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Show me the Money, Part II
The Application of the Asset Forfeiture
Provisions of the U.S. Arms Export Control
Act and the RICO Act and Suggestions for the
Future

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Since the beginning of the Mexican Drug War in December 2006, more than 22,000 people have died as a result of it; many of these deaths have occurred along the U.S.-Mexico border.¹

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Additionally, over 100 of the victims have been U.S. citizens, including a State Department employee and his wife who were shot and killed on their way home from a children's party.² Recently, an American was shot and killed in front of his wife while jet skiing on Falcon Lake, a lake that borders the United States and Mexico.³ A Mexican detective assigned to investigate the murder was beheaded shortly thereafter.⁴ Since it is illegal to possess a small arm or light weapon in Mexico, it is suspected that the vast majority of these deaths were caused by small arms and light weapons that were illegally smuggled into Mexico from the United States.⁵

Trafficking in small arms and light weapons is a financially lucrative crime that is prevalent throughout the world. While the exact number and amount of illegal and illicit small arms and light weapons are difficult to measure,⁶ experts estimate that ten to

Immigration Review, Board of Immigration Appeals and an officer in the United States Army Reserves. Any opinions expressed in this Article are the author's own and do not, in any way, reflect the official position or views of the United States Department of Justice, the Executive Office for Immigration Review, the Board of Immigration Appeals, the Department of Defense, the Department of the Army, or the United States Army Reserve. The author would like to thank her family for their support and encouragement in this research project and the staff of the Oregon Review of International Law for their hard work.

¹ Ken Ellingwood, *Mexico Death Toll in Drug War Higher than Previously Reported*, L.A. TIMES (Apr. 14, 2010), available at <http://articles.latimes.com/2010/apr/14/world/la-fg-mexico-toll14-2010apr14>. See also Ben Conery and Jerry Seper, *Border Violence Threatens Americans*, WASH. TIMES (Apr. 1, 2010, 4:00 AM), <http://www.washingtontimes.com/news/2010/apr/01/violent-mexican-drug-gangs-pose-rising-risk-to-ame/>.

² Conery & Seper, *supra* note 1. See also Gwen Ifill, *Deaths of Americans Raise New Concerns Over Mexico's Drug Wars*, PBS NEWS HOUR (Mar. 15, 2010), available at http://www.pbs.org/newshour/bb/law/jan-june10/mexico_03-15.html.

³ Patrik Jonsson, *Mexican Pirates Shoot US Jet Skier Near Border on Falcon Lake, Texas*, CHRISTIAN SCI. MONITOR, (Oct. 1, 2010), available at <http://www.csmonitor.com/USA/2010/1001/Mexican-pirates-shoot-US-jet-skier-near-border-on-Falcon-Lake-Texas>.

⁴ Patrik Jonsson, *Falcon Lake 'Pirate' Murder: Is Beheading 'Message to the Americans'?*, CHRISTIAN SCI. MONITOR, (Oct. 13, 2010), available at <http://www.csmonitor.com/USA/2010/1013/Falcon-Lake-pirate-murder-Is-beheading-message-to-the-Americans>.

⁵ James C. McKinley, Jr., *U.S. is Arms Bazaar for Mexican Cartels*, N.Y. TIMES, (Feb. 25, 2009), available at <http://www.nytimes.com/2009/02/26/us/26borders.html?pagewanted=1>. See also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-781T, FIREARMS TRAFFICKING: U.S. EFFORTS TO COMBAT ARMS TRAFFICKING TO MEXICO FACE PLANNING AND COORDINATION CHALLENGES (2009), available at <http://gao.gov/new.items/d09781t.pdf> (providing that eighty-seven percent of firearms seized by Mexican authorities and traced in the last five years originated in the United States).

⁶ SMALL ARMS SURVEY 2005: WEAPONS AT WAR 114 (Eric G. Berman & Keith Krause eds., 2005), available at <http://www.smallarmssurvey.org/publications/by-type>

twenty percent of all small arms and light weapons are traded on the black and gray markets,⁷ generating over one billion dollars annually in illegal and illicit funds.⁸ The illegal and illicit funds generated from trafficking in small arms and light weapons, and the small arms and light weapons themselves, contribute to increased international crises, including violence along our own nation's border with Mexico, drug trafficking,⁹ terrorism,¹⁰ the attempted overthrow of legitimate governments,¹¹ and the deaths of thousands of innocent civilians.¹²

/yearbook/small-arms-survey-2005.html (providing that information central to the effort to tackle the small arms problem is lacking because few states can provide public data on customs seizures of illicit small arms and that customs seizures alone give a misleadingly small picture of the illicit trade).

⁷ An illegal black market transfer is defined as a transfer that is “[i]n clear violation of national and/or international laws and policies, and without official government knowledge, consent, or control,” SMALL ARMS SURVEY 2001: PROFILING THE PROBLEM 166 (2001), available at <http://www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2001.html>, whereas an illicit gray market transfer occurs covertly when “governments, government-sponsored brokers, or other entities . . . exploit loopholes or intentionally circumvent national and/or international law or policies,” *id.* (footnote omitted); See Matt Schroeder, *The Illicit Arms Trade*, FEDERATION OF AMERICAN SCIENTISTS, <http://www.fas.org/asmp/campaigns/smallarms/IssueBrief3ArmsTrafficking.html> (last visited Mar. 18, 2011).

