

Section 13: Offenses Involving Firearms, Ammunition, Explosives, and Weapons

General Commentary

During a conflict, trafficking in weapons, firearms, or explosives is typically widespread, often orchestrated by organized criminal gangs to feed the conflict. In a post-conflict state, dealing with the surplus of weapons or firearms in circulation is a top priority for both the domestic government and international actors. Often, former combatants are brought into disarmament, demobilization, and reintegration (DDR) programs. Disarmament involves the collection and disposal of weapons; demobilization involves the disbandment of armed groups for administrative processing and discharge orientation; and reintegration seeks to reintegrate former combatants into society through compensation, training programs, or employment.

Once this problem has been addressed, other measures need to be taken to regulate weapons production, the flow of weapons into and out of the state, and issues of who can possess a firearm. These measures are more proactive in nature than DDR programs and involve the establishment both of regulatory licensing systems for firearms, explosives, and weapons and of criminal offenses for unlawful possession. (In contrast, in a DDR program a person is not penalized for admitting that he or she possessed a weapon and for handing it over; instead, he or she is usually paid for the weapon.) The United Nations Transitional Administration in East Timor promulgated UNTAET Regulation 2001/5 on Firearms, Ammunition, Explosives and Other Offensive Weapons in East Timor. The United Nations Mission in Kosovo promulgated UNMIK Regulation 2001/7 on the Authorization of Possession of Weapons in Kosovo. In Iraq, the Coalition Provisional Authority promulgated CPA Order No. 3 on Weapons Control. The regulations focused primarily on the internal regulation of firearms, ammunition, and explosives by establishing a scheme of registration under which a person could legally possess firearms, weapons, or explosives. In some cases, such as in East Timor, the scheme also regulated the import and export of weapons. In each case the scope of the prohibition on weapons, firearms, and explosives was slightly different. In East Timor, for example, machetes were not prohibited weapons, because they were required for farming. In Kosovo, hunting weapons were permissible. In Iraq,

firearms for personal use at home or in businesses were permissible subject to the licensing regulations. Defining what weapons will be subject to a domestic regulatory regime should therefore be considered anew in each post-conflict state.

The regulation of weapons is a matter not only of domestic concern but also of international concern. In 2001 the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, was drafted. The protocol provides for a comprehensive system to control the movement of firearms, their parts, and ammunition. It focuses on their import, export, and transit and establishes a reciprocal system between states to track the flow of firearms and ammunition. It also deals extensively with record keeping (Article 7) and the marking of firearms (Article 8)—necessary to track and trace individual firearms—and the deactivation of firearms (Article 9). Furthermore, and important with respect to the MCC, it contains provisions on certain firearms-related criminal offenses under Article 4 that states parties should introduce into domestic legislation. Reference should be made to the *Legislative Guide for the Implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime* for a discussion of the substantive provisions of the protocol, including the regulatory system established under it.

The criminal offenses contained in Section 13 are a mixture of criminal offenses required under the Protocol against Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (which have both an international and a domestic dimension), and criminal offenses provided for in regulations drafted for post-conflict states such as Kosovo, East Timor, and Iraq.

Ideally, a state would draft a separate piece of legislation that establishes a regulatory and licensing mechanism for firearms, their parts and components, ammunition, explosives, and weapons (all of which are dealt with in Section 13), including both procedural dimensions and substantive criminal offenses for breach of the mechanism. Under the Protocol against Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, it is also necessary to establish a system of record keeping and marking of firearms. Reforms are necessary to establish and regulate a licensing system and a system of record keeping. These reforms may also include the extension of criminal legislation on weapons/firearms/explosives regulation to include minor offenses linked to breaches of procedural provisions, such as failure to inform the weapons-licensing authority of a change of address or failure to report a licensed weapon missing or stolen.

