

Compliance of the Criminal Legislation of Ukraine with the UN Protocol on Firearms

Mykola I. Khavroniuk^{1,*}, Ivan V. Krasnytskyi² and Nataliya R. Lashchuk³

¹*Department of Criminal and Criminal Procedural Law, National University of "Kyiv-Mohyla Academy", Kyiv, Ukraine*

²*Faculty of Law, Lviv State University of Internal Affairs, Lviv, Ukraine*

³*Department of Criminal Law Disciplines, Lviv State University of Internal Affairs, Lviv, Ukraine*

Abstract: Problems with regulating the trafficking of weapons and ammunition emerged in Ukraine after the collapse of the Soviet Union. The Soviet military left behind a large number of small arms, light weapons and ammunition, much of which did not have proper (in some cases any whatsoever) inventory control and accounting. The purpose of the study is to find the best models of criminal liability for illicit manufacturing and trafficking of firearms in Ukraine, its parts and components and ammunition, taking into account international experience. The study investigates the issue of compliance of the criminal legislation of Ukraine with the United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organised Crime, and proposes for harmonisation of national legislation with this Protocol. It is concluded that Ukraine needs to adopt the Law "On Arms Trafficking", which, among other things, must clearly define such concepts as "firearms", "parts and components", "ammunition", "illicit manufacturing", "illicit trafficking", etc. which would also be relevant for the criminal legislation of Ukraine.

Keywords: Ammunition, illicit manufacturing, crime, legal framework, organised group.

INTRODUCTION

Problems with regulating the trafficking of weapons and ammunition emerged in Ukraine after the collapse of the Soviet Union. The Soviet military left behind a large number of small arms, light weapons and ammunition, much of which did not have proper (or, in some cases, any at all) inventory control and accounting. In 1992, there were about 7.1 million small arms and light weapons in military depots in Ukraine. By 2007, this total had decreased to 6.2 million units (Illegal weapons in Ukraine 2017). Prior to Russia's annexation of Crimea and the start of hostilities in Donbas, the situation with arms trafficking in the country was relatively controlled by law enforcement and was virtually inaccessible to the average citizen. The events on the Maidan in autumn 2013 – winter 2014 changed everything significantly: to protect the insurgent people, Viktor Yanukovich's regime massively armed the so-called "titushkys" – thugs for hire brought from some eastern and southern regions of Ukraine, and after that, no pistol or machine gun did not return to the Ministry of Internal Affairs of Ukraine; at the same time, the source of mass illegal weapons in those days was the seizure of police weapons depots throughout Ukraine – for protection against the same "titushkys". After the annexation of Crimea, Russia also

sent a huge number of small arms from the captured Ukrainian arms depots of the Ministry of Internal Affairs and the Armed Forces to Donbas and in the southern region of Ukraine.

The largest number of illegal weapons appeared on the black market with the start of hostilities in Donbas. Trophy weapons were brought by soldiers and officers of the Armed Forces and soldiers of Ukrainian volunteer battalions from the front on vacation or rotation, as well as sent home by mail, because in 2014 there was no effective control system. According to very rough estimates, in 2014 alone, law enforcement agencies declared lost over 20,000 units of submachine guns and machine guns, other small arms, hundreds of thousands of cartridges of various calibres, mortars, and grenade launchers. Apart from hostilities, theft in the rear was also quite widespread – unclean officers and ensigns wasted hundreds of small arms. Thus, currently tens of thousands of submachine guns and pistols are in illicit trafficking, and the number of grenades, ammunition, and explosives cannot be even approximated. Most of them are biding their time in hiding "just in case", and the rest has become a commodity. According to some media, in 2017, on the black market of Kyiv, a hand grenade cost from \$20 to \$50 apiece, an AK assault rifle – from \$350 to \$600 (Zhirokhov 2020).

*Address correspondence to this author at the National University of "Kyiv-Mohyla Academy", Kyiv, Ukraine; Tel: +38 (044) 463-70-67; E-mail: khavroniuk.myk@uohk.com.cn

The Swiss arms project Small Arms Survey estimates the volume of illegal weapons in Ukraine at 2

to 6 million units, the legal figure is seven weapons per hundred inhabitants, which ranks the country 36th in Europe. Other weapons is the shadow market. Residents of Ukraine voluntarily surrender part of their firearms, in particular during monthly campaigns conducted by the National Police, in connection with which they are released from criminal liability for their storage. For example, in October 2019, in just two weeks of the month, citizens voluntarily surrendered 3,273 weapons. In particular, it is a rifled weaponry of army models (552 units), as well as 204.3 thousand units of ammunition for various weapons, 255 grenades, 373 shells, 43 incendiaries, 56 mines, and 11 explosive devices (Ukrainians voluntarily surrendered...2019). Part of the surrendered weapons is destroyed. Unfortunately, the Days of Weapons Destruction are not defined and public control over their destruction is weak.

