eyes of some states.¹³² Notwithstanding the parallel negotiation of the *Firearms Protocol* and the *PoA*, there are key differences between the two instruments, which are discussed in the following.

5.1.1. Nature and Scope

The *PoA* and the *Firearms Protocol* were negotiated in different thematic contexts and take different approaches in the fight against firearms-related

¹³⁰ *PoA*, Preamble.

¹³¹ *Ibid.*

¹³² Pintaske (n 80) 319.

crime.¹³³ The *PoA* resulted from arms control initiatives, while the *Firearms Protocol* is the only instrument relating to crime control,¹³⁴ which stems from its focus on organised crime. Due to the arms control approach, the *PoA* covers a wider variety of small arms and light weapons than the *Firearms Protocol*, which only covers firearms. However, contrary to the *Firearms Protocol*,¹³⁵ the *PoA* does not include definitions of the weapons it applies to, which may lead to gaps in its implementation. Furthermore, the *PoA* does not apply to parts and components, and ammunition.¹³⁶ The *PoA* does, however, apply to state-to-state transactions, which the *Firearms Protocol* exempts,¹³⁷ thereby neglecting one of the most prominent form of firearms transactions¹³⁸ and limiting the potential impact of the requirements under the *Firearms Protocol*. Whilst the inclusion of state-to-state transactions is an important strength of the *PoA*, the more restrictive scope of the *Firearms Protocol* and its focus on crime control can also be regarded a strength in that it is adapted to address transnational organised crime specifically.¹³⁹ Additionally, the crime control approach of the *Firearms Protocol* made it less political than other international initiatives, including the *PoA*, thereby enabling the adoption of the *Firearms Protocol* as legally binding instrument. The *PoA*, in contrast, is only politically binding, which may negatively impact its implementation.

5.1.2. Enforcement

The enforcement of the provisions of the international instruments is key to their effective implementation. The *PoA* and the *Firearms Protocol* both require states to criminalise certain conduct to ensure their implementation. Under the *PoA* states undertake to criminalise the illegal manufacture, possession, stockpiling, and trade of small arms and light weapons.¹⁴⁰ Additional specifications are however not included. By

133 UN Office on Drugs and Crime, *Comparative Analysis of Global Instruments on Firearms and other Conventional Arms: Synergies for Implementation* (2016) 1.

134 [s.n.], 'The UN "Firearms Protocol": Addressing the trafficking problem' (n 53) 1.

135 *Firearms Protocol*, art 3.

136 UN Office on Drugs and Crime, (n 133) 20–22.

137 *Firearms Protocol*, art 4(2).

138 Salton (n 23) 391.

139 Fellmeth (n 4) 218.

140 *PoA* s II, para 3.

contrast, the *Firearms Protocol* obligates states parties to criminalise illicit manufacturing of and trafficking in firearms, their parts and components, and falsifying or illicitly obliterating, removing or altering the required markings, as well as different *modi operandi* thereof.¹⁴¹ Although leaving details mostly at the discretion of states parties, the *Firearms Protocol* gives further indications of what such offences entail in its use of terms.¹⁴² Although the *Protocol* has often been criticised for its lack of effective enforcement mechanism,¹⁴³ the *Firearms Protocol* contains a stronger enforcement strategy than the *PoA*.

5.1.3. Prevention Provisions

Differences can further be identified in relation to the prevention provisions of the *Firearms Protocol*. Although the *PoA* regulates marking, only minimum standards are included, whereas the *Firearms Protocol* further entails marking requirements when firearms are imported or transferred from government stocks to civilian use.¹⁴⁴ Likewise, the *PoA* only encompasses general record-keeping provisions, whilst the *Firearms Protocol* goes into more detail.¹⁴⁵ In contrast to the *PoA*, the *Firearms Protocol* requires states parties to keep information on marking, and import and transit authorisations, which must include the issuance and expiration dates, the countries of import, export, and transit, and, where appropriate, the final recipient and the description and quantity of the products of the shipment.¹⁴⁶ Additionally, the *PoA* only contains broad transactions provisions that do not touch upon deactivation contrary to the comparably detailed transaction and authorisation system of the *Firearms Protocol*.¹⁴⁷ Furthermore, the *PoA* only includes broad cooperation obligations that merely encourage states to ‘consider’ international cooperation.¹⁴⁸ The *Firearms Protocol* conversely requires states parties to

141 *Firearms Protocol*, art 5.