⁸ SMALL ARMS SURVEY 2001: PROFILING THE PROBLEM *supra* note 7, at 167. See also Rachel Stohl, *The Tangled Web of Illicit Arms Trafficking*, CENTER FOR AMERICAN PROGRESS, (Oct. 12, 2004), available at <http://www.americanprogress.org/kf/terrorinshadows-stohl.pdf>.

⁹ JOHN M. MARTIN & ANNE T. ROMANO, MULTINATIONAL CRIME: TERRORISM, ESPIONAGE, DRUG & ARMS TRAFFICKING 69 (1992) (stating that the illegal trade pattern between the United States and Latin America is well established because the United States is rich in small arms, which are sold illegally to individuals in Latin American countries that ban the possession of small arms by individuals, while Latin America is rich in cocaine, which is sold illegally to meet the demands of the United States). See also News Release, Special Agent Elizabeth Jordan, Public Information Officer, U.S. Drug Enforcement Administration, Victor Infante Charged With Weapons Exportation and Methamphetamine Distribution Arrested in the Phillipines (Nov. 6, 2003), available at <http://www.justice.gov/dea/pubs/states/newsreel/2003/nyc110603.html>; Stohl, *supra* note 8 (stating that the FARC, a Colombian guerrilla organization, earns approximately \$500 million through its illegal drug operations, much of which is spent on weapons).

¹⁰ Schroeder, *supra* note 7 (providing that six terrorists armed only with several hundred-dollar assault rifles, pistols, and knives inflicted horrendous casualties in November 1997 in Luxor, Egypt, when they systematically slaughtered fifty-eight tourists).

¹¹ SMALL ARMS SURVEY 2005: WEAPONS AT WAR, *supra* note 6, at 161–63 (describing the FARC's attempt to overthrow the Colombian government through its involvement in trafficking in small arms and light weapons).

¹² *Id.* at 229–66. See also U.S. DEP'T OF STATE, BUREAU OF POLITICAL-MILITARY AFFAIRS, BACKGROUND PAPER: THE U.S. APPROACH TO COMBATING THE SPREAD OF SMALL ARMS (2001) (stating that, in places like Sierra Leone, Kosovo, and Colombia, thousands of

The U.S. government has taken significant political and legal steps to diminish trafficking in small arms and light weapons. For example, the U.S. government recently committed billions of dollars to law enforcement activities to stop the violence along the U.S.-Mexico border.¹³ The United States also implemented various laws and policies, including the Arms Export Control Act,¹⁴ the Foreign Military Sales Authorization program,¹⁵ the Conventional Arms Transfer policy,¹⁶ and the Racketeer Influenced and Corrupt Organizations (RICO) Act,¹⁷ which control the export and import of legal firearms. Despite these funds and laws, the violence continues to escalate along the border partly because the U.S. government has not sought to eliminate the financial profitability of trafficking in small arms and light weapons by adding the crime of trafficking in small arms and light weapons to the list of crimes defined as “racketeering activities” under the RICO Act. Defining trafficking in small arms and light weapons as a “racketeering activity” would significantly reduce its profitability—the main impetus for the crime. Curbing its profitability would subject any interest in, security of, claim against, or property or contractual right constituting, or derived from, any proceeds that the trafficker obtained, directly or indirectly, from their trafficking activity to criminal forfeiture.¹⁸

However, even by defining trafficking in small arms and light weapons as a “racketeering activity” within the RICO Act, the United States would be able to seize only the property of those individuals who traffic in small arms and light weapons that remain within the U.S. borders. Traffickers who are keen to this

innocent civilians have been killed and tens of thousands more displaced by ethnic and civil conflicts perpetuated in large part by easy access to illicit small arms and light weapons).

¹³ Catherine R. Dooley and Ariadne Medler, *A Farewell to Arms: Managing Cross-border Weapons Trafficking*, HEMISPHERE FOCUS (Ctr. for Strategic & Int'l Studies, Wash. D.C.), Sept. 9, 2008, available at http://csis.org/files/media/isis/pubs/hf_v16_02.pdf (providing that President George W. Bush signed into law a 2008 supplemental budget bill that included \$465 million for a project called the Merida Initiative, a multi-year billion dollar program aimed at combating drug trafficking and the violent crimes related to it).

¹⁴ 22 U.S.C. §§ 2751–99 (2010).

¹⁵ 22 U.S.C. §§ 2761–67 (2010).

¹⁶ THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, STATEMENT BY THE WHITE HOUSE PRESS SECRETARY ON CONVENTIONAL ARMS TRANSFER POLICY 1 (Feb. 17, 1995); see THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, FACT SHEET, CONVENTIONAL ARMS TRANSFER POLICY 1 (Feb. 17, 1995), available at <http://www.fas.org/asmp/resources/govern/whfacts.htm>.

¹⁷ 18 U.S.C. §§ 1961–68 (2010).