In May 2020, Anatoliy Petrenko, Deputy Minister of Defence of Ukraine for European Integration during an online meeting of the OSCE Forum for Security Cooperation on SALW, SCA, and Demining stressed that Ukraine was faced with large-scale illegal movement of small arms and light weapons and ammunition across the border, which is located in the temporarily occupied areas of Donbas. Therefore, Ukraine must regain border control in the occupied Donbas to stop the illegal movement of small arms and light weapons (SALW) and stockpiles of conventional ammunition (SCA) from Russia. Remaining unresolved, this problem continues to worsen the humanitarian situation, foment violence in conflict-affected areas, and fuel organised crime and terrorism. The OSCE SMM regularly reports on secret night convoys entering and leaving Ukraine outside official checkpoints (Restoration of border control... 2020).

There are other sources of illegal weapons, and the line between legal and illegal possession is sometimes blurred. For example, smoothbore and rifled firearms (mostly hunting ones) may go from legal to illegal possession after the transfer of ownership (by way of gift, will, or otherwise). Another example is recycled weapons – legally available deactivated, dummy, or defunct firearms modified for use with live ammunition. Finally, weapons found at the sites of the battles of World War II, which took place in Ukraine, are restored and put up for sale by the so-called "tomb raiders" (Illegal weapons in Ukraine 2017). Therewith, Ukraine is a state where there is no law to regulate the manufacture, acquisition, and possession of firearms; there is also no central state register of firearms held

by civilians. This complicates even the distinction between the legal and illicit trafficking of firearms and prevents the implementation of measures to control and block illegal flows of weapons (Illegal weapons in Ukraine 2017).

Issues of criminal liability for the trafficking of firearms and ammunition at different times were the subject matter of Ukrainian researchers: O.S. Klymenko (2012), O.O. Knyzhenko (2017), G.S. Krainyk (Krainyk and Bondareva 2019), N.E. Minaylo (2012), V.P. Tykhy (2019), P.L. Fris (2015; 2017), V.V. Shablysty (2018), etc. The problem of compliance of the criminal legislation of Ukraine with the UN Protocol on Firearms (Protocol against the... 2001) and the Palermo Convention (United Nations Convention... 2000) has not been specifically studied in the scientific literature.

The purpose of the study – considering international experience to find the best models of criminal liability for the illicit manufacture and trafficking of firearms in Ukraine, its parts and components, as well as ammunition to it.

ANALYSIS OF THE LEGAL FRAMEWORK FOR REGULATING FIREARMS

Draft laws on the subject of legal sale and carrying of firearms recurrently appear (there have been at least fifteen over the last 20 years), but none of the draft laws on arms registered in parliament have yet been adopted. In Art. 22 of the Association Agreement between Ukraine and the EU (Association Agreement between Ukraine... 2016) mentions cooperation in the fight against crime, in particular to address the issue of firearms. Such cooperation may take place, in particular, within Europol. At the same time, the only and insufficient changes to the national legislation that were directly related to Ukraine's accession to the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (hereinafter referred to as the UN Protocol on Firearms) (Protocol against the illicit... 2001), which entered into force for Ukraine on 4 July 2013 and complements the UN Convention against Transnational Organised Crime, ratified by the Law of 4 February 2004 (hereinafter referred to as the Palermo Convention (United Nations Convention... 2000), included as follows.

- 1) Amendments to the Criminal Code of Ukraine (Criminal Code of Ukraine 2001). According to

the Law "On Amendments to Article 263-1 of the Criminal Code of Ukraine in connection with Ukraine's accession to the UN Protocol on Firearms, supplementing the Convention of the United Nations against Transnational Organised Crime of 14 May 2013, title and part 1 of Art. 263-1 of the Criminal Code of Ukraine is set out in a new wording (entered into force on July 4, 2013) (Law of Ukraine "On Amendments to Article 263-1..." 2013).

- 2) Amendments to the Order of the Ministry of Internal Affairs of Ukraine No. 622 "On approval of the Instruction on the procedure for manufacture, purchase, storage, accounting, transportation, and use of firearms, pneumatic, and melee weapons, devices of domestic production for firing cartridges equipped with rubber or similar properties of non-lethal metal shells, and these cartridges, as well as ammunition for weapons and explosives" of August 21, 1998 (Order of the Ministry... 1998) (Order of the Ministry of Internal Affairs of Ukraine of August 7, 2013 No. 749 (Order of the Ministry ... 2013), which also amended the Instruction (hereinafter referred to as the Instruction of the Ministry of Internal Affairs of Ukraine (Instruction on the procedure for manufacture... 1998). This procedure applies, apart from firearms and ammunition, also to empty weapons and major parts of weapons.
- 3) Additional amendments to the Criminal Code of Ukraine (Criminal Code of Ukraine 2001). According to the Law "On Amendments to Article 201 of the Criminal Code of Ukraine on the criminalisation of smuggling of firearms" of May 18, 2017, Part 1 Article 201 of the Criminal Code of Ukraine currently mentions the smuggling not only of weaponry and ammunition (except for smoothbore hunting weaponry or ammunition to it), but also of parts of firearms (Law of Ukraine "On Amendments to Article 201..." 2017).