142 *Ibid* art 3(d), (e).

143 See for instance Salton (n 23) 390.

144 UN Office on Drugs and Crime, (n 133) 26–27.

145 *Ibid* 29–32.

146 *Firearms Protocol*, art 7.

147 UN Office on Drugs and Crime, (n 133) 29, 39–45; *Firearms Protocol*, art 9, 10.

148 *PoA*, s III, para 10; UN Office on Drugs and Crime, (n 133) 49–53.

cooperate on a bilateral, regional and international basis,¹⁴⁹ and contains rigorous information-sharing obligations, which are exceptionally comprehensive, for they even include case-specific information, means of concealment, trafficking routes, as well as scientific and technological information.¹⁵⁰ When considering the *Firearms Protocol* in the context of the *UNTOC*, which encompasses additional equally expansive articles on mutual legal assistance, joint investigative teams, and law enforcement cooperation,¹⁵¹ the instrument provides a comprehensive international cooperation framework, which the *PoA* lacks.

Overall, the general requirements of the *PoA* regarding the comparably detailed prevention provisions of the *Firearms Protocol*, in particular with regards to international cooperation, give the *Firearms Protocol* a significant advantage over the *PoA*. States that are party to the *PoA*, yet not the *Firearms Protocol*, might hence want to consider ratifying the *Firearms Protocol* for more effectively preventing and combatting firearms-related crime.

5.2. International Tracing Instrument (ITI)

The *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (ITI)*,¹⁵² in short, the International Tracing Instrument, was developed and adopted in 2005 in the context of the *PoA* review. The *ITI* was developed as law enforcement tool complimentary to and consistent with existing international obligations, including the *Firearms Protocol*.

149 *Firearms Protocol*, art 13(1).

150 *Ibid* art. 12(1) – (3).

151 *UNTOC*, art 18, 19, and 27.

152 UN General Assembly, *The International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, The Open-ended Working Group to Negotiate an International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, A/60/88 and Corr.2, annex, adopted by UN Doc A/RES/60/81 (8 December 2005).

5.2.1. Nature and Scope

The *ITI*, like the *PoA*, applies to small arms and light weapons and consequently to a wider variety of weapons than the *Firearms Protocol*, which only covers firearms. However, the *Firearms Protocol* additionally applies to parts and components, and ammunition, which the *ITI* does not.¹⁵³ While the scope of the *ITI* may be similar to other international initiatives, its nature is unique. As a law enforcement tool, the main aim of the *ITI* is to identify and trace, in a timely and reliable manner, illicit small arms and light weapons.¹⁵⁴ While the nature the *ITI* allows it to further specify prevention provision, such as marking, record-keeping and tracing,¹⁵⁵ it prevents the criminalisation of certain conduct as included in Article 5 of the *Firearms Protocol*. Furthermore, the *ITI* only establishes voluntary obligations,¹⁵⁶ in contrast to the *Firearms Protocol*, which is legally binding.

5.2.2. Enforcement

As the *ITI* serves as law enforcement tool, the whole instrument is essentially about enforcement.¹⁵⁷ While the *ITI* does not contain offences, it entails a definition of ‘illicit’ small arms and light weapons in Article 6, thereby complimenting the enforcement strategies of other international initiatives, in particular the *Firearms Protocol*. Although the *ITI* provides additional guidance for law enforcement authorities, it is insufficient to fight and prevent the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition by itself. This is due to its voluntary nature as law enforcement tool and the lack of criminalisation provisions. States should therefore contemplate ratifying the *Firearms Protocol* to further facilitate the effective implementation and enforcement of the international obligations included in both instruments.

