

**UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL
ORGANIZED CRIME
(NEW YORK, 15 NOVEMBER 2000)
[2000] ATNIF 16**

Documents tabled on 2 December 2003

National Interest Analysis

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NATIONAL INTEREST ANALYSIS: CATEGORY B TREATY

SUMMARY PAGE

United Nations Convention Against Transnational Organized Crime (New York, 15 November 2000) [2000] ATNIF 16

Date of Tabling of Proposed Treaty action

1. 2 December 2003.

Nature and Timing of Proposed Treaty Action

2. The proposed binding treaty action is the ratification of the United Nations Convention Against Transnational Organised Crime (the TOC Convention).
3. The TOC Convention was adopted by the General Assembly of the United Nations on 15 November 2000. The TOC Convention entered into force generally on 29 September 2003 following the ratification of the Convention by 40 States.
4. Australia signed the TOC on 13 December 2000. The TOC Convention would enter into force for Australia thirty days after the date on which Australia's instrument of ratification is deposited with the Secretary-General of the United Nations (Article 38(2)).

Overview and National Interest Summary

5. The TOC Convention provides a global approach to preventing and combating transnational organised crime. The purpose of the Convention is to criminalise offences committed by organised criminal groups, to combat money laundering, and to facilitate international cooperation in the fight against transnational organised crime.
6. Australia already has extensive domestic policy and legislation designed to combat transnational organised crime. Ratifying the Convention will increase the effectiveness of domestic measures by providing a mechanism for cooperation with a wide range of other countries in preventing, detecting and prosecuting transnational crimes. It will also permit Australia to participate in the Conference of Parties, the first of which is likely to be held in mid 2004.

Reasons for Australia to Take the Proposed Treaty Action

7. The globalisation of economic systems, and developments in transportation and communication technologies have created significant new opportunities for organised crime. In this environment, transnational organised crime threatens the security and prosperity of all countries, including Australia. Effective responses require resolute domestic action, backed up by coordinated international cooperation so that there are no 'safe havens' for offenders or the proceeds of crime.

8. The TOC Convention encourages States to adopt comprehensive measures to combat transnational organised crime. It provides a standardised approach to criminalisation and ensures States Parties have systems in place to facilitate law enforcement cooperation. Ratification of the TOC Convention will therefore strengthen Australia's law enforcement cooperation with other countries.

9. Ratification of the TOC Convention will also support Australia's work as co-chair of the Regional Ministerial Conferences on People Smuggling, Trafficking in Persons and Related Transnational Crime. As co-chair of these conferences with Indonesia, the Australian Government has taken an active role in promoting regional cooperation to break down the criminal networks responsible for transnational crime. Australia and Indonesia issued co-chair statements after both Regional Ministerial Conferences encouraging states to consider ratifying the TOC and its People Smuggling and Trafficking in Persons Protocols.

10. In addition, some of the matters dealt with in the TOC Convention complement and are compatible with measures that are already being taken in other international fora, such as the Financial Action Task Force on Money Laundering of the Organisation for Economic Cooperation and Development.

11. Failure to ratify the TOC Convention may weaken Australia's standing in international and regional fora designed to encourage international cooperation against transnational crime.

Obligations

Criminalisation

12. The TOC Convention requires States Parties to criminalise four types of conduct (Convention offences):

(i) participation in an organised criminal group (Article 5) and organising, directing, aiding, abetting, facilitating or counselling the commission of a serious crime involving an organized criminal group (Article 5(1)(b));

(ii) laundering of proceeds of crime (Article 6);

(iii) corruption in the public sector (Article 8); and,

(iv) obstruction of justice (Article 23).

Procedural elements to ensure effective criminalisation

Jurisdiction

13. Under Article 15 Australia would be required to take the necessary measures to establish jurisdiction over Convention offences where they are committed either on Australian territory, or on board Australian-flagged vessels, or on an aircraft that is registered under Australian laws at the time the offence is committed.

14. Under Article 10, Australia would be required to establish the criminal or civil liability of legal persons for participation in serious crimes involving an organised criminal group and for Convention offences. Australia would be required also to establish effective and proportionate criminal and non-criminal sanctions for legal persons held liable for such participation.

Prosecution, adjudication and sanctions

15. Under Article 11 of the TOC Convention Australia would be required to ensure that Convention offences attract adequate sanctions having regard to the gravity of each offence, and ensure that any discretionary powers are exercised to maximise effectiveness for law enforcement and deterrence. Australia would also be required to take appropriate measures to ensure the presence of defendants at criminal proceedings.

16. Under Article 11(5), States Parties are requested to establish a long statute of limitations period where appropriate, in which to commence proceedings for any offence covered by the Convention and a longer period where the alleged offender has evaded the administration of justice.