¹⁸ See generally 18 U.S.C. § 1963(a).

limitation could deposit or invest their illicit wealth in foreign countries, thereby avoiding the asset forfeiture laws associated with the RICO Act. Accordingly, even if trafficking in small arms and light weapons was a defined “racketeering activity” within the RICO Act, the RICO Act, by itself, would not effectively eliminate the financial impetus that entices many criminals to begin trafficking in small arms and light weapons.

While the Arms Export Control Act,¹⁹ the Foreign Military Sales Authorization program,²⁰ the Conventional Arms Transfer policy, and the RICO Act were significant steps in preventing small arms and light weapons from becoming commodities on the gray and black markets, this Article asserts that trafficking in small arms and light weapons should be included in the list of crimes defined as “racketeering activities” under the Racketeer Influenced and Corrupt Organizations Act. While this would be a significant step in eliminating the financial profitability of trafficking in small arms and light weapons, this article also asserts that the U.S. government should realize that international cooperation is needed in order to implement an international asset forfeiture policy. Such a policy would ensure the assets of traffickers could be seized on a global level. As such, it would more effectively eliminate the financial profitability of trafficking in small arms and light weapons.

After providing a brief background of trafficking in small arms and light weapons, this Article addresses the shortcomings of the application of the U.S. Arms Export Control Act and the RICO Act, the principle domestic laws governing transactions of small arms and light weapons, as they relate to asset forfeiture. Section III provides an overview of the asset forfeiture provisions of the RICO Act and will assert that trafficking in small arms and light weapons should be included in the list of crimes defined as “racketeering activities” under the RICO Act. Section IV explores how civil and criminal forfeiture provisions of the RICO Act apply when a trafficker’s assets are located abroad. Section V provides an overview of the United Nations Convention against Transnational Organized Crime and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, two current treaties that allows for international asset forfeiture against traffickers in small arms and light weapons. Finally, section VI concludes that these

¹⁹ 22 U.S.C. §§ 2751–99 (2010).

²⁰ 22 U.S.C. §§ 2761–67 (2010).

international treaties should be ratified so that the United States may attack the assets of international traffickers in small arms and weapons in order to effectively eliminate the financial profitability of such activities.

I BACKGROUND

As previously noted, the extreme profitability of trafficking in small arms and light weapons is the main impetus for the crime. With estimated profits of over one billion dollars annually,²¹ trafficking in small arms and light weapons is the second most profitable trafficking industry behind drug trafficking.²² However, unlike illegal drugs, the majority of small arms and light weapons are manufactured and traded on the legal market before they reach illicit or illegal markets.²³ A trade is legal if it complies with the national and international laws of the importing and exporting countries.²⁴ An illegal black market trade occurs when there is a “clear violation of national and/or international law and without official government consent or control;”²⁵ whereas, an illicit gray market trade, which accounts for a much larger share of the market than the illegal black market trade, occurs when “governments, their agents, or individuals exploit loopholes or intentionally circumvent national and/or international laws or policies.”²⁶

A small arm or light weapon can reach the illegal black or illicit gray markets in a number of ways. For example, legal small arms and light weapons can be stolen from their registered owners and then sold or traded on the black and gray markets.²⁷ They can be manufactured on the illegal black market.²⁸ Government-

²¹ SMALL ARMS SURVEY 2001: PROFILING THE PROBLEM, *supra* note 7, at ch. 5. See also Stohl, *supra* note 8.

²² Ian Peck, *Removing the Venom from the Snakehead: Japan's Newest Attempt to Control Chinese Human Smuggling*, 31 VAND. J. TRANSNAT'L L. 1041, 1044 (1998).

²³ Rachel Stohl, *Small Arms & Light Weapons, Fighting the Illicit Trafficking of Small Arms*, 25 SAIS REV. 59 (2005).

²⁴ Schroeder, *supra* note 7.

²⁵ SMALL ARMS SURVEY 2001: PROFILING THE PROBLEM, *supra* note 7, at ch. 5.

²⁶ *Id.*

²⁷ SMALL ARMS SURVEY 2004 43, available at <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2004/en/Small-Arms-Survey-2004-Chapter-02-EN.pdf> (providing that approximately 500,000 small arms enter the black market each year after they are stolen from registered owners in the United States).

²⁸ SMALL ARMS SURVEY 2005: WEAPONS AT WAR, *supra* note 6, at 161–62 (providing that the FARC has been able to create a comparatively large-scale, illicit small arms industry, producing submachine guns and light weapons such as mortars and hand

controlled small arms and light weapons, including stockpiles, that are not adequately managed and secured can be lost, stolen, or looted and then sold or traded on the black and gray markets.²⁹ Corrupt soldiers can illegally sell their government-issued weapons.³⁰ Corrupt government officials can facilitate the import or export of illegal or illicit small arms and light weapons between countries where it may be illegal to do so by providing licenses to individuals who would otherwise be ineligible to receive them.³¹ Finally, governments, companies, and individuals may violate national and/or international law by selling and/or exporting small arms and light weapons to and through individuals and countries who would otherwise be ineligible to receive them.³²

Once the small arms and light weapons reach the gray and/or black markets, they often fall into the hands of terrorists and other criminals who use these weapons to attack innocent civilians. For example, the Department of State concluded that approximately half of the 175 terrorist attacks committed in 2001 were committed with small arms or light weapons,³³ the large majority of which were likely obtained by the terrorists groups on the gray and black markets. Additionally, in 2002, West African gun smugglers tricked the Nicaraguan government into selling them 3000 assault rifles and 2.5 million rounds of ammunition which were then illegally routed to the United Self-Defense Forces of Colombia,³⁴ an international organization that has killed thousands of innocent civilians. Finally, although it is unknown

and mortar grenades; further providing that the FARC's production differs from much of the illicit, or so-called craft, production conducted elsewhere in the world due to its large volume as well as the sophistication of its products and the manufacturing methods).