153 UN Office on Drugs and Crime, (n 133) 20–22.

154 *ITI*, art 1.

155 *ITI*, art 7–23.

156 UN Office on Drugs and Crime, (n 133) 4.

157 *Ibid* 55.

5.2.3. Prevention Provisions

The *ITI* and the *Firearms Protocol* contain similar, comparably comprehensive marking provisions, which include marking requirements when firearms are imported or transferred from government stocks to civilian use.¹⁵⁸ Moreover, both instruments encompass similar record-keeping obligations, although the *ITI* requires records to be kept for at least twenty to thirty years depending on the information maintained, which is longer than required under the *Firearms Protocol*.¹⁵⁹ One of the most significant weaknesses of the *ITI* in comparison to the *Firearms Protocol* is the lack of international transaction provisions, thereby neglecting the regulation of firearms while moving through different jurisdictions, which is when there is an increased risk of diversion of firearms. Similarly, the *ITI* includes less detailed international cooperation and information-sharing provisions than the *Firearms Protocol*. Whilst the *ITI* entails comprehensive cooperation provisions regarding the tracing of firearms, the more general cooperation obligations are less detailed than the ones included in the *Firearms Protocol*. The *ITI* merely requires states to ‘cooperate on a bilateral and, where appropriate, on a regional and international basis to support the effective implementation of this instrument’, to assist in national capacity building upon request, and to ‘consider international cooperation and assistance to examine technologies that would improve the tracing and detection of illicit small arms and light weapons, as well as measures to facilitate the transfer’¹⁶⁰. In contrast, the *Firearms Protocol*, especially in the context of the *UNTOC*, sets out a comprehensive cooperation and information-sharing framework, as set out in relation to the *PoA* above.

5.3. Arms Trade Treaty (ATT)

The *Arms Trade Treaty (ATT)* was adopted by the UN General Assembly on 2 April 2013.¹⁶¹ Although the *ATT* was adopted more than twelve years after

158 UN Office on Drugs and Crime, (n 133) 26–29.

159 *ITI*, art 11–12; *Firearms Protocol*, art 7; see also UN Office on Drugs and Crime, (n 133) 29–34.

160 *ITI*, art 26–28.

161 Opened for signature 2 April 2013, 3013 UNTS (entered into force 24 December 2014).

the adoption of the *Firearms Protocol* and represents the latest of the international initiatives used in this comparison, the ground stone for the *ATT* was already laid in 2006, when the UN General Assembly began the formal process towards establishing the treaty pursuant to its resolution 61/89. This process was thus started only a year after the *Firearms Protocol* had entered into force. While the *ATT* contains a wider scope than the *Firearms Protocol*, this temporal link could be interpreted as lack of support of the *Firearms Protocol* by the international community. In a similar way to the analysis in the introduction of the *PoA*, this misperception does not do justice to the strengths of the *Firearms Protocol* when compared with the *ATT*, which are analysed below.

5.3.1. Nature and Scope

The *ATT* and the *Firearms Protocol* are both legally binding and have similar objectives, but diverging scopes. Although both aim to prevent and eradicate the weapons trade they apply to by promoting international cooperation,¹⁶² the *ATT* relates to all conventional arms and the *Firearms Protocol* only covers firearms. Both treaties apply to certain parts and components, and ammunition. The *Firearms Protocol*, in addition to firearms trafficking, also applies to their manufacture,¹⁶³ which the *ATT* does not cover, as it aims at setting 'the highest possible common international standards for regulating or improving the regulation of the international trade' only.¹⁶⁴ In contrast to the *Firearms Protocol*, the *ATT* also regulates state-to-state transactions, which represents a major strength of the *ATT* for the relevance and number of these transactions. In addition, it should be noted that like the *PoA*, the *ATT* also takes an arms control, rather than a crime control approach. What is discussed regarding this point in chapter 5.1.1. therefore applies to the *ATT* as well. Despite or because of the incredibly wide scope of the *ATT*, the trafficking of firearms is only a very small part of the treaty and is not put into the context of organised crime. Consequently, the *Firearms Protocol* might be better equipped to prevent and combat the illicit trafficking, and especially the illicit manufacturing, of firearms, their parts and components and ammunition.