Protection of Witnesses and Victims

17. The TOC Convention recognises the importance of alleviating the impact of transnational organised crime on vulnerable individuals and groups. In particular, Australia would be required under Articles 24 and 25 to:

- provide effective protection for witnesses, within available means,
- consider relocation agreements,
- assist, within available means, with procedures for victims to claim compensation and restitution (for example, provisions allowing victims to sue offenders and other statutory or common law torts for civil damages, allowing criminal courts to award criminal damages, or dedicated funds for victims), and
- provide opportunities for victims to present views and concerns at appropriate stages of criminal proceedings, subject to domestic law.

18. Under Article 26, Australia would be required to take appropriate measures to encourage persons who participate or who have participated in organised criminal groups to supply information for investigative and evidentiary purposes, and to provide assistance to deprive organised criminal groups of their resources or of the proceeds of crime.

Prevention

19. The TOC Convention also calls on States Parties to adopt certain measures to prevent various forms of transnational organised crime. The TOC Convention is designed also to ensure that countries have strong confiscation regimes that provide for the identification, freezing, seizure and confiscation of illicitly acquired funds and property.

Measures to combat money laundering and proceeds of crime

20. Australia would be required to take measures to combat money laundering (the concealment or disguise of the illegal origin of proceeds of crime). In particular, Article 7 of the TOC Convention would require Australia to:

- establish a regulatory and supervisory regime for banks and non-bank financial institutions, emphasising requirements of customer identification, record keeping and the reporting of suspicious transactions; and,
- ensure that administrative, regulatory, law enforcement and other authorities have the capacity to cooperate and exchange information at both national and international levels.

21. Under Article 12 of the TOC Convention, Australia would be required to take measures to confiscate property and equipment used in or destined for use in offences covered by the TOC Convention and, to confiscate the proceeds of crime, or property the value of which corresponds to that of such proceeds, derived from such offences. Australia would be required also to take measures to enable the identification of, tracing of, freezing or seizing the proceeds of crime, property or equipment covered by the TOC Convention, including empowering courts or other competent authorities to order the production of bank, financial or commercial records (Article 12(6)). Article 12(8) of the TOC Convention provides that the provisions on confiscation and seizure are not to prejudice the rights of *bona fide* third parties.

Measures against Public Sector Corruption

22. Under Articles 8 and 9 of the TOC Convention, Australia would be required to criminalise corruption (defined in Article 8(1)(a) and (b) of the TOC Convention) and to take legislative, administrative and other measures to prevent, detect and punish the corruption of public officials.

Investigations

23. Where permitted by domestic law, Australia would be required to take steps to allow for the use of controlled delivery and where appropriate, other investigative techniques such as surveillance and undercover operations (Article 20).

International cooperation in combating transnational organised crime

Cooperation in the confiscation and disposal of the proceeds of crime

24. Under Article 13, Australia would be placed under an obligation to cooperate with other State Parties for the purposes of confiscation of the proceeds of crime, property and equipment referred to in Article 12 of the Convention. Article 13 also sets out the procedure to govern requests for assistance.

25. Article 14 of the TOC Convention requires State Parties to give priority to requests from other States Parties for the return of confiscated assets for use as compensation to crime victims or restoration to legitimate owners to the extent permitted by domestic law.

Extradition

26. Article 16(3) provides that all Convention offences shall be deemed to be included as an extraditable offence in any extradition treaty existing between the States Parties. The TOC Convention also requires States Parties that do not make extradition conditional on the existence of a treaty to recognise Convention offences as extraditable offences between themselves (Article 16(6)). Article 16(7) provides also that extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including the grounds upon which the requested State Party may refuse extradition.

27. Article 16(10) requires a State Party that denies an extradition request on the ground that the fugitive is its national shall, at the request of the State Party seeking extradition, submit the case for domestic prosecution (Article 16(10)).

28. Article 16(14) provides also that nothing in the TOC Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any of these reasons.

29. Article 16(17) provides that States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or enhance the effectiveness of extradition.

Mutual assistance in criminal matters

30. Under Article 18 of the TOC Convention mutual legal assistance shall be afforded to the fullest extent possible, under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention (Article 18(2)).

31. Under the TOC Convention, mutual legal assistance may be requested for a variety of purposes including: taking evidence or statements from persons; effecting service of judicial documents; executing searches, seizures, and freezing; examining objects and sites; providing information, evidentiary items and expert evaluations; providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; identifying or tracing the proceeds of crime,

facilitating the appearance of witnesses; and, any other kind of assistance not barred by domestic law (Article 18(3)).

32. Article 18(7) of the TOC Convention provides that in the absence of a mutual assistance treaty between the requesting and requested States, the procedures sets out at paragraphs 9-29 of Article 18 will govern mutual legal assistance between States Parties to the TOC Convention.