A preliminary analysis of these legislative provisions shows that these changes are not enough for the full implementation of the UN Firearms Protocol. The current legislation of Ukraine does not contain a clear and unambiguous definition of the term "weapon". There is also no special law that would regulate the trafficking of weapons in Ukraine. Apart from several articles of the Criminal Code of Ukraine, the main acts of legislation governing the trafficking – manufacture,

acquisition, storage, transportation, accounting, and use of weapons and ammunition, are sub-legislative acts, the main of which include:

- 1) regulations on the permit system (approved by the resolution of the Cabinet of Ministers of Ukraine No. 576 of October 12, 1992 (Resolution of the Verkhovna Rada of Ukraine 1992). The permit system constitutes a system of special rules for the manufacture, purchase, storage, transportation, accounting, and use of reinforced concrete. In accordance with paragraph 2 of the Regulations on the permit system, the objects of the permit system include, in particular: firearms (rifled military models, outdated small arms, sports, training, emptied, hunting rifled, and smoothbore weaponry), ammunition for it, pneumatic weapons with a more than 4.5 millimetres calibre and a bullet velocity of more than 100 meters per second, domestically produced devices for firing cartridges equipped with non-lethal rubber or similar metal shells, and specified cartridges, explosives, and substances;
- 2) Instruction of the Ministry of Internal Affairs of Ukraine (Instruction on the procedure for manufacture... 1998). Paragraphs 8 and 13 of the Instruction define the types of reinforced concrete for which the permit system is implemented: firearms; explosives – explosive substances and detonation devices.

Only some issues concerning the trafficking of weapons and ammunition are regulated by certain provisions of the laws of Ukraine: "On state control over international transfers of military and dual-use goods" (Law of Ukraine "On State Control..." 2003); "On the National Police" (Law of Ukraine "On the National Police" 2015); "On the fight against terrorism" (Law of Ukraine "On Combating Terrorism" 2003); "On prevention and counteraction to legalisation (laundering) of proceeds from crime, terrorist financing and financing of proliferation of weapons of mass destruction" (Law of Ukraine "On Prevention..." 2014); "On licensing of economic activities" (Law of Ukraine "On Licensing..." 2020); "On state awards of Ukraine" (Law of Ukraine "On State Awards of Ukraine" 2000); "On game husbandry and hunting" (Law of Ukraine "On Hunting Farm and Hunting" 2020); Customs Code of Ukraine (Customs Code of Ukraine 2012); Code of Ukraine on Administrative Offences (Code of Ukraine on Administrative Offenses 1984).

Instead, Art. 3 of the UN Protocol on Firearms prescribes the necessary legal definitions. By the way, a detailed definition of the term "firearms" is also contained in Annex No. 1 to the European Convention on the Control of the Acquisition and Storage of Firearms by Private Individuals (ETS No. 101) (European Convention on the Control... 1978), but Ukraine has not acceded to the Convention. Important EU acts are also not in force in Ukraine, in particular Directive 91/477/EEC on control of the acquisition and possession of weapons, Luxembourg, 18 June 1991 (Directive No. 91/477 / EEC... 1991), which makes provision for the mandatory and unique marking of each firearm and its main components, and Regulation of the European Parliament and of the Council (EU) No. 258/2012 of 14 March 2012 on the implementation of Article 10 of the UN Protocol on Firearms (Regulation of the European Parliament... 2012).

LEGAL TERMINOLOGY FOR WEAPONS AND AMMUNITION

Only partially and with differences, both linguistic and substantive, the legal definitions of firearms provided by the Instruction of the Ministry of Internal Affairs of Ukraine (Sections 8 and 13) (Instruction on the procedure for manufacture... 1998), correspond to the definitions given in the UN Protocol on Firearms (Protocol against the illicit... 2001). Table 1 below and the commentary below clearly demonstrate this.

Regarding the Definition of Weapons

As is known, the definition of any concept includes the corresponding features. Considering this with regard to the definition of a "firearm" contained in Article 3 of the UN Protocol on Firearms (Protocol against the illicit... 2001), we can conclude that a firearm is an object that is described by a combination of the following features: 1) it is portable; 2) has a barrel; 3) expels a shot or is designed to expel or may be readily converted to expel a shot, bullet or projectile; 4) the shot occurs by the action of an explosive; 5) antique firearms or their replicas are not considered firearms.