Other legal provisions are required with respect to firearms offenses and their regulation. These include provisions on confiscation and seizure (as set out in Article 6 of the protocol); cooperation between states (Article 13); training and technical assistance (Article 14); and the regulation of brokering in firearms (Article 15). To adequately address the issue of firearms, these provisions should be looked at by states seeking to implement the convention into domestic law. The legislative guide to the convention provides useful guidance on these provisions. Because the protocol is sup-

plementary to the United Nations Convention against Transnational Organized Crime, Article 1(2) of the protocol provides that the provisions of the convention are applicable also, with necessary modifications. Reference should be made to the commentary to Article 136 of the MCC, which discusses these obligations.

Article 164: Illicit Manufacturing or Trafficking in Firearms or Ammunition

Article 164.1: Definition of Offense

1. A person commits the criminal offense of illicit manufacturing or trafficking in firearms or ammunition when he or she:
 - (a) illicitly manufactures firearms, their parts, components, or ammunition; or
 - (b) illicitly traffics firearms, their parts, components, or ammunition.
2. For the purposes of Article 164:
 - (a) *firearm* means any portable barreled weapon that expels, is designed to expel, or may be readily converted to expel a shot, bullet, or projectile by the action of an explosive, excluding antique firearms or their replicas;
 - (b) *parts and components* means any element or replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by firing a firearm;
 - (c) *ammunition* means the complete round or its components, including cartridge cases, primers, propellant powder, bullets, or projectiles used in a firearm;
 - (d) *illicit manufacturing* means the manufacturing or assembly of firearms, their parts and components, or ammunition:
 - (i) from parts and components illicitly trafficked;
 - (ii) without a license or authorization from the state;
 - (iii) without marking the firearms at the time of manufacture; and
 - (e) *illicit trafficking* means the unlawful import, export, acquisition, sale, delivery, movement, or transfer of firearms, their parts and components, and ammunition.

Commentary

Paragraph 1: Articles 5(1)(a) and 5(1)(b) of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Organized Crime requires that a state party establish the criminal offense set out in Article 164. The definitions of illicit manufacturing and illicit trafficking are contained in Articles 3(d) and 3(e) of the protocol. For further discussion on the core content of these offenses, reference should be made to the *Legislative Guide for the Implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*, in particular paragraphs 166–218. The protocol requires that any attempt at, participation as an accomplice in, organizing, directing, aiding, abetting, facilitating, or counseling on the manufacturing or trafficking of firearms, their parts and components, or ammunition be included in domestic criminal legislation. These grounds of liability are covered in Sections 10 and 11 of the General Part of the MCC. Reference should be made to Articles 27–32. As mentioned previously, many of the provisions from the United Nations Convention against Transnational Organized Crime, such as jurisdiction, apply to the present criminal offense. Reference should be made to the commentary to Article 136 of the MCC, which discusses this issue in greater detail.

Whether or not the trafficking or manufacturing of firearms, their parts and components, and ammunition is illicit will depend on legislation outside the MCC that regulates licit, or legitimate, manufacture, import, export, sale, delivery, movement, and so on of firearms, their parts and components, and ammunition. This legislation would be part of the regulation and licensing system discussed in the general commentary at the beginning of this section. Reference should be made to this commentary. Obviously, the criminal offense set out in Article 164 could not be introduced without this legislation having already been introduced or being introduced simultaneously.

Paragraph 2(a): The wording of this paragraph comes from Article 3(a) of the protocol. Reference should be made to the *Legislative Guide for the Implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*, in particular paragraphs 24–43, for a discussion of the meaning of Article 3(a).

Paragraph 2(b): The wording of this paragraph comes from Article 3(b) of the protocol. Reference should be made to the *Legislative Guide for the Implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*, in particular paragraphs 44–51, for a discussion of the meaning of Article 3(b).

Paragraph 2(c): The wording of this paragraph comes from Article 3(c) of the protocol. Reference should be made to the *Legislative Guide for the Implementation of the*

Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime, in particular paragraphs 52–58, for a discussion of the meaning of Article 3(c).

Paragraph 2(d): The wording of this paragraph comes from Article 3(d) of the protocol. Reference should be made to the *Legislative Guide for the Implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*, in particular paragraphs 181–200, for a discussion of the meaning of Article 3(d).

Paragraph 2(e): The wording of this paragraph comes from Article 3(e) of the protocol. Reference should be made to the *Legislative Guide for the Implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*, in particular paragraphs 201–218, for a discussion of the meaning of Article 3(e).