¹⁶² *ATT*, art 1; *Firearms Protocol*, art 2.

¹⁶³ *Firearms Protocol*, art 4.

¹⁶⁴ *ATT*, art 1.

5.3.2. Enforcement

Notwithstanding the legally binding nature of the *ATT*, it does not proscribe any enforcement measures. Although options, including the establishment of penalties and the possibility to inspect and seized shipments, were discussed during the negotiations of the *ATT*,¹⁶⁵ they were not adopted in the final text of the treaty. The *ATT* merely requires states parties to ‘take appropriate measures to enforce national laws and regulations that implement’ its provisions.¹⁶⁶ The *Firearms Protocol*, by contrast, entails an enforcement strategy, albeit flawed and often criticised,¹⁶⁷ by requiring states parties to criminalise certain conduct. The presence of an enforcement strategy is essential to ensuring the effective implementation of international instruments. The absence thereof may hence be regarded a major flaw of the *ATT*.

5.3.3. Prevention Provisions

Contrary to the *Firearms Protocol*, the *ATT* does not contain any references to or obligations of the marking of firearms. Furthermore, the *ATT* merely requires states parties to keep records of its issuance of export authorisations or its actual exports.¹⁶⁸ Similarly, states are indirectly required to keep records via the reporting requirement, as records may form the basis of the content of the mandatory annual reports on the authorised and actual exports and imports of conventional arms.¹⁶⁹ The record-keeping obligation under the *ATT* is, therefore, only limited to documents related to international transactions, whilst the record-keeping obligation under the *Firearms Protocol* goes further by also including records of the appropriate markings required under Article 8 of the *Firearms Protocol*, and establishing content requirements for transaction-related information.¹⁷⁰ In addition, the *ATT* encompasses comprehensive transaction provisions. It sets out circumstances when export is prohibited

165 UN Office on Drugs and Crime, (n 133) 55–56.

166 *ATT*, art 14.

167 See for instance Salton (n 23) 390.

168 *ATT*, art 12.

169 *Ibid* art 13(3).

170 *Firearms Protocol*, art 7.

due to potential negative consequences.¹⁷¹ However, it does not expressly prohibit the transfer of firearms to organised criminal groups,¹⁷² and only broadly touches upon imports, while not referring to deactivation at all. The *Firearms Protocol*, in contrast, proscribes a reciprocal authorisation system for international transactions and establishes procedural requirements, including a system for import licensing and obligations regarding deactivated firearms.¹⁷³ These procedural requirements are specifically aimed at preventing the diversion of firearms while moving through different jurisdictions as well as the reactivation of firearms after transfer. Moreover, the *ATT* only entails a general international cooperation requirement, with specified conduct merely being ‘encouraged’¹⁷⁴, while the *Firearms Protocol* establishes a comprehensive framework of obligations as discussed above. Strong marking, records-keeping, trade, and cooperation requirements are paramount in identifying and tracing individual firearms in order to prevent illicit firearms trafficking and the diversion of firearms, especially while crossing borders. They are equally necessary to collect evidence to eventually prosecute firearms-related crime. The detailed provisions of the *Firearms Protocol* that are specifically adapted to organised crime are arguably better equipped to achieve this aim than provisions of the *ATT*.

6. Conclusion and the Way Ahead

This article has illustrated substantial regulatory benefits of the *Firearms Protocol*, especially in comparison to other instruments. In spite of the lack of guidance within its provisions, the *Firearms Protocol* is arguably most successful in regulating the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition, particularly since it is specifically adapted to the threat of organised crime. Notwithstanding the barriers to ratification identified in this article, states that have not yet done so may therefore wish to consider ratifying or acceding to the *Firearms Protocol*.

¹⁷¹ *ATT*, art 7.

¹⁷² Boister (n 95) 220.

¹⁷³ *Firearms Protocol*, art 9, 10.