²⁹ Stoll, *supra* note 23 (providing that, in 1997, Albanian government arsenals emptied as the country descended into chaos and more than half a million weapons flowed into the hands of Albanian citizens, many of which quickly spread to the Balkans). See also SMALL ARMS SURVEY 2004, *supra* note 27 (providing that approximately 1 million small arms are lost and stolen from government and military stocks each year).

³⁰ Inigo Gilmore, *Weapons Stolen by Israeli Soldiers Arm Palestinians*, DAILY TELEGRAPH (July 22, 2001, 12:01 AM) <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/1334906/Weapons-stolen-by-Israeli-soldiers-arm-Palestinians.html> (providing that Israeli soldiers sympathetic to the Palestinian cause sold their own weapons to Palestinians knowing that they would be used against Israelis).

³¹ Stohl, *supra* note 8, at 22.

³² MARTIN & ROMANO, *supra* note 9, at 92–93 (describing the Iran-Contra Affair).

³³ U.S. DEPT. OF STATE, PATTERNS OF GLOBAL TERRORISM 2001 (2002), available at <http://www.state.gov/documents/organization/10319.pdf>.

³⁴ Stohl, *supra* note 8, at 21.

how many innocent civilians are killed by illegal and illicit small arms and light weapons, a conservative estimate is that more than 100,000 innocent civilians are killed each year.³⁵

II STATUS QUO

A. The Arms Export Control Act

The United States is the lead exporter of small arms and light weapons.³⁶ In order to curb the proliferation of illegal and illicit small arms and light weapons, the United States has focused its efforts on controlling the legal sale and trade of small arms and light weapons in order to prevent them from becoming a part of the illicit and illegal markets. The Arms Export Control Act, the principal domestic law governing transactions of military equipment, regulates the sale of military small arms and light weapons, both commercially and between governments.³⁷ Among other measures, the Arms Export Control Act (1) requires all manufacturers, exports, and importers of small arms and light weapons to register and obtain licenses; (2) stipulates the purposes for which weapons may be exported; (3) requires the President to provide Congress with notice of sales of \$14 million or more; and (4) requires foreign governments or entities to obtain approval from the United States before selling or transferring the small arms and light weapons to a third party.³⁸

B. The Racketeer Influenced and Corrupt Organizations (RICO) Act

The United States also controls the legal sale and trade of small arms and light weapons through the RICO Act. For example, those who engage in the business of importing, manufacturing, or dealing in any firearm must be licensed.³⁹ Additionally, those licensed individuals are generally prohibited from selling small arms and light weapons to children, out-of-state residents, fugitives, felons, illegal aliens, drug addicts, individuals with mental defects, dishonorably discharged military members, individuals who have renounced their U.S. citizenship, or any individual subject to a restraining order or convicted of a crime of

³⁵ Schroeder, *supra* note 7.

³⁶ SMALL ARMS SURVEY 2005: WEAPONS AT WAR, *supra* note 6, at 105.

³⁷ 22 U.S.C. §§ 2751-99 (2010).

³⁸ 22 U.S.C. § 2278 (2010).

³⁹ 18 U.S.C. § 922(a) (2010).

domestic violence.⁴⁰ It further prohibits licensed individuals from shipping or transporting any firearm or ammunition.⁴¹ Licensed importers, manufacturers, and dealers in firearms are in large part prohibited from selling machine guns, short-barreled shotguns, or short-barreled rifles, and armor-piercing firearms and ammunition.⁴²

Even with the implementation of the Arms Export Control Act and the RICO Act, the United States is still a major source of gray and black market arms,⁴³ most likely because individuals violate the aforementioned law. While there are penalties for individuals who violate these laws⁴⁴ by allowing small arms and light weapons to reach the gray and black markets, they are not severe enough to prevent people from selling and trading weapons on the gray and black markets, especially in relation to their asset forfeiture provisions. In that regard, one of the RICO penalties available for prosecutors to charge, prosecute, and convict traffickers in small arms and light weapons is an asset forfeiture provision.⁴⁵ This provision allows the government to seize any firearm or weapon traded illicitly or illegally through civil forfeiture.⁴⁶ In particular, it provides that any firearm or ammunition involved in, used in, or intended for use in a violation of the RICO Act is subject to seizure and forfeiture.⁴⁷

III

ASSET FORFEITURE PROVISIONS OF THE RACKETEER INFLUENCED AND

⁴⁰ 18 U.S.C. § 922(b-d) (2010).

⁴¹ 18 U.S.C. § 922(g) (2010).

⁴² 18 U.S.C. § 922(b) (2010).

