

U.N. CONVENTION AGAINST TRANSNATIONAL ORGANIZED
CRIME (TREATY DOC. 108–16)

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Mr. LUGAR, from the Committee on Foreign Relations,
submitted the following

REPORT

[To accompany Treaty Doc. 108–16]

The Committee on Foreign Relations, to which was referred the U.N. Convention Against Transnational Organized Crime, together with two supplementary protocols: (1) The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and (2) the Protocol Against Smuggling of Migrants by Land, Sea and Air (Treaty Doc. 108–16) (hereinafter “Convention,” “Trafficking Protocol,” and “Smuggling Protocol”), signed at Palermo, Italy on December 13, 2000, having considered the same, reports favorably thereon and recommends that the Senate give its advice and consent to ratification thereof with three reservations and one declaration relating to the Convention, three reservations, one understanding, and one declaration relating to the Trafficking Protocol, and two reservations and one understanding relating to the Smuggling Protocol, as set forth in this report and the accompanying resolution of advice and consent to ratification.

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I. PURPOSE

The Convention and accompanying Protocols are the first multi-lateral treaties to address the phenomenon of transnational organized crime. The instruments require the parties to criminalize certain conduct and to cooperate on extradition and mutual legal assistance in relation to these crimes. The agreements would thus enhance the ability of the United States to render and receive assistance on a global basis in the common struggle to prevent, investigate, and prosecute transnational organized crime. The Trafficking Protocol aims to prevent and combat trafficking in persons, particularly women and children, to protect and assist the victims of such trafficking, and to promote cooperation among parties in meeting these objectives. The Smuggling Protocol is designed to prevent and combat the smuggling of migrants and to promote cooperation among states parties to that end, while protecting the rights of smuggled migrants.

II. BACKGROUND

The Convention, Trafficking Protocol, and Smuggling Protocol were adopted by the United Nations General Assembly on November 15, 2000, and were signed by the United States on December 13, 2000, at Palermo, Italy. The Convention, which entered into force on September 29, 2003, now has 107 parties. The Trafficking Protocol entered into force on December 25, 2003, and has 87 parties. The Smuggling Protocol entered into force on January 28, 2004, and has 78 parties.

III. SUMMARY OF KEY PROVISIONS OF THE CONVENTION AND PROTOCOLS

A detailed article-by-article discussion of the Convention and Protocols may be found in the Letter of Submittal from the Secretary of State to the President, which is reprinted in full in Treaty Document 108–16. A summary of the key provisions of the Convention and Protocols is set forth below.

The Convention requires parties to criminalize participation in an organized criminal group, money laundering, bribery of domestic public officials, and obstruction of justice in relation to offenses covered by the Convention, and to take measures to combat money laundering and bribery of public officials.

The Convention also provides a legal basis for strengthening international cooperation to combat transnational organized crime, including in the areas of extradition, mutual legal assistance, and confiscation of the proceeds and instrumentalities of crime. In the area of extradition, Article 16(3) of the Convention requires parties to deem offenses covered by the Convention to be included among the extraditable offenses in extradition treaties existing between the parties. These offenses include the specific conduct that the Convention requires parties to criminalize, as well as other crimes punishable by a maximum sentence of at least four years that are “transnational” and involve an “organized criminal group” as those terms are defined in the Convention. For the United States, the Convention will not provide an independent legal basis for extradition, which will continue to be based on U.S. domestic law and

applicable bilateral treaties. It will, however, effectively expand the scope of offenses covered under certain existing bilateral extradition treaties (those that specifically list the offenses for which extradition may be granted).

Article 18 of the Convention obligates parties to afford each other the widest measure of mutual legal assistance in investigations, prosecutions, and judicial proceedings in relation to the offenses covered by the Convention. Existing international agreements on mutual legal assistance between parties will not be affected by the Convention, as Article 18(7) provides that where such an agreement exists, the parties will apply that agreement. Where there is no such agreement in place between parties, however, the parties will make and receive requests for mutual assistance in transnational organized crime cases under the provisions of Article 18, paragraphs 9 through 29. The procedures in these paragraphs are similar to those contained in U.S. bilateral mutual legal assistance treaties, but contain broader grounds for refusal of such assistance.

The Committee notes that Articles 16 and 18 of the Convention on extradition and mutual legal assistance, as well as any provisions of the Trafficking and Smuggling Protocols implemented through these articles, are intended to operate in the same way as similar provisions contained in bilateral extradition and mutual legal assistance treaties. As with such provisions in bilateral treaties, these provisions are self-executing. They will be implemented by the United States in conjunction with applicable federal statutes. Additionally, the Executive Branch has indicated that they are not intended to create any private rights of action. The Committee notes that the lack of a private right of action does not affect the ability of persons whose extradition is sought to raise any available defenses in the context of the extradition proceeding.