Article 164.2: Penalty

The applicable penalty range for the criminal offense of illicit manufacturing or trafficking in firearms or ammunition is three to fifteen years' imprisonment.

Article 165: Illicit Obliteration, Removal, or Altering of Markings on Firearms

Article 165.1: Definition of Offense

1. A person commits the criminal offense of illicit obliteration, removal, or altering of markings on firearms when he or she illicitly obliterates, removes, or alters the markings on firearms.
2. For the purposes of Article 165, *firearm* has the same meaning as in Article 164.1(2)(a).

Commentary

Paragraph 1: Article 5(1)(c) of the Protocol against Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, requires that a state party establish the criminal offense set out in Article 165. Reference should be made to the *Legislative Guide for the Implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*, in particular paragraphs 219–228, for a discussion of the core content of this offense. The protocol requires that any attempt at, participation as an accomplice in, organizing, directing, aiding, abetting, facilitating, or counseling on the obliteration, removal, or altering of markings on firearms be included in domestic criminal legislation. These grounds of liability are covered in Sections 10 and 11 of the General Part of the MCC. Reference should be made to Articles 27–32. As mentioned previously, many of the provisions from the United Nations Convention against Transnational Organized Crime, such as jurisdiction, apply to the present criminal offense. Reference should be made to the commentary to Article 136 of the MCC, which discusses this issue in greater detail.

Whether the obliteration, removing, or altering of markings on firearms is illicit or legitimate will depend on legislation outside the MCC that regulates marking. This would be part of the regulation and licensing system discussed in the general commentary at the beginning of this section. Reference should be made to this commentary. Obviously, the criminal offense set out in Article 165 could not be introduced without legislation on the licit marking of firearms being introduced earlier or at the same time.

Paragraph 2: Reference should be made to Article 164.1(2)(a) and its accompanying commentary.

Article 165.2: Penalty

The applicable penalty range for the criminal offense of illicit obliteration, removal, or alteration of markings on firearms is one to five years' imprisonment.

Article 166: Illicit Manufacturing or Trafficking in Explosives

Article 166.1: Definition of Offense

1. A person commits the criminal offense of illicit manufacturing and trafficking in explosives when he or she:
 - (a) illicitly manufactures explosives; or
 - (b) illicitly traffics explosives.
2. For the purposes of Article 166:
 - (a) *explosives* means any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion. Explosives include but are not limited to dynamite and other high explosives, detonators, safety fuses, squibs, detonating cord, igniter cord, and igniters;
 - (b) *illicit manufacturing* means the manufacturing or assembly of explosives; and
 - (c) *illicit trafficking* means the unlawful import, export, acquisition, sale, delivery, movement, or transfer of explosives.

Commentary

Paragraph 1: The regulation of explosives does not fall within the ambit of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime. However, trafficking in explosives has been subject to criminalization in the legislation of a number of post-conflict states in recent years. Article 166 uses the criminal offense contained in Article 164, above, as its basis, but it substitutes *explosives* for the term *firearms, their parts, components, or ammunitions*.

Whether the trafficking or manufacturing of explosives is illicit will depend on legislation outside the MCC that regulates their licit manufacture, import, export, sale, delivery, movement, and so on. This legislation would be part of the regulation and licensing system discussed in the general commentary at the beginning of this section. Reference should be made to this commentary. The criminal offense set out in Article 166 could not be introduced without legislation on the licit manufacture, import, export, sale, delivery, and so on of explosives being introduced earlier or at the same time.

Paragraph 2(a): The definition of explosives was arrived at through a comparative survey of the definition of explosives from different jurisdictions, whereupon the suitable definition was found based on the advice of explosives experts sought by the drafters. It is important to point out use of the term *primary* or *common purpose* in the definition. Many seemingly innocuous substances, such as a common fertilizer used in farming, are explosive in nature. That said, the fact that their primary or common purpose is as fertilizer exempts them from the definition of explosive.

Paragraph 2(b): The definition contained in this paragraph is based on Article 3(d) of the protocol. Reference should be made to the commentary accompanying Article 164.1(2)(d).