⁴³ Lora Lumpe, *Illicit Arms Market Sustains Global Conflict*, 50 F.A.S. PUB. INT. REP 3, July/Aug. 1997.

⁴⁴ 18 U.S.C. § 924 (2011).

⁴⁵ 18 U.S.C. § 924(d) (2011). (The asset forfeiture provision provides the following: "Any firearm or ammunition involved in or used or intended to be used in any . . . violation of the provisions of this chapter . . . or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States . . . shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 . . . relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code . . . shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter . . .").

⁴⁶ *United States v. One Lot Eighteen Firearms*, 325 F. Supp. 1326 (1st Cir. 1971); *United States v. One Assortment of 93 Firearms*, 463 F. Supp. 365 (4th Cir. 1978); *United States v. One Assortment of 12 Rifles*, 313 F. Supp. 641 (5th Cir. 1970); *United States v. 1,922 Assortment Firearms*, 330 F. Supp. 635 (8th Cir. 1971); *United States v. 86 Firearms*, 623 F.2d 643 (10th Cir. 1980) (all cases either stating or holding that forfeiture proceedings pursuant to 18 U.S.C. § 924(d) are civil in nature).

⁴⁷ 18 U.S.C. § 924 (d) (2011).

CORRUPT ORGANIZATIONS ACT

Unlike other trafficking crimes, such as trafficking in persons,⁴⁸ there is no asset forfeiture provision regarding trafficking in small arms and light weapons that allows the government to seize all of a trafficker's assets, including any interest in real and personal property, derived from the crime of trafficking in small arms and light weapons through civil and criminal forfeiture. Furthermore, unlike the crime of trafficking in persons, the crime of trafficking in small arms and light weapons has not been added to the list of crimes defined as "racketeering activities" under the RICO Act.⁴⁹ Amending the definition of a "racketeering activity" to include activities related to trafficking in small arms and light weapons would significantly decrease the financial profitability of the crime by allowing prosecutors to seize the trafficker's assets. For example, current criminal forfeiture provisions under the RICO Act subject any interest in, security of, claim against, or property or contractual right constituting, or derived from, any proceeds which the trafficker obtained, directly or indirectly, from their trafficking activity to criminal forfeiture.⁵⁰ Property subject to criminal forfeiture includes: (1) real property, including things growing on, affixed to, and found in land, and (2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.⁵¹ All rights, title, and interest in

⁴⁸ Pub. L. No. 106-386, § 1594, 114 Stat. 1464, 1489. The asset forfeiture provision of the Trafficking Victims Protection Act provides the following: . . .

. . . (b) The court, in imposing sentence on any person convicted of a violation of this chapter, shall order, in addition to any other sentence imposed and irrespective of any provision of State law, that such person shall forfeit to the United States—

(1) such person's interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of such violation; and

(2) any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation.

(c)(1) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(A) Any property, real or personal, used or intended to be used to commit or to facilitate the commission of any violation of this chapter.

(B) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.

(2) The provisions of chapter 46 of this title relating to civil forfeitures shall extend to any seizure or civil forfeiture under this subsection.

⁴⁹ 18 U.S.C. § 1961(1) (2011).

⁵⁰ 18 U.S.C. § 1963(a) (2011).

⁵¹ 18 U.S.C. § 1963(b) (2011).

property subject to criminal forfeiture vests at the time of the commission of the criminal racketeering act.⁵²

IV

THE SEIZING OF ASSETS LOCATED OUTSIDE OF THE UNITED STATES

Adding the crime of trafficking in small arms and light weapons to the list of crimes defined as “racketeering activities” under the RICO Act would not limit the United States’ ability to seize a trafficker’s assets located outside the United States. However, the manner in which the U.S. government could seek to seize a trafficker’s assets would depend upon whether the government initiates a criminal or civil forfeiture action. Regardless of which forfeiture action the U.S. government initiates, the cooperation of foreign states would be required in order to successfully enforce any asset forfeiture order and seize assets located outside the United States. As such, bilateral agreements or international treaties would generally be necessary in order to seize assets located outside the United States and eliminate the financial profitability of trafficking in small arms and light weapons.

A. Criminal Forfeiture Action

The current asset forfeiture provision contained in 18 U.S.C. § 924 does not provide for a criminal asset forfeiture action; however, adding the crime of trafficking in small arms and light weapons to the list of crimes defined as “racketeering activities” under the RICO Act could provide for a criminal forfeiture. Criminal forfeiture is an *in personam* action. As such, the court must obtain jurisdiction over the defendant. If the court is able to gain jurisdiction over the defendant and the defendant is convicted, the forfeiture provision of the act causes the defendant to lose his or her interest in the property, not the actual physical property.⁵³ A convicted trafficker’s assets may automatically be included in the criminal forfeiture order, regardless of where those assets are located.⁵⁴ As a practical matter, however, foreign countries are generally reluctant to enforce a criminal forfeiture provision against an individual criminally convicted in a U.S. court absent provisions allowing for such enforcement contained in

⁵² See 18 U.S.C. § 1963(c) (2010).

⁵³ See *United States v. Gilbert*, 244 F.3d 888, 919–20 (11th Cir. 2001), (*superseded by rule on other grounds*).