The Trafficking Protocol provides, for the first time, a definition of “trafficking in persons” in an international treaty, and requires all parties to criminalize such conduct and to take certain measures to prevent and combat it. The Protocol also focuses on victim protection by requiring that victims are offered the possibility of obtaining compensation, and that parties facilitate and accept the return of their nationals and permanent residents who are trafficking victims. In addition, the Protocol calls on parties, in appropriate cases, to make available to trafficking victims certain protections and assistance, including protection of their privacy and physical safety, as well as provisions for their physical, psychological, and social recovery.

The Smuggling Protocol requires parties to criminalize: the smuggling of migrants; document fraud when committed for the purpose of enabling the smuggling of migrants; and, enabling a person to reside illegally in a State by means of document fraud or other illegal means; as well as participation as an accomplice in, aiding and abetting in, and attempts to commit such offenses. It also contains provisions designed to address the smuggling of migrants by sea, by requiring parties to cooperate to the fullest extent possible to prevent and suppress migrant smuggling by sea in accordance with international law and by establishing procedures for interdicting at sea vessels that are engaged in such smuggling.

These procedures are based on long-standing international law principles of flag-state jurisdiction on the high seas, universal jurisdiction over ships without nationality, and the rights of approach and visit. The Protocol contains several provisions on cooperation and prevention, including a requirement that parties, consistent with their domestic law, exchange information for the purpose of achieving the Protocol's objectives, such as known or suspected smuggling routes. Similar to the Trafficking Protocol, the Smuggling Protocol also obligates parties to facilitate and accept the return of smuggled migrants who are their nationals or permanent residents at the time of return.

Both the Trafficking Protocol and the Smuggling Protocol require parties to those instruments to apply all of the benefits and obligations of the Convention to the offenses established in the protocols, including those related to extradition, mutual legal assistance, and confiscation of the proceeds and instrumentalities of crime.

IV. IMPLEMENTING LEGISLATION

No implementing legislation is required for the Convention, Trafficking Protocol, or Smuggling Protocol. An existing body of federal and state laws will suffice to implement the obligations of the Convention and Protocols, although a few narrow reservations are needed, as explained below in section VI.

V. COMMITTEE ACTION

The Convention, and the Trafficking and Smuggling Protocols, were transmitted to the Senate for advice and consent to their ratification on February 23, 2004 (see Treaty Doc. 108–16). The Committee on Foreign Relations held a public hearing on these instruments on June 17, 2004 (S. Hrg. 108–721), at which it heard testimony from representatives of the Departments of State and Justice. On July 26, 2005, the Committee considered the Convention and Protocols and ordered them favorably reported by a voice vote, with the recommendation that the Senate give its advice and consent to ratification of the Convention and Protocols, subject to reservations, understandings, and declarations contained in the resolution of advice and consent to ratification.

VI. COMMITTEE RECOMMENDATIONS AND COMMENTS

The Committee on Foreign Relations believes that the Convention, Trafficking Protocol and Smuggling Protocol are in the interest of the United States and urges the Senate to act promptly to give advice and consent to ratification, subject to the reservations, understandings, and declarations contained in the resolution of advice and consent.

The Committee has included a number of reservations, understandings, and declarations in the resolution of advice and consent. Section two of the resolution contains three reservations and one declaration relative to the Convention. The first reservation relates to the federal system in the United States. Although U.S. federal law prohibits the conduct proscribed by the Convention, federal criminal law generally covers conduct involving interstate or foreign commerce or another important federal interest, while offenses

of a purely local character generally fall within the jurisdiction of the states. Not all U.S. states have criminalized all of the conduct proscribed by the Convention (for example, a few states have extremely limited conspiracy laws). The Executive Branch therefore has recommended that the United States reserve against these obligations in these narrow circumstances, and the Committee agrees with this recommendation.

The second reservation relates to the scope of the Convention. Article 15(1)(b) of the Convention requires each party to establish jurisdiction in respect of the listed offenses when committed in its territory or on board a vessel flying its flag or an aircraft registered under its laws. U.S. law does not expressly extend U.S. jurisdiction over these particular crimes when committed on board U.S. vessels and aircraft outside of U.S. territory, although in certain cases U.S. jurisdiction may exist on other jurisdictional bases. Because the United States cannot ensure its ability to exercise jurisdiction in all such cases, the Committee concurs with an Executive Branch recommendation that the United States enter a reservation limiting the obligation of the United States consistent with the reach of U.S. law.