33. Requests for mutual assistance will be required to be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request (Article 18(17)).

34. Article 18 also provides that mutual legal assistance may be refused in certain circumstances. This includes where the request is not made in conformity with the TOC Convention; where the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, public order or other essential interests; where the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction; if it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

Direct law enforcement cooperation

35. Under Article 27 of the TOC Convention, Australia would be required to cooperate with other States Parties to the Convention to enhance the effectiveness of law enforcement action to combat Convention offences. Measures cover the enhancement of channels of communication, joint investigations, the provision of material for analytical or investigative purposes, and exchanging information on methods used by organised criminal groups.

Training and technical assistance

36. The TOC Convention obliges States Parties to maintain adequate expertise in its law enforcement personnel to deal with transnational organised crime (Article 29). The TOC Convention also encourages States Parties to take measures to the extent possible, to assist less developed countries with technical expertise, resources or both (Article 30).

Dispute settlement

37. Article 35 of the TOC Convention provides that any dispute between States Parties concerning the interpretation or application of the TOC Convention that is not resolved through negotiations within a reasonable time may be submitted to arbitration at the request of a party to the dispute. It further provides that in the event that the parties are unable to agree on the organisation of the arbitration within six months of the request for arbitration, any of the parties to the dispute may refer the dispute to the International Court of Justice.

38. A State Party to the TOC Convention may declare at the time of signature, ratification, acceptance or approval of the TOC Convention that it is not bound by the

procedure set out in Article 35. It is not proposed that Australia make such a declaration when ratifying the TOC Convention.

Conference of the Parties to the Convention

39. Article 32 of the TOC Convention establishes a Conference of the Parties to the TOC Convention. The purpose of the Conference of Parties is to improve the capacity of States Parties to combat transnational organised crime and to promote and review the implementation of the TOC Convention.

40. The Secretary-General of the United Nations is required to convene the Conference of the Parties not later than one year following the entry into force of the TOC Convention (Article 32(2)).

41. Australia would be required to provide information to the Conference of the Parties relating to domestic programs, plans and practices, as well as legislative and administrative measures to implement the TOC Convention, as required by the Conference of the Parties (Article 32(5)).

Implementation

42. A number of Australia's obligations under the TOC Convention can be implemented administratively or under existing Commonwealth legislation. Regulations will be made under the *Mutual Assistance in Criminal Matters Act 1987* (Cth) and the *Extradition Act 1988* (Cth) to give effect to those obligations under the TOC Convention that can not be implemented under existing Commonwealth law and practice.

43. No change to the existing roles of the Commonwealth or the States or Territories in law enforcement will arise as a consequence of the proposed treaty action.

Costs

44. States Parties to the TOC Convention will incur some expense in the activities of the Conference of the Parties. The rules governing the payment of expenses will be discussed and agreed on by the Conference of the Parties. The United Nations expects to hold the first session of the Conference of the Parties in mid-2004.

45. Law enforcement costs associated with activities such as investigations, prosecutions, extradition proceedings and responding to mutual assistance requests will be funded from existing resources.

Consultation

46. The Commonwealth Government consulted with the States and Territories on the TOC Convention through the Standing Committee on Treaties and relevant ministerial committees. Details of the consultation process are at **Attachment A**.

Regulation Impact Statement

47. The Office of Regulation Review (Productivity Commission) has been consulted and confirms that a Regulation Impact Statement is not required.

Future Treaty Action

Amendment Procedures

48. Under Article 39, amendments to the TOC Convention may be proposed by a State Party to the Convention at any time after 28 September 2008 (five years after the Convention entered into force). The agreement of a two-thirds majority of States Parties present and voting at the Conference of Parties is required for the adoption of a proposed amendment to the TOC Convention. An adopted amendment to the TOC Convention would be binding only upon those States Parties that express their consent to be bound by it.

49. Amendments to the TOC Convention would be subject to the Australian treaty process.

Protocols

50. The TOC Convention may be supplemented by protocols (Article 37). Currently there are three protocols to the Convention: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children [2003] ATNIF 1, the Protocol against the Smuggling of Migrants by Land, Sea and Air [2002] ATNIF 5, and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition [2002] ATNIF 7.

51. A State Party to the TOC Convention is not bound by a protocol unless it becomes a Party to the protocol (Article 37(3)).

Withdrawal or Denunciation

52. Article 40 of the TOC Convention provides that a State Party may denounce the Convention by written notification to the Secretary-General of the United Nations. Denunciation would take effect one year after the date of receipt of the notification by the Secretary-General. Any denunciation of the TOC Convention would also entail a denunciation of the protocols to the Convention (Article 40(3)).

53. Denunciation would be subject to the Australian treaty making process.

Contact details

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