⁵⁴ 18 U.S.C. §§ 982, 1963(j) (2011); 21 U.S.C. § 853(1) (2011).

their domestic law or a bilateral agreement or international treaty between the two states.⁵⁵

B. Civil Forfeiture Action

18 U.S.C.S. § 924 provides for a civil forfeiture action, but only insofar as it relates to the illegal or illicit weapon or firearm. It does not allow the U.S. government to seize any other items belonging to the trafficker. Civil forfeiture is an *in rem* action, whereby the forfeiture action initiated by the government is against the trafficker's property rather than the trafficker himself. Accordingly, it is only necessary for the court to gain jurisdiction over the property in question. Historically, the property had to be within the court's jurisdiction. However, the U.S. Congress recently amended the legislation related to civil forfeiture so that the government may bring a civil asset forfeiture action in a U.S. district court regardless of where the assets are located.⁵⁶ A U.S. court's jurisdiction over international property is a legal fiction without the cooperation of the foreign country where the property is located. If the foreign country does not agree to enforce a U.S. district court's civil forfeiture order, the U.S. government would be unable to seize the property.⁵⁷

V

CURRENT APPLICABLE INTERNATIONAL LAW

A. The United Nations Convention Against Transnational Organized Crime

The United Nations General Assembly adopted the United Nations Convention against Transnational Organized Crime (the "Convention") on November 15, 2000, and it entered into force on September 29, 2003.⁵⁸ It is a treaty that imposes legally binding obligations on those nations that ratify or accede to it. The United States has signed and ratified the Convention against Transnational Organized Crime.

⁵⁵ William J. Snider, *Developments in Criminal Law and Criminal Justice: International Cooperation in the Forfeiture of Illegal Drug Proceeds*, 6 CRIM. L.F. 377, 381 (1995).

⁵⁶ 28 U.S.C. § 1355(b)(2) (2011).

⁵⁷ See *U.S. v. Meza*, 856 F. Supp. 759, 763 (E.D.N.Y. 1994), *aff'd*, 63 F.3d 148 (2d. Cir. 1995).

⁵⁸ United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, art. 17 U.N. Doc. A/RES/55/25 [hereinafter Organized Crime Convention]. Currently, there are 147 signatories to the Convention and 158 parties.

The Convention against Transnational Organized Crime does not specifically define “trafficking in small arms and light weapons” as a transnational organized crime. The offenses included within the Convention are defined broadly. They include the following: (1) a serious crime for a purpose relating to the benefit and involving an act undertaken by one of the participants in furtherance of or involving in organized criminal group, (2) the illicit laundering of the proceeds of crime, (3) official corruption, (4) the obstruction of justice, and (5) a “serious crime” where the offense is transnational in nature and involves an organized criminal group.⁵⁹ A “serious crime” is defined by the Convention as “conduct constituting an [offense] punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.”⁶⁰ Although the Convention does not define “trafficking in small arms and light weapons” as a transnational organized crime, its usefulness with respect to trafficking in small arms and light weapons relates specifically to asset forfeiture.

Article 13 describes the obligations on the state party sending a request regarding the “confiscation”⁶¹ of the proceeds of crime, property, equipment or other instrumentalities related to trafficking in small arms and light weapons. Article 13 describes the obligations of the state party receiving a confiscation request.⁶² Pursuant to Article 13, the sending state party must provide with its request a description of the property to be forfeited and a statement of the facts relied upon for making the request.⁶³ In certain cases, the sending state must also provide a legal copy of an order of confiscation upon which the request is based and a description of the action requested.⁶⁴ Under Article 13, the receiving state party must submit the request to the appropriate authority with a view to affecting the request.⁶⁵ The receiving state party must further attempt to carry out the sending state party’s request by taking “measures to identify, trace, and freeze or seize proceeds of crime, property, equipment

⁵⁹ *Id.* arts. 3, 5, 6, 8, 23.

⁶⁰ *Id.* art. 2(b).

⁶¹ *Id.* art. 2(g). The Convention describes what is commonly referred to in the United States as asset forfeiture as “confiscation.” The Convention defines “confiscation” as the “permanent deprivation of property by order of a court or other competent authority.”

⁶² *Id.* art. 13.

⁶³ *Id.* art. 13, para 3(a).

⁶⁴ *Id.* art. 13, para 3(b–c).

⁶⁵ *Id.* art. 13, para 1.

or other instrumentalities” related to trafficking in small arms and light weapons.⁶⁶

Article 14 describes the obligations on the sending and receiving state parties with respect to the disposal of confiscated proceeds of crime or property related to trafficking in small arms and light weapons.⁶⁷ Ultimate authority over the proceeds of crime or property confiscated by a state party lies with the domestic law of the confiscating state.⁶⁸ However, the Convention against Transnational Organized Crime requires all state parties, if possible, to give priority consideration to returning the proceeds to the requesting state for the purpose of compensating the victim(s) or returning the property to its original owner.⁶⁹ State parties are directed to consider donating the proceeds to intergovernmental bodies that specialize in the combating organized crime or to share proceeds with other state parties.⁷⁰

B. Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts, and Components and Ammunition

The United Nations Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (the “Protocol”), was implemented as a supplement to the United Nations Convention Against Transnational Organized Crime. The United Nations General Assembly adopted it on May 31, 2001.⁷¹ The Protocol also imposes legally binding obligations on those nations that ratify or accede to it. The United States is not a signatory to the Protocol, nor has it ratified it.