The third reservation addresses dispute settlement. Article 35(2) of the Convention provides that disputes between parties regarding the interpretation or application of the Convention that are not settled through negotiation within a reasonable period may be referred by a party to arbitration or to the International Court of Justice if the parties are unable to agree on the organization of the arbitration. At the recommendation of the Executive Branch, the Committee has included a reservation exercising the right of the United States under article 35(3) of the Convention to opt out of this dispute settlement mechanism.

The declaration relative to the Convention relates to U.S. implementation of the Convention under existing U.S. law. The Executive Branch has recommended that the United States include an understanding to clarify that the United States intends to comply with the Convention based on existing law. The Committee has included such a statement in the resolution, formulated as a declaration in accordance with recent Committee practice.

Section three contains three reservations, one understanding, and one declaration relative to the Trafficking Protocol. At the recommendation of the Executive Branch, the Committee has included three reservations that mirror the reservations to the Convention, relating to offenses committed on board U.S. vessels and aircraft, the U.S. federal system, and dispute settlement. As with the Convention, the Executive Branch also recommended an understanding clarifying that the U.S. intends to comply with the Protocol based on existing U.S. law. Consistent with its approach to this issue in section two, the Committee has included a declaration on this issue. The understanding relative to the Trafficking Protocol, also included at the recommendation of the Executive Branch, contains the understanding of the United States regarding how it will implement the obligation to establish the offenses listed in the Trafficking Protocol as money laundering predicate offenses under U.S. law.

Section four contains two reservations and one understanding relative to the Smuggling Protocol. The first reservation, included at the recommendation of the Executive Branch, reserves in part against the obligation contained in Article 6(2)(a) of the Protocol to criminalize attempted possession of fraudulent travel or identity documents, as U.S. law does not criminalize this conduct in all cases. The second reservation is similar to those contained in sections two and three of the resolution relative to the Convention and the Trafficking Protocol, and exercises the right of the United States under article 20(3) of the Smuggling Protocol to opt out of the dispute settlement mechanism established in article 20(2) of the Protocol. The understanding relative to the Smuggling Protocol mirrors that included in section three of the resolution in relation to the Trafficking Protocol, and contains the U.S. understanding of how it will implement the obligation to establish the offenses listed in the Smuggling Protocol as money laundering predicate offenses under U.S. law.

VII. TEXT OF RESOLUTION OF ADVICE AND CONSENT TO RATIFICATION

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS

The Senate advises and consents to the ratification of the United Nations Convention Against Transnational Organized Crime (hereinafter in this resolution referred to as the “Convention”) and two supplementary protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter in this resolution referred to as the “Trafficking Protocol”) and the Protocol Against Smuggling of Migrants by Land, Sea and Air (hereinafter in this resolution referred to as the “Smuggling Protocol”), adopted by the United Nations General Assembly on November 15, 2000 and signed by the United States on December 13, 2000 at Palermo, Italy (T. Doc. 108–16), subject to the reservations, understandings, and declarations of sections 2, 3 and 4.

SECTION 2. RESERVATIONS AND DECLARATION RELATIVE TO THE CONVENTION

(a) RESERVATIONS.—The advice and consent of the Senate under section 1 is subject to the following reservations relative to the Convention, which shall be included in the United States instrument of ratification:

- (1) The United States of America reserves the right to assume obligations under the Convention in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to the conduct addressed in the Convention. U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, serves as the principal legal regime within the United States for combating organized crime, and is broadly effective for this purpose. Federal criminal law does not apply in the rare case where such criminal conduct does not so involve

interstate or foreign commerce, or another federal interest. There are a small number of conceivable situations involving such rare offenses of a purely local character where U.S. federal and state criminal law may not be entirely adequate to satisfy an obligation under the Convention. The United States of America therefore reserves to the obligations set forth in the Convention to the extent they address conduct which would fall within this narrow category of highly localized activity. This reservation does not affect in any respect the ability of the United States to provide international cooperation to other Parties as contemplated in the Convention.

(2) The United States of America reserves the right not to apply in part the obligation set forth in Article 15, paragraph 1(b) with respect to the offenses established in the Convention. The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. However, in a number of circumstances, U.S. law provides for jurisdiction over such offenses committed on board U.S.-flagged ships or aircraft registered under U.S. law. Accordingly, the United States will implement paragraph 1(b) to the extent provided for under its federal law.

(3) In accordance with Article 35, paragraph 3, the United States of America declares that it does not consider itself bound by the obligation set forth in Article 35, paragraph 2.