¹⁷⁴ *ATT*, art 15.

In addition, the newly launched *Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto* might help address a number of the concerns raised in the article, and potentially lead to a wider acceptance of the *Firearms Protocol*. The review mechanism was established by the Conference of Parties in October 2018 and launched in October 2020. The review process, which takes eight years, entails a general review in the plenary of the Conference based upon a report by the Secretariat, as well as country reviews, during which each state will provide information on its implementation that will subsequently be reviewed by one state from the same and one from another region.¹⁷⁵ Whilst the overall aim of the review process is to facilitate full implementation of the *Firearms Protocol*, additional aims were identified by the Conference, inter alia, improving the capacity of states parties, helping states identify specific needs for technical assistance, gathering information on successes, good practices and challenges, and promoting and facilitating the exchange of such information.¹⁷⁶ The information gathered during the review will potentially not only help the effective implementation of the provisions, but also address some of the barriers to ratification.

Most of the reasons why states fail to ratify can be addressed by technical assistance. Before the review mechanism, effective technical assistance was hampered by a lack of information on specific needs, since previous attempts to review the implementation only received a limited number of responses and did not encompass the prevention measures. Technical assistance directed at specific needs may especially be suited to address the lack of understanding, as well as capacity and resource limitations. It might further indirectly tackle the lack of political will. Owing to the review of national legislation, the misconception that existing standards of firearms manufacturing and trafficking are sufficient, and that states already comply with the provisions of the *Firearms Protocol* due to other international agreements might be corrected. Likewise, technical assistance

¹⁷⁵ UN, Working Group on Firearms, *Responsiveness of the Firearms Protocol and national legislation to new and emerging threats relating to the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition: Background paper prepared by the Secretariat*, UN Doc CTOC/COP/WG.6/2020/2 (14 January 2020), Res 9/1, Annex V.

¹⁷⁶ *Ibid.*

will potentially facilitate effective implementation, thus increasing the relevance of the *Firearms Protocol*. Despite the review mechanism not being able to address all barriers to ratification, it is likely that most non-party states are discouraged from ratifying or acceding to the *Firearms Protocol* for a combination of the identified issues. Therefore, resolving a number of the deterrents may give extra incentives and facilitate widespread ratification.

Moreover, emerging threats and technological trends, inter alia, the 3D-printing of firearms, the use of modular weapons, and internet and dark-web purchases may further impact the relevance of the *Firearms Protocol* and its future role.

The additive manufacture, also known as 3D-printing, of firearms,¹⁷⁷ has become increasingly popular at industrial and consumer levels in the past decade. Due to the increased speed of the development of designs, the cheap customisation and the availability of the necessary material, hardware, and software to private individuals,¹⁷⁸ this technology may accelerate the proliferation of firearms, their parts and components, and ammunition and change the nature of their manufacture. Despite the manner of production, the provisions of the *Firearms Protocol* fully apply to 3D-printed products, including the marking, record-keeping and international trade requirements.¹⁷⁹ The additive manufacture, especially on a consumer basis, may, however, hamper the enforcement of such regulations.¹⁸⁰ The *Firearms Protocol's* obligation to criminalise the illicit manufacture of firearms, their parts and components, and ammunition, which specifically entails unlicensed manufacture and manufacture

¹⁷⁷ According to the UN, additive manufacture entails the following steps: 'a 3D printer reads the design from a 3D printable file and lays down successive layers of various materials to build a model from a series of cross sections. The layers are joined or automatically fused to create the final shape'; see UN, Working Group on Firearms, *Responsiveness of the Firearms Protocol and national legislation to new and emerging threats relating to the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition: Background paper prepared by the Secretariat*, UN Doc CTOC/COP/WG.6/2020/2 (14 January 2020) 11.

¹⁷⁸ Glenn McDonald, *One Meeting After Another: UN Process Update* (February 2015) 72.