The definition of a firearm contained in the Instruction of the Ministry of Internal Affairs of Ukraine takes into account only feature (2) and partially features (4) and (5), where instead of the action of the explosive the pressure of gases produced by combustion of a metal charge is specified, and antique weapons do not belong only to combat weapons (i.e. antique weapons are not recognised as combat

weapons). At the same time, other features that are missing from the UN Protocol on Firearms (Protocol against the illicit... 2001) include: 6) purpose – hitting targets with projectiles and 7) the presence of kinetic energy sufficient to hit a target at a certain distance.

Thus, these two definitions differ significantly. At least, the Instruction of the Ministry of Internal Affairs of Ukraine (Instruction on the procedure for manufacture... 1998) does not explicitly state that a firearm is an object intended for expelling a shot, and that such an object is portable.

Regarding the Definition of Weapon Parts and Components

By the same principle, the definitions of "parts and components" ("main parts of weapons") are compared. According to the UN Protocol on Firearms (Protocol against the illicit... 2001), "parts and components" are items for which there is a set of such features: 1) they include a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by a firing a firearm, any other elements or replacement elements; 2) they are specially designed for a firearm; 3) they are essential to the operation of a firearm.

The definition of "the main parts of the weapon", which is given in the Instruction of the Ministry of Internal Affairs of Ukraine (Instruction on the procedure for manufacture... 1998), includes the same three features. However, the list of such parts of the weapon is exhaustive, which logically follows from the word "main". These parts include only: a barrel, frame or receiver, slide or cylinder, bolt or breech block, and do not include a device designed or adapted to reduce the sound caused by a shot, as well as any other elements or spare parts, of which there may be dozens.

Regarding the Identification of Important Parts of the Weapon

As noted above, the Instruction of the Ministry of Internal Affairs of Ukraine (Instruction on the procedure for manufacture... 1998) defines not all "parts and components of weapons", but only "main parts of weapons" and includes only a barrel, frame or receiver, slide or cylinder, bolt or breech block.

Regarding the Definition of Ammunition

The definitions of ammunition in the UN Protocol on Firearms (Protocol against the illicit... 2001) and in the

Table 1: Comparison of Terminology for Weaponry and Ammunition

| UN Protocol on Firearms | Instruction of the Ministry of Internal Affairs of Ukraine |
|--|---|
| a) "Firearm" shall mean any barrelled 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. | "Firearm" shall mean a weapon designed to hit targets with projectiles that receive a directed movement inside the barrel (using the pressure force of the gases created by the combustion of a metal charge) and have sufficient kinetic energy to hit a target at a certain distance. |
| Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899. | Firearms do not include antique weapons and their replicase, which were manufactured up to and including 1899. |
| b) "Parts and components" shall mean any element or replacement 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. | The "main parts of the weapon" shall mean any elements or replacements specifically designed for a firearm and essential to its operation, namely: barrel, frame or receiver, slide or cylinder, bolt or breech block. |
| c) "Ammunition" shall mean the complete round or its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves fall subject to authorisation in the respective State Party. | "Ammunition" shall mean specially made disposable products designed to hit a target in the conditions of armed struggle, self-defence, hunting, sports. Ammunition includes bullets for rifled firearms of various calibres, as well as loaded cartridges for smoothbore hunting rifles, propellant powder, and capsules. |
| d) "Illicit manufacturing" shall mean the manufacturing or assembly of firearms, their parts and components or ammunition: (i) From parts and components illicitly trafficked, (ii) Without a license or authorisation from a competent authority of the State Party where the manufacture or assembly takes place, or (iii) Without the marking of firearms in accordance with Article 8 of this Protocol at the time of manufacture; the issuance of a license or permit for the manufacture of parts and components is carried out in accordance with national legislation. | The instruction does not define "illicit manufacturing". The definition of "illicit manufacturing of weapons" is contained in paragraph 13 of the resolution of the Plenum of the Supreme Court of Ukraine No. 3 of April 26, 2002 "On Judicial Practice in Cases of Abduction and Other Illegal Treatment of Weapons, Ammunition, Explosives, Explosive Devices or Radioactive Materials" (Resolution of the Plenum... 2002) – intentional acts committed without their statutory permission to create or processing, as a result of which they acquire the respective characteristic properties. Such actions, in particular, are the conversion of devices adapted for firing cartridges, equipped with rubber or similar in their properties metal shells of non-lethal action, into a weapon suitable for expelling a shot, or conversion of a hunting rifle into the sawed-off gun, etc. |
| e) "Illicit trafficking" shall mean 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 authorise it in accordance with the terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol. | The Instruction does not define "illicit trafficking". |
| f) "Tracing" shall mean the systematic tracking of firearms and, where possible, their parts and components and ammunition from manufacturer to purchaser, for the purpose of assisting the competent authorities of States Parties in detecting, investigating and analysing illicit manufacturing and illicit trafficking. | Instructions do not define "tracing". |

Instruction of the Ministry of Internal Affairs of Ukraine (Instruction on the procedure for manufacture... 1998) are completely different. Thus, the first of these acts indicates the following features of ammunition: 1) they are cartridge cases, primers, propellant powder, bullets or projectiles, another complete round or its components; 2) they are used in a firearm, provided that those components are themselves subject to authorisation in the respective State Party.