Article 1 of the Protocol, articulates the relation between the Protocol and the Convention against Transnational Organized Crime.⁷² Recognizing that, as of the date of the adoption of the Protocol some member states had not criminalized the act of trafficking in small arms and light weapons or had not

⁶⁶ *Id.* art. 13 para 2.

⁶⁷ *Id.* art. 14.

⁶⁸ *Id.* art. 14, para 1.

⁶⁹ *Id.* art. 14, para 2.

⁷⁰ *Id.* art. 14, para 3.

⁷¹ United Nations Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, G.A. Res 55/255, at art. 18, U.N. Doc. A/RES/55/255 (June 8, 2001). Currently, there are fifty-two signatories to the Protocol and seventy-seven parties.

⁷² *Id.* art. 1. Relation with the United Nations Convention against Transnational Organized Crime.

implemented a punishment so severe that it would rise to the level of a “serious crime” as defined in the Convention against Transnational Organized Crime. The Protocol specifically provides that the offenses established in accordance with the Convention against Transnational Organized Crime include the offenses of illicit manufacturing of firearms, their parts and components and ammunition; illicit trafficking in firearms, their parts and components and ammunition; and falsifying or illicitly obliterating, removing or altering the marking(s) on firearms required by the Protocol.⁷³ The Protocol defines “illicit trafficking [in firearms]” as:

the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorize it in accordance with the terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol.⁷⁴

It further defines “illicit manufacturing” as:

The manufacturing or assembly of firearms, their parts and components or ammunition:

(i) From parts and components illicitly trafficked;

(ii) Without a licence or authorization from a competent authority of the State Party where the manufacture or assembly takes place; or

(iii) Without marking the firearms at the time of manufacture, in accordance with . . . [the] Protocol.⁷⁵

The Protocol also provides that the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition must involve an offense that is transnational in nature and involves an organized crime group.⁷⁶ It does not apply to state-to-state transactions nor to cases that would prejudice a state’s right to act in the interest of national security.⁷⁷

The Protocol does not contain an asset forfeiture provision. However, it specifically provides that the provisions of the Convention against Transnational Organized Crime apply to the

⁷³ *Id.* art. 5.

⁷⁴ *Id.* art. 3(e).

⁷⁵ *Id.* art. 3(d).

⁷⁶ *Id.* art. 4, para 1.

⁷⁷ *Id.* art. 4, para 2.

Protocol.⁷⁸ As such, the asset forfeiture provisions contained in the Convention against Transnational Organized Crime apply directly to the crime of “trafficking in small arms and light weapons.”⁷⁹

VI

THE USE OF MUTUAL LEGAL ASSISTANCE TREATIES AND OTHER TYPES OF BILATERAL AGREEMENTS

Although the United States has failed to ratify the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, it has entered into numerous mutual legal assistance treaties. Mutual legal assistance treaties are essentially bilateral treaties that impose legally binding obligations on the two nations that enter into them.⁸⁰ Mutual legal assistance treaties and other types of bilateral agreements would allow the United States, in part, to request the seizure of a trafficker’s assets in a foreign country even if the United States fails to ratify the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition. The development of mutual legal assistance treaties and other types of bilateral agreements between the United States and other countries has increased rapidly in the past few decades.⁸¹ A number of bilateral

⁷⁸ *Id.* art. 1, para 2.

⁷⁹ Organized Crime Convention, *supra*, note 58, arts. 2(g), 13, 14.

⁸⁰ Jorene Soto, *Show Me the Money: The Application of the Asset Forfeiture Provisions of the Trafficking Victims Protection Act and Suggestions for the Future*, 23 PENN ST. INT’L L. REV. 365, 379 (2004).

⁸¹ See William J. Snider, *supra*, note 55, at n.9. See also, Treaty Between the United States of America and the Republic of Argentina on Mutual Legal Assistance in Criminal Matters with Attachments, Dec. 4, 1990, U.S.-Arg., S. TREATY DOC. NO. 102-18 (*entered into force* Feb. 9, 1993); Treaty Between the United States of America and the Commonwealth of the Bahamas on Mutual Assistance in Criminal Matters, June 12, Aug. 18, 1987, U.S.-Bah., S. TREATY DOC. NO. 100-17 (*entered into force* July 18, 1990); Treaty Between the United States of America and Canada on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.-Can., S. TREATY DOC. NO. 100-14 (*entered into force* Jan. 24, 1990); Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, Dec. 19, 1987, U.S.-Mex., S. TREATY DOC. NO. 100-13 (*entered into force* May 3, 1991); Agreement Between the Kingdom of Morocco and the United States of America Regarding Joint Cooperation in Fighting Against International Terrorism, Organized Crime, and the Illicit Production, Trafficking, and Abuse of Narcotics, Oct. 17, 1983, U.S.-Morocco (*entered into force* June 23, 1983); Treaty Between the United States of America and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters, June 12, 1981, U.S.-Neth., T.I.A.S. No. 10734 (*entered into force* Sept. 15, 1983); Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019 (*entered into*

agreements between the United States and other countries specifically address the issue of asset forfeiture; however, it is generally addressed only with the relation to drug trafficking.⁸² There is, however, at least one mutual legal assistance treaty that briefly addresses the issue of asset forfeiture with relation to trafficking in small arms and light weapons—the United States’ mutual legal assistance treaty with Brazil.⁸³ Such a mutual legal assistance treaty could be used as a basis to form the framework for future mutual legal assistance treaties with other countries.