¹⁷⁹ N.R. Jenzen-Jones, 'Small arms and additive manufacturing: An assessment of 3D-printed firearms, components, and accessories' in King, Benjamin, and Glenn McDonald (eds), *Behind the Curve: New Technologies, New Control Challenges* (2015) 43, 58–61.

¹⁸⁰ *Ibid* 62.

without applying the required markings,¹⁸¹ may therefore constitute an important tool in combatting 3D-printed firearms.

In addition, the use of modular firearms is an emerging challenge to firearms regulation. This is evident from its inclusion in the 2019 report of the Secretary-General on the illicit trade in small arms and light weapons.¹⁸² Modular weapons consist of a core section around which the key parts and components can be altered,¹⁸³ consequently allowing even private gun owners to convert their semi-automatic firearm to a fully automatic one.¹⁸⁴ Although the *Firearms Protocol* generally applies to parts and components, the marking, as well as the record-keeping provision, do not cover or were rendered useless in this regard. However, the unlicensed or unauthorised assembly of modular firearms may fall under the *Firearms Protocol's* understanding of illicit manufacture and would thus be criminalised under it.¹⁸⁵

Furthermore, the dark web has gained considerable popularity for people looking to illicitly purchase firearms, their parts and components, and ammunition, due to its easy access and the anonymity it offers.¹⁸⁶ Although the obligations of the *Firearms Protocol* technically also apply to online trafficking, a 2017 report found that the transfer provisions are entirely circumvented by the cyber criminals and suggested to strengthen control over marketplace administrators.¹⁸⁷ To this end, brokering regulations would be essential, which are unfortunately not mandatory under the *Firearms Protocol*.¹⁸⁸ However, due to the inherently transnational nature of dark web purchases and its advanced anonymity, effective law enforcement operations will, inter alia, also depend upon information exchange, special investigative techniques, international cooperation, and border control,¹⁸⁹ where the *Firearms Protocol* and its parent Convention provide strong frameworks. The ratification of the

181 *Firearms Protocol*, art 3(d).

182 UN, Working Group on Firearms (n 176) 10.

183 McDonald (n 173) 70.

184 UN, Working Group on Firearms (n 176) 10.

185 *Ibid.*

186 *Ibid.* 12.

187 Giacomo Persi Paoli et al, *Behind the curtain: The illicit trade of firearms, explosives and ammunition on the dark web* (2017) 100.

188 *Firearms Protocol*, art 15.

189 Paoli et al (n 187) 102–104.

Firearms Protocol, therefore, offers major regulatory benefits to tackle this emerging threat, which will potentially increase its relevance in the future.

Bibliography

- Anders, Holger, 'The UN Process on Small Arms: All Is Not Lost' (2007) 37(2) *Arms Control Today* 17
- Bajrektarevic, Anis, 'The Justice–Home Affairs Diplomacy: The Palermo Convention, Ten Years After – Towards The Universal Criminal Justice' (2011) 3(1) *Geopolitics, History, and International Relations* 119
- Boister, Neil, *An Introduction to Transnational Criminal Law*, Oxford: Oxford University Press, 2nd ed, 2018
- Bourne, Michael, 'Transnational Trafficking in Weapons' in Philip Reichel and Jay Albanese (eds), *Handbook of Transnational Crime and Justice*, Los Angeles: SAGE Publications, 2014, 85
- Cukier, Wendy, 'International fire/small arms control' (1998) 6(1) *Canadian Foreign Policy Journal* 73
- Fellmeth, Aaron, 'Part II UN Core Conventions on Transnational Organised Crime, 10 The UN Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components, and Ammunition 2001' in Pierre Hauck and Sven Peterke (eds), *International Law and Transnational Organised Crime*, Oxford: Oxford University Press, 2016, 197
- Hauck, Pierre, and Sven Peterke, 'Organized crime and gang violence in national and international law' (2010) 92(878) *International Review of the Red Cross* 407
- Hayes, James, 'The United Nations Firearms Protocol' in The International Centre for Criminal Law Reform and Criminal Justice Policy (ed), *The Changing Face of International Criminal Law: Selected Papers*, Vancouver: ICCLR&CJP, 2002, 125
- Jenzen-Jones, N.R., 'Small arms and additive manufacturing: An assessment of 3D-printed firearms, components, and accessories' in King, Benjamin, and Glenn McDonald (eds), *Behind the Curve: New Technologies, New Control Challenges*, Geneva: Small Arms Survey, 2015, 43
- McClellan, David, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols*, Oxford: Oxford University Press, 2007