The instruction of the Ministry of Internal Affairs of Ukraine (Instruction on the procedure for manufacture... 1998) defines somewhat other features:

1) these are cartridges for rifled firearms of various calibres, as well as loaded cartridges for smoothbore hunting rifles, propellant powder, and capsules. That is, there is no emphasis on the fact that the components of the round are also recognised as ammunition, although this is not denied, as propellant powder and capsules are mentioned; 2) they constitute specially made disposable products; 3) their purpose is to ensure the hitting targets in the conditions of armed struggle, self-defence, hunting, sports. This list is exhaustive, although ammunition may have other purposes, such as signal, start, animal stun.

Regarding the Definition of Illicit Trafficking

The Instruction of the Ministry of Internal Affairs of Ukraine does not define the concepts of "illicit manufacturing" and "illicit trafficking" at all. In this regard, Article 263 of the Criminal Code of Ukraine (Criminal Code of Ukraine 2001) is notable. It is entitled "Illicit handling of weapons, ammunition or explosives", and stipulates liability for such acts as carrying, storage, acquisition, transfer, sale of these items, if they are committed without the authorisation prescribed by law. Article 263-1 of the Criminal Code of Ukraine stipulates liability, in particular, for illicit manufacturing, processing or repair of firearms, illicit removal of its markings, illicit manufacturing of ammunition (Criminal Code of Ukraine 2001).

For a long time, the words and phrases "without legal authorisation" and "illicit" were understood as meaning that, in the first case, the above acts were committed without permission, which must be provided in accordance with the procedure prescribed by *legislation* (i.e. not necessarily by the law), and in the second – that the relevant actions are contrary to legislation (again – not necessarily the law). This approach was rather based on tradition. Article 129 of the Civil Code of Ukraine of 1964 (Civil Code of the Ukrainian SSR 1963) stipulated that the list of items that could be purchased only with a special permit (including weapons), as well as the procedure for issuing such permits were established by the legislation of the USSR and the Ukrainian SSR. Part 4 Article 13 of the Law of Ukraine "On Property" of February 7, 1991 (Law of Ukraine "On Property" 1991) stated that the legislation of Ukraine may establish a special procedure for citizens to acquire ownership of certain types of property, as well as types of property that cannot be owned by citizens. The Resolution of the Verkhovna Rada of Ukraine "On the Right to Ownership of Certain Types of Property" of June 17, 1992 (Resolution of the Verkhovna Rada of Ukraine 1992) allowed citizens to acquire the right of ownership to the respective weapons acquired by them with the corresponding permit issued by the internal affairs authorities. These provisions were developed in the Regulations on the Permitting System, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 576 of October 12, 1992 (Resolution of the Cabinet ... 1992), which stipulated that these permits shall be issued in accordance with the procedure prescribed by the Ministry of Internal Affairs of Ukraine. At the end of this hierarchical chain of regulations is the Instruction of the Ministry of Internal Affairs of Ukraine.

On June 21, 2007, the Law of Ukraine "On Property" expired due to the entry into force of the new Civil Code of Ukraine. To date, there is no formal law as an act of higher legal force that would directly regulate the procedure for obtaining permits by citizens to handle weapons. This established the basis for a different interpretation of the provisions of Article 263 of the Criminal Code of Ukraine, including in judicial practice. Thus, on February 19, 2018, the Pecherskyi District Court of Kyiv in case No. 757/7651/16-k entered an acquittal regarding the person accused of committing a crime under Part 2 Article 263 of the Criminal Code of Ukraine, namely by carrying a cold weapon – a military bayonet – without the authorisation prescribed by the law. The court noted: "The state has no right to apply procedural coercion to a person in the form of criminal liability for the absence of authorisation prescribed by law, as long as there is no law that provides for obtaining this authorisation. The court concludes that there is currently no Law of Ukraine, which would make provision for procurement of authorisation to carry a weapon... The presence of sub-legislative acts of the Cabinet of Ministers of Ukraine, the Ministry of Internal Affairs of Ukraine... does not replace such a law" (Verdict of the Pechersk... 2018). However, this sentence was cancelled by a decision (Ruling of the Court... 2018) of the appellate court due to the fact that "it is impossible to draw an indisputable conclusion from the content of the sentence as to the grounds for acquittal of a person under Part 2 Article 263 of the Criminal Code of Ukraine".