Paragraph 2(c): The definition contained in this paragraph is based on Article 3(e) of the protocol. Reference should be made to the commentary accompanying Article 164.1(2)(e).

Article 166.2: Penalty

The applicable penalty range for the criminal offense of illicit manufacturing or trafficking in explosives is three to fifteen years' imprisonment.

Article 167: Unlawful Purchase of Firearms, Ammunition, Explosives, or Weapons

Article 167.1: Definition of Offense

1. A person commits the criminal offense of unlawful purchase of firearms, ammunition, explosives, or weapons when he or she unlawfully purchases firearms, ammunition, explosives, or weapons.
2. For the purposes of Article 167:
 - (a) *firearm* has the same meaning as in Article 164.1(2)(a);
 - (b) *ammunition* has the same meaning as in Article 164.1(2)(c);
 - (c) *explosives* has the same meaning as in Article 166.1(2)(a); and
 - (d) *weapon* means an instrument designed or redesigned for inflicting bodily harm such as crossbows, bows and arrows, pepper spray, blank-firing

weapons, replica weapons, stun guns, tasers, and all categories of weapons prohibited under the applicable law.

Commentary

Paragraph 1: The criminal offenses of trafficking in firearms, their parts and components, ammunition, and explosives, set out above in Articles 164 and 166, all focus on criminalizing the conduct of a person involved in their removal from or introduction into the state and their sale. In contrast, Article 167 focuses on the buyer of firearms, ammunition, explosives, and weapons. No such provision exists in the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Organized Crime, but it is a common feature of domestic legislation. In addition to bringing firearms, ammunition, and explosives under the ambit of the MCC, Article 167 also criminalizes the purchase of weapons. Obviously, whether the purchase of any of these items is lawful will depend on legislation outside the MCC that regulates when they can be lawfully purchased. This legislation would be part of the regulation and licensing system discussed in the general commentary at the beginning of this section. Reference should be made to this commentary. The criminal offense set out in Article 167 could not be introduced without legislation, introduced earlier or simultaneously, that informs individuals of lawful and unlawful behavior with regard to the purchase of firearms, ammunition, explosives, and weapons.

Paragraph 2(a): Reference should be made to Article 164.1(2)(a) and its accompanying commentary.

Paragraph 2(b): Reference should be made to Article 164.1(2)(c) and its accompanying commentary.

Paragraph 2(c): Reference should be made to Article 166.1(2)(a) and its accompanying commentary.

Paragraph 2(d): This paragraph contains a general definition and a nonexhaustive list of weapons. A state may wish to incorporate more weapons into the applicable law. As mentioned above, the exact scope of the prohibition on weapons is slightly different in the legislation of different post-conflict states.

Article 167.2: Penalty

1. The applicable penalty range for the criminal offense of unlawful purchase of firearms, ammunition, explosives, or weapons is one to five years' imprisonment.

2. The applicable penalty range for the criminal offense of unlawful purchase of firearms, ammunition, explosives, or weapons is two to ten years' imprisonment where a trafficable quantity of firearms, ammunition, explosives, or weapons is purchased.
3. The court may impose a fine, as a principal penalty, upon a person convicted of unlawful possession of firearms, ammunition, explosives, or weapons where the applicable penalty range is one to five years' imprisonment.

Article 168: Unlawful Possession, Control, or Ownership of Firearms, Ammunition, Explosives, or Weapons

Article 168.1: Definition of Offense

1. A person commits the criminal offense of unlawful possession, control, or ownership of firearms, ammunition, explosives, or weapons when he or she unlawfully possesses, controls, or owns a firearm, ammunition, explosive, or weapon.
2. For the purposes of Article 168:
 - (a) *firearm* has the same meaning as in Article 164.1(2)(a);
 - (b) *ammunition* has the same meaning as in Article 164.1(2)(c);
 - (c) *explosives* has the same meaning as in Article 166.1(2)(a); and
 - (d) *weapon* has the same meaning as in Article 167.1(2)(d).

