

gotiating the Protocol, extensive discussion about whether to require States Parties to also regulate the activities of brokers, who arrange transactions without actually possessing the goods or being directly involved in matters such as transportation. Ultimately it was decided to deal with this sort of activity separately and on a non-mandatory basis (see Protocol Art.15), which may strengthen the interpretation that more direct involvement, including mere transportation, is covered by the mandatory requirements of Articles 3 and 5. Further, the requirements of Article 5, subparagraphs (2)(a) and (b) that States Parties also criminalise attempted trafficking, participating as an accomplice to trafficking, and organising, directing, aiding and abetting, facilitating and counselling trafficking also reinforce the interpretation that the drafters intended to require the application of the offences to all forms of involvement in an illicit trafficking occurrence. One could argue, for example, that in requiring States Parties to criminalise conduct which involves the hiring of someone to transport illicit firearms as »organising or directing« the trafficking in Article 5, paragraph (2), the drafters intended to require the criminalisation of the actual transportation or transfer as part of the principal trafficking offence in Article 5, paragraph (1).

This parallels the approach taken by the parent Convention, and by other international instruments, such as the UN Conventions dealing with narcotics drugs. As a result, our understanding is that the domestic offences of many countries which cover smuggling or illicit import/export activities generally extend both to cases where a third party is caused to import contraband and where the accused actually does so him- or herself. This approach also has obvious evidentiary advantages, broadening the range of conduct criminalised and therefore, the range of evidence which might be used as proof in prosecutions. If Danish law takes this approach in respect of other forms of smuggling or trafficking, this would also strengthen the argument that Denmark should take a similar position in implementing this Protocol.

Having said this, there are then some important limitations on the scope of criminal liability. Applied too broadly, there is a risk that national legislation criminalising illicit trafficking might lead to the prosecution of an individual or legal

person who actually transported illicit firearms, but was not aware of their existence or legal status. The owner or operator of a vessel or aircraft containing contraband firearms, for example might be unaware of their presence, or might have been presented with false or fraudulent documentation leading to the conclusion that the transfer was legal. The approaches taken by different legal systems to this scenario vary, but delegations to the negotiations were aware that such cases are in many countries considered to be outside the scope of liability, either because the transporter completely lacked the necessary mens rea for offences such as possession or illicit trafficking, or because he, she or it was mistaken as to information about the status of the goods and therefore believed the transaction to have been legal (mistake of fact defences). With this in mind, a general provision was incorporated into the parent Convention (Article 11, paragraph (6)), to ensure that existing legal defences in various systems could be maintained, without specifying how this would apply to each offence and each system. This applies to the Protocol, *mutatis mutandis* (see Protocol Article 1), which means that, in criminalising the mere transport of trafficked firearms, assuming this is provided for in Danish law generally, Denmark would not be required to criminalise cases of mistake of fact or where basic intention was lacking. This interpretation is further strengthened by the language of the basic criminalisation requirement of Protocol Article 5, paragraph (1), which requires only the criminalisation of proscribed conduct «...when committed intentionally...». Depending on how this is implemented in domestic law, in cases in which firearms were moved, one issue for the trier of fact would presumably be whether there was an intention to illicitly traffic the weapons or only to move them from one place to another.

For these reasons, when asked by countries for advice on the drafting of the relevant offences, the Secretariat would generally respond that criminal offence provisions should include cases where the sole involvement of the accused was to transport the firearms, parts, components or ammunition, but that it should not include cases where the accused was not aware of the existence of these items or of any other matter of fact essential to the offence of illicit trafficking. This advice might vary to some degree depending on our assessment of existing laws and legal prin-