Other acquittals were also entered when courts applied the principle of law that no one can be punished for doing something that is not prohibited by law. These are the following court rulings:

- Shevchenkivskyi District Court of Chernivtsi, by which the person was acquitted of a crime under Part 1 Article 263 of the Criminal Code of Ukraine (commission of illegal acquisition, storage, carrying of firearms, ammunition) (Judgment of the Shevchenkivsky... 2018). In this verdict, the court, among other things, noted that "...there can be no punishment for violating a non-existent order. The objective side of the crime under Part 1 Article 263 of the Criminal Code of Ukraine comprises acquisition, transfer, and storage of the firearm and ammunition without the authorisation prescribed by the law. The legislator has determined the presence (existence) of a law that makes provision for the issuance of a permit for the carrying, acquisition,

and use of firearms. Therefore, the relevant actions of a person may be considered criminal provided that there is a law that determines the procedure for possession of a firearm, but a person carries a weapon without such authorisation. The state is not entitled to apply procedural coercion to a person in the form of criminal liability for the absence of a permit prescribed by law, as long as there is no law that provides for procurement of such authorisation. The court concludes that there is currently no Law of Ukraine, which would stipulate the procurement of authorisation to possess firearms";

- Kyiv District Court of Odesa, which acquitted the person in the crime under Part 1 Article 263 of the Criminal Code of Ukraine (storage and purchase of ammunition without authorisation prescribe by law) (Judgment of the Kyiv... 2018);
- Myronivskiy District Court of Kyiv Oblast, according to which the person was acquitted of a crime under Part 2 Article 263 of the Criminal Code of Ukraine (carrying a cold weapon without authorisation prescribed by law) (Judgment of Myronivka... 2018);
- Biliav District Court of Odeska Oblast, which acquitted the person of a crime under Part 1 Article 263 of the Criminal Code of Ukraine (acquisition, carrying, and storage of ammunition without authorisation prescribed by law) (Verdict of Bilyaiv... 2018);
- Vasykivskiy Municipal and District Court of Kyivska Oblast, according to which the person was acquitted of a crime under Part 1 Article 263 of the Criminal Code of Ukraine (illicit acquisition, carrying, and storage of ammunition without authorisation prescribed by law) (Judgment of the Vasykiv... 2018).

However, the legal debate continued and some contrasting decisions were made by the Supreme Court.

Thus, on May 31, 2018 in case No. 127/27182/15-k the Supreme Court ruled as follows: "The provision of Article 263 of the Criminal Code of Ukraine is subsidiary and to understand the illegality of the handling of weapons requires an analysis of the relevant law. The concept of "law" used by the legislator has an expanded interpretation and includes

legislation in general, including regulations governing the relevant legal relations, the violation of which forms an objective aspect of the crime under Article 263 of the Criminal Code of Ukraine". Thus, according to the logic of the judges of the Supreme Court, the Instruction of the Ministry of Internal Affairs is the Law of Ukraine.

In another judgement (Resolution of the panel of judges of the First Judicial Chamber 2018), the Supreme Court noted: "By the judgement of the Lutskiy City District Court of the Volynska Oblast of 4 November 2016, PERSON_7 was sentenced under Part 1 Article 263 of the Criminal Code to 4 years' imprisonment... PERSON_7 was found guilty of acquiring, carrying, storing firearms and ammunition without a statutory authorisation. The court found that in mid-July 2015 in the area of the city of Shchastia, Luhanska Oblast, the convict procured (purchased) ammunition: a grenade "F1", a unified charge "UZRGM", 8 rounds of 7.62 mm calibre, as well as a firearm – an "SVT" rifle calibre 7.62 mm, which the convict carried with him, transported and stored at his place of residence. These items were seized by law enforcement officers on December 2, 2015 during a sanctioned search... To substantiate the absence of the crime prescribed by Part 1 Article 263 of the Criminal Code in the act of the convicted person, the defence refers to the fact that the disposition of this provision constitutes a blanket provision, which refers in its content to another law, as it mentions "statutory authorisation". As there is no law governing the ownership of weapons and their trafficking, this provision of the criminal law cannot be applied due to its uncertainty. The court cannot agree with such an argument... The disposition of Part 1 Article 263 of the Criminal Code cannot be considered as a blanket provision, as it does not refer to other laws or regulations in defining prohibited acts, but defines them in its text... According to established judicial practice, authorisation procured in accordance with the law, in the broadest meaning of the term, excludes the application of Part 1 Article 263 of the Criminal Code (Criminal Code of Ukraine 2001). The Court has no legal grounds to change such an established approach, confirmed, *inter alia*, by recent judgements of the Supreme Court (see Judgment in Case No. 127/27182/15-k, Case No. 51-3305km18 (Resolution of the panel of judges of the Second Judicial Chamber... 2018). The court concludes that the disposition of Part 1 Article 263 of the Criminal Code, according to which the convict was found guilty, is formulated with

sufficient clarity to allow the presumption that the act for which he was convicted is criminal from the standpoint of this provision".