(b) **DECLARATION.**—The advice and consent of the Senate under section 1 is subject to the following declaration relative to the Convention:

The United States of America declares that, in view of its federalism reservation, current United States law, including the laws of the States of the United States, fulfills the obligations of the Convention for the United States. Accordingly, the United States of America does not intend to enact new legislation to fulfill its obligations under the Convention.

SECTION 3. RESERVATIONS, UNDERSTANDING, AND DECLARATION RELATIVE TO THE TRAFFICKING PROTOCOL

(a) **RESERVATIONS.**—The advice and consent of the Senate under section 1 is subject to the following reservations relative to the Trafficking Protocol, which shall be included in the United States instrument of ratification:

(1) The United States of America reserves the right not to apply in part the obligation set forth in Article 15, paragraph 1(b), of the United Nations Convention Against Transnational Organized Crime with respect to the offenses established in the Trafficking Protocol. The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. However, in a number of circumstances, U.S. law provides for jurisdiction over such offenses committed on board U.S.-flagged ships or aircraft registered under U.S. law. Accordingly, the United States will implement paragraph 1(b) of the Convention to the extent provided for under its federal law.

(2) The United States of America reserves the right to assume obligations under this Protocol in a manner consistent

with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to conduct addressed in the Protocol. U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, such as the Thirteenth Amendment's prohibition of "slavery" and "involuntary servitude," serves as the principal legal regime within the United States for combating the conduct addressed in this Protocol, and is broadly effective for this purpose. Federal criminal law does not apply in the rare case where such criminal conduct does not so involve interstate or foreign commerce, or otherwise implicate another federal interest, such as the Thirteenth Amendment. There are a small number of conceivable situations involving such rare offenses of a purely local character where U.S. federal and state criminal law may not be entirely adequate to satisfy an obligation under the Protocol. The United States of America therefore reserves to the obligations set forth in the Protocol to the extent they address conduct which would fall within this narrow category of highly localized activity. This reservation does not affect in any respect the ability of the United States to provide international cooperation to other Parties as contemplated in the Protocol.

(3) In accordance with Article 15, paragraph 3, the United States of America declares that it does not consider itself bound by the obligation set forth in Article 15, paragraph 2.

(b) UNDERSTANDING.—The advice and consent of the Senate under section 1 is subject to the following understanding relative to the Trafficking Protocol, which shall be included in the United States instrument of ratification:

The United States of America understands the obligation to establish the offenses in the Protocol as money laundering predicate offenses, in light of Article 6, paragraph 2(b) of the United Nations Convention Against Transnational Organized Crime, as requiring States Parties whose money laundering legislation sets forth a list of specific predicate offenses to include in such list a comprehensive range of offenses associated with trafficking in persons.

(c) DECLARATION.—The advice and consent of the Senate under section 1 is subject to the following declaration relative to the Trafficking Protocol:

The United States of America declares that, in view of its reservations, current United States law, including the laws of the States of the United States, fulfills the obligations of the Protocol for the United States. Accordingly, the United States of America does not intend to enact new legislation to fulfill its obligations under the Protocol.

SECTION 4. RESERVATIONS AND UNDERSTANDING RELATIVE TO THE SMUGGLING PROTOCOL

(a) RESERVATIONS.—The advice and consent of the Senate under section 1 is subject to the following reservations relative to the Smuggling Protocol, which shall be included in the United States instrument of ratification:

(1) The United States of America criminalizes most but not all forms of attempts to commit the offenses established in accordance with Article 6, paragraph 1 of this Protocol. With respect to the obligation under Article 6, Paragraph 2(a), the United States of America reserves the right to criminalize attempts to commit the conduct described in Article 6, paragraph 1(b), to the extent that under its laws such conduct relates to false or fraudulent passports and other specified identity documents, constitutes fraud or the making of a false statement, or constitutes attempted use of a false or fraudulent visa.

(2) In accordance with Article 20, paragraph 3, the United States of America declares that it does not consider itself bound by the obligation set forth in Article 20, paragraph 2.

(b) UNDERSTANDING.—The advice and consent of the Senate under section 1 is subject to the following understanding relative to the Smuggling Protocol, which shall be included in the United States instrument of ratification:

The United States of America understands the obligation to establish the offenses in the Protocol as money laundering predicate offenses, in light of Article 6, paragraph 2(b) of the United Nations Convention Against Transnational Organized Crime, as requiring States Parties whose money laundering legislation sets forth a list of specific predicate offenses to include in such list a comprehensive range of offenses associated with smuggling of migrants.