- McDonald, Glenn, *One Meeting After Another: UN Process Update*, Issue Brief Nr. 12, Geneva: Small Arms Survey, February 2015
- OAS, *Model Regulation for the Control of the International Movement of Firearms, their Arts and Components and Ammunition*, OAS/Ser. L/XIV.2.22, CICAD/doc. 905/97 (5 November 1997)
- Paoli, Giacomo Persi, et al, *Behind the curtain: The illicit trade of firearms, explosives and ammunition on the dark web*, Santa Monica, California and Cambridge, UK: RAND Corporation, 2017
- Pintaske, Patrick, *Das Palermo-Übereinkommen und sein Einfluss auf das deutsche Strafrecht: Eine Untersuchung der UN-Konvention gegen grenzüberschreitende organisierte Kriminalität und ihrer Zusatzprotokolle*, Göttingen: V&R unipress, 2014, 317
- Salton, Daniel, 'Starving the Dark Markets: International Injunctions as a Means to Curb Small Arms and Light Weapons Trafficking Note' (2013) 46(1) *Connecticut Law Review* 369
- Schloenhardt, Andreas, and Ellen Bevan, 'To Ratify or Not to Ratify? Exploring the Barriers to Wider Ratification of the Trafficking in Persons Protocol' (2011) 9 *New Zealand Yearbook of International Law* 161
- Schloenhardt, Andreas, and Hamish MacDonald, 'Barriers to Ratification of the United Nations Protocol Against the Smuggling of Migrants' (2017) 7 *Asian Journal of International Law* 13
- UN General Assembly, *The International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, The Open-ended Working Group to Negotiate an International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, A/60/88 and Corr.2, annex, adopted by UN Doc A/RES/60/81 (8 December 2005).
- UN, *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, UN Doc A/CONF.192/15 (20 July 2001)
- UN General Assembly, *Interpretative notes for the official records (travaux préparatoires) of the negotiation 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*, Ad Hoc Committee on the Elaboration of a Convention against

Transnational Organized Crime, 12th Session, UN Doc A/55/383/Add.3 (21 March 2001)

UN General Assembly, *Resolution adopted by the General Assembly on 31 May 2001: 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*, UN Doc A/RES/55/255 (8. June 2001)

UN General Assembly, *Resolution adopted by the General Assembly on 9 December 1998: Transnational organized crime*, UN Doc A/RES/53/111 (20. January 1999)

UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *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: Analytical report of the Secretariat*, UN Doc CTOC/COP/2006/8 (16 August 2006)

UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *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: consolidated information received from States: Report of the Secretariat*, UN Doc CTOC/COP/2006/8/Rev.1 (12 August 2008)

UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its sixth session, held in Vienna from 15 to 19 October 2012*, UN Doc CTOC/COP/2012/15 (5 November 2012)

UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its ninth session, held in Vienna from 15 to 19 October 2018*, UN Doc CTOC/COP/2018/13 (1 November 2018)

UN, Working Group on Firearms, *Responsiveness of the Firearms Protocol and national legislation to new and emerging threats relating to the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition: Background paper prepared by the Secretariat*, UN Doc CTOC/COP/WG.6/2020/2 (14 January 2020)

UN Office on Drugs and Crime, *Comparative Analysis of Global Instruments on Firearms and other Conventional Arms: Synergies for Implementation*, Vienna: United Nations, 2016

UN Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, Vienna: United Nations, 2004

UN Office on Drugs and Crime, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the protocols thereto*, Vienna: United Nations, 2006

[s.n], 'The UN "Firearms Protocol": Addressing the trafficking problem' (2001) 7(6) *Strategic Comments*