Subsequently, the dispute was transferred to the public domain by the convicted person's lawyers. In one of their articles (Orekhovsky and Kolomiets 2020), they noted, in particular: "In this opinion of the Supreme Court we observe a violation of the laws of logic, resulting in substitution of notions of "law" and "authorisation prescribed by law" with "legislation" and "permission", respectively... Restriction of trafficking of things is possible only based on the law, instead of instructions of the Ministry of Internal Affairs. Liability is impossible for lawful conduct, i.e. such that complies with the Constitution of Ukraine (Constitution of Ukraine 1996). For example, in cases where a person has acquired a thing in accordance with Article 41 of the Constitution and has it in accordance with Articles 319 and 328 of the Civil Code of Ukraine (The Civil Code of Ukraine 2003). These provisions prescribe the freedom to acquire and possess a thing, except in cases where such acquisition or possession is limited exclusively by law. At the time of adoption of Article 263 of the Criminal Code of Ukraine (2001) such laws were the Criminal Code of the Ukrainian SSR and the Law "On Property", which expired in 2004 and 2007, respectively (Civil Code of Ukraine 1963). Replacing "law" with "legislation" allows to equate the instruction with the law and prosecute for violating it when procuring authorisation for weapons. However, such permission is not prescribed by law".

Notably, Part 2 Article 178 of the Civil Code of Ukraine (The Civil Code of Ukraine 2003) establishes that the types of objects of civil rights, which are not allowed in civil transactions (objects withdrawn from civil transactions), must be directly established by law. The types of objects of civil rights, which may belong only to certain participants in the turnover or whose stay in the civil turnover is allowed by a special authorisation (objects with limited turnover), are established by law. Therewith, there is an opinion in the doctrine that such a law on firearms is the Criminal Code of Ukraine, which, specifying the objects for which criminal liability is prescribed, determines the legal regime of these objects as those withdrawn from civil transactions or the turnover of which is possible with special authorisation (Melnik and Havronyuk 2019). Thus, the public debate on this issue is ongoing and certainty is yet to be found.

In accordance with Part 1 Article 5, of the UN Protocol on Firearms (Protocol against the illicit...

2001), each State Party shall take such legislative and other measures as may be necessary to establish the commission of the following intentional acts as criminal offences: the illicit manufacture of firearms, their parts and components; ammunition to it; illegal trafficking in firearms, their parts and components and ammunition; falsification or unlawful removal, destruction, or alteration of the marking on firearms stipulated in Article 8 of this Protocol.

The Criminal Code of Ukraine (Criminal Code of Ukraine 2001) stipulates crimes in accordance with paragraphs (a) (b) (c) of Part 1 Article 5 of the UN Protocol on Firearms (Protocol against the illicit... 2001). Thus, Article 263-1 of the Criminal Code of Ukraine prescribes liability for commission of the following intentional acts: illicit manufacturing of firearms; illicit conversion of firearms; illicit repair of firearms; falsification of firearms markings; illicit removal of firearms markings; change of markings; illicit manufacturing of ammunition; illicit manufacturing of explosives; illicit manufacturing of explosive devices. The content of these acts is covered in the research and practice literature (Melnik and Havronyuk 2019) and is beyond doubt.

The illicit manufacturing of firearms, ammunition means intentional actions, committed without the permission of the law in order to create them from objects, compounds (mixtures, substances), which were not previously endowed with the characteristics of these objects. As a result of the manufacture of weapons, ammunition reappears, turning into such objects (for example, products, metal parts, chemicals), which have not yet been suitable for the inflicting of damage on manpower or the destruction of obstacles or did not have such a special purpose and as a result, were not withdrawn from civil transactions. The manufacture of firearms also includes changes in the device or means that structurally resembles weapons, but do not fall into the respective category in terms of its damaging properties (processing air gun, starting pistol, device for firing gas cartridges, or cartridges with rubber bullets for firing ammunition, etc.).

Recycling of firearms constitutes the introduction of changes in objects that were previously weapons. Conversion lies in giving the weapon additional qualities that change its damaging properties, increase accuracy, provide the possibility of concealed carrying, transform into an object with a different legal regime. This, in particular, includes the conversion of a hunting rifle for automatic firing "bursts", the installation of new

optics, sawing off a part of the barrel or butt-stock and creating a "sawed-off gun", inserting a rifled barrel into the barrel of a smoothbore hunting rifle.

Repair of firearms lies in restoration of the damaging properties of the weapon damaged or which due to other reasons failed, bringing it to a condition where it is again suitable for expelling a shot. Repair is carried out by replacing or restoring parts, mechanisms worn or unusable for other reasons, elimination of defects, breakdowns or damage, adjustment of normal functioning of various parts and mechanisms, their adjustment, as a result of which these items become suitable for their intended purpose, "registering the fire", etc. Repair of firearms involves the manufacture of its parts and components.