Commentary

Paragraph 1: The criminal offenses of unlawful possession, control, or ownership of firearms, ammunition, explosives, or weapons is not contained in the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Organized Crime, but it is characteristic of the domestic legislation of many states. In addition to bringing firearms, ammunition, and explosives under the ambit of the MCC, Article 168 also criminalizes the unlawful possession, control, or ownership of weapons, as defined in Article 167.1(2)(d). It is considered particularly important in a post-conflict context to criminalize the possession of firearms, ammunition, explosives, and weap-

ons in order to facilitate the state's return to peace and normalcy. As discussed in the commentary to Article 167.1(2)(d), the particular weapons that are prohibited may vary from state to state and should be decided upon on an individual basis. For example, it would be unwise to prohibit the possession of instruments used for farming, such as machetes in East Timor.

Whether the possession, control, or ownership of any of these items is lawful will depend on legislation outside the MCC that regulates when they can be lawfully possessed, controlled, or owned. This legislation would be part of the regulation and licensing system discussed in the general commentary at the beginning of this section. Reference should be made to this commentary. The criminal offense set out in Article 168 could not be introduced without the prior or simultaneous introduction of legislation that informs individuals of lawful and unlawful behavior with regard to the purchase of weapons.

Paragraph 2(a): Reference should be made to Article 164.1(2)(a) and its accompanying commentary.

Paragraph 2(b): Reference should be made to Article 164.1(2)(c) and its accompanying commentary.

Paragraph 2(c): Reference should be made to Article 166.1(2)(a) and its accompanying commentary.

Paragraph 2(d): Reference should be made to Article 167.1(2)(d) and its accompanying commentary.

Article 168.2: Penalty

1. The applicable penalty range for the criminal offense of unlawful possession, control, or ownership of firearms, ammunition, explosives, or weapons is one to five years' imprisonment.
2. The applicable penalty range for the criminal offense of unlawful possession, control, or ownership of firearms, ammunition, explosives, or weapons is two to ten years' imprisonment where a person possesses a trafficable quantity of firearms, ammunition, explosives, or weapons.
3. The court may impose a fine, as a principal penalty, upon a person convicted of unlawful possession, control, or ownership of firearms, ammunition, explosives, or weapons.

Commentary

Paragraph 2: Article 168 includes two distinct penalty ranges, the higher of which applies to a person who bought a “trafficable quantity” of firearms, ammunition, explosives, or weapons. This distinction is meant to penalize persons involved in trafficking firearms, ammunition, explosives, or weapons more heavily than those who purchase them for personal use. Ordinarily, legislation would set down the quantity of firearms, ammunition, explosives, or weapons that would be deemed to constitute a trafficable quantity. For the purposes of the MCC, this has not been done. However, it is advisable that a state implementing provisions on firearms offenses do this.

Article 169: Unlawful Use of Firearms

Article 169.1: Definition of Offense

1. A person commits the criminal offense of unlawful use of firearms when he or she uses or brandishes a firearm in a threatening, intimidating, or otherwise unauthorized manner or directs another person to do the same.
2. For the purposes of Article 169, *firearm* has the same meaning as in Article 164.1(2)(a).

Commentary

Paragraph 1: The perpetration of the criminal offense of unlawful use of firearms is independent of whether a person is lawfully in possession of firearms. The offense may be perpetrated by a person in lawful possession or unlawful possession of a firearm. In the latter case, the person would then also be criminally responsible for the criminal offense of unlawful possession of a firearm under Article 168, above. The use of a firearm in the context of aggravated robbery under Article 120 or burglary under Article 122 is an element of both criminal offenses. The person could be prosecuted for the offense of unlawful use of firearms in addition to aggravated robbery or aggravated burglary. In the present article, there is no requirement that a criminal offense be committed with the firearm. The focus of this article is simply the use of firearms in a threatening or intimidating manner.

Paragraph 2(a): Reference should be made to Article 164.1(2)(a) and its accompanying commentary.

Article 169.2: Penalty

1. The applicable penalty range for the criminal offense of unlawful use of firearms is one to five years' imprisonment.
2. The court may impose a fine, as a principal penalty, upon a person convicted of unlawful use of firearms.