Article 1 of the mutual legal assistance treaty between the United States and Brazil specifically provides that, “[T]he Parties recognize the particular importance of combating serious criminal activities, including money laundering and the illicit trafficking in firearms, ammunition, and explosives and that the Parties shall provide each other with assistance . . . to such matters.”⁸⁴ Article 4 describes the obligations of the state party sending a request, and Article five describes the obligations of the state party receiving the request.⁸⁵ Most importantly with regard to the issue of asset forfeiture, Article 16 provides, “If the Central Authority of one Party becomes aware of proceeds or instrumentalities of offenses that are located in the territory of the other Party and may be forfeitable or otherwise subject to seizure under the laws of that Party, it may so inform the Central

force Jan. 23, 1977); Treaty Between the United States of America and the Republic of Turkey on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, U.S.-Turk., 32 U.S.T. 3111 (*entered into force* Jan. 1, 1981); Treaty Between the United States of America and the Oriental Republic of Uruguay on Mutual Legal Assistance in Criminal Matters, May 6, 1991, U.S.-Uru., S. TREATY DOC. NO. 102-19 (*entered into force* Apr. 15, 1994).

⁸² See generally, Memorandum of Understanding Between the United States and Columbia Concerning Cooperation in the Seizure and Forfeiture of Property and Proceeds of Illicit Trafficking in Narcotic Drugs, July 24, 1990, U.S.-Colom., T.I.A.S. No. 12417; Agreement on Cooperation in the Control of Illicit Traffic in Narcotic Drugs, Nov. 5, 10, 1971, U.S.-Ecuador, 22 U.S.T. 2109 (*entered into force* Nov. 10, 1971); Agreement Between the United States and the United Kingdom Concerning the Investigation of Drug Trafficking and Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, Feb. 9, 1988, U.S.-U.K., T.I.A.S. No. 11649; Agreement on Investigation of Drug Trafficking Offences and Seizure of Proceeds, Feb. 9, 1988 (as amended Jan. 6, 1994), (U.S.-U.K., T.I.A.S. No. 11649 (*entered into force* Apr. 11, 1989); Agreement on the Transfer of Forfeited Assets Connected to Drug Trafficking, May 19–22, 1995, U.S.-Mex. (*entered into force* May 22, 1995).

⁸³ Treaty Between the United States of America and the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters, Oct. 14, 1997, U.S.-Brazil, S. TREATY DOC. NO. 105-42.

⁸⁴ *Id.* art. 1.

⁸⁵ *Id.* arts. 4, 5.

Authority of that Party.”⁸⁶ The remainder of Article 16 requires the Parties to assist each other in proceedings relating to asset forfeiture.⁸⁷ However, the ability to seize assets under the forfeiture provisions provided at Article 16 appears to be limited to the extent permitted by the domestic law of the assisting state.⁸⁸ Hence, even if Brazil’s asset forfeiture provisions are broad-based in relation to their approach to the crime of trafficking in small arms and light weapons, it appears that the United States would only assist Brazil in seizing only the illicit or illegal weapon per the forfeiture provision provided at 18 U.S.C. § 924, rather than any interest in real or personal property related to the illegal trafficking in small arms and light weapons. As such, in the future, more expansive mutual legal assistance treaties with respect to the issue of asset forfeiture would be needed to effectuate the international forfeiture of all proceeds related to trafficking in small arms and light weapons.

CONCLUSION

Trafficking in small arms and light weapons is a highly profitable crime. In order to take the profit out of trafficking in small arms and light weapons, the United States must have an effective and successful asset forfeiture policy against traffickers in small arms and light weapons. The current asset forfeiture provision contained in 18 U.S.C. § 924, by itself, is inadequate because it only allows the United States to seize the weapon or small arm at issue. A significant first step in abolishing the financial profitability of trafficking in small arms and light weapons would be to add the crime of trafficking in small arms and light weapons to the RICO Act. However, adding the crime of trafficking in small arms and light weapons to the RICO Act would still be insufficient because traffickers in small arms and light weapons would still be able to evade domestic forfeiture laws by placing their assets and property outside of the United States. In order to have an effective asset forfeiture policy that is fully able to take the financial incentive out of trafficking in small arms and light weapons, the United States needs the international cooperation of other countries. As such, the United States should ratify the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and

⁸⁶ *Id.* art. 16.

⁸⁷ *Id.*

⁸⁸ *Id.*

Ammunition as quickly as possible and pursue bilateral and multilateral treaties with those countries who have not ratified the Convention Against Transnational Organized Crime and the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.