Falsification of firearms involves a variety of actions that involve making changes to the weapon aimed at misjudging the relevant items. Such changes are insignificant in content, as they do not change the status of weapons as objects specifically designed to damage manpower or to overcome obstacles that have no other purpose and have a special legal regime. At the same time, they lead to the provision of weapons of a different appearance, which usually do not correspond to the type of weapon, leading to the perception of certain objects as harmless to others. This includes inserting a barrel, slide, and trigger mechanism, which together are suitable for expelling a shot, into a handle, umbrella, stick, or crutch. It will also be a falsification to disguise the real type of weapon, for example, by introducing changes that make the machine gun look like a hunting rifle, or a sniper rifle looks like a sporting rifle.

Removal or change of markings of a firearm means changes in the markings applied to the firearm by its manufacturer and allow to determine where and by whom it was produced (country, enterprise), date of manufacture, calibre, and other features, identified by individual number. Typically, such markings constitute marks or inscriptions affixed to the barrel, receiver, slide, and other large parts and components that are not interchangeable with the relevant parts of other types or instances of weapons. Removal of the marking lies in destruction of the corresponding marks by sawing off, milling them, making them illegible due to damage by drill, chisel, electric welding equipment, or otherwise. Changing the markings constitutes a complete or partial forgery – it is the application of new marks that do not correspond to the actual data on the weapon or changes in existing markings (addition of

symbols, text that were not present on the weapon, changes in existing alphanumeric symbols, etc.). Removal or alteration of markings must be sufficiently significant to prevent the reading of existing markings or to give rise to another determination of the characteristics of the weapon.

Article 263 of the Criminal Code of Ukraine (Criminal Code of Ukraine 2001) establishes liability for illegal handling of weapons, ammunition, or explosives. Crimes include carrying, storage, acquisition, transfer, sale – committed in relation to firearms (except smoothbore hunting) ammunition, explosives or explosive devices without a statutory permit.

COMPARISON OF THE PROVISIONS OF THE CRIMINAL CODE OF UKRAINE AND ARTICLE 5 OF THE UN PROTOCOL ON FIREARMS

Comparison of the above articles with Article 5 of the UN Protocol on Firearms (Protocol against the illicit... 2001) yields the following results (Table 2).

Thus, the Criminal Code of Ukraine (Criminal Code of Ukraine 2001) does not stipulate liability for: 1) destruction of markings on firearms, as well as, accordingly, for attempting such actions and complicity in them; 2) illicit trafficking in parts and components of firearms; 3) illicit trafficking in firearms within the meaning of the UN Protocol on Firearms (Protocol against the illicit... 2001) ("Illicit trafficking" – the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from across the territory of one State Party to that of another State Party if any of the States Parties concerned does not authorise it in accordance with the terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol (Protocol against the illicit... 2001)). That is, Article 263 of the Criminal Code of Ukraine refers to the circulation of weapons exclusively on the territory of Ukraine, although the definition contained in Article 3 of the UN Protocol on Firearms, which is included in the provisions on criminal liability, which is prescribed in Article 5 of the Protocol, clearly indicates the need for a cross-border attribute of the crime. Article 263 of the Criminal Code of Ukraine, neither in itself nor in combination with other articles of the Criminal Code of Ukraine, does not directly make provision for this (Protocol against the illicit... 2001).

At the same time, Articles 7 and 8 of the Criminal Code of Ukraine prescribe the possibility of liability for a crime stipulated as such in the Criminal Code of

Table 2: Comparison of the Provisions of the Criminal Code of Ukraine and Article 5 of the UN Protocol on Firearms

| Article 5 of the UN Firearms Protocol | Criminal Code of Ukraine |
|---|---|
| Illicit manufacturing of firearms | Article 263-1 |
| Illicit manufacturing of parts and components of firearms | Article 263-1 (repair of the weapon involves the manufacturing of its parts and components) |
| Illicit manufacturing of ammunition for firearms | Article 263-1 |
| Illicit trafficking in firearms | Article 263 (partially) |
| Illicit trafficking in parts and components of firearms | – |
| Illicit trafficking in ammunition for firearms | Article 263 |
| Falsification of marking(s) on firearms | Article 263-1 |
| Illicit obliteration of marking(s) on firearms | Article 263-1 |
| Removal of marking(s) on firearms | – |
| Alteration of marking(s) on firearms | Article 263-1 |
| Attempt to commit any crime established in article 5 | Articles 15 and 263 or 263-1 |
| Participation as an accomplice in an offence established in article 5 | Articles 27, 29, and 263 or 263-1 |
| Organisation of any offence established in article 5 | Articles 27, 29, and 263 or 263-1 |
| Direction of any offence established in article 5 | Articles 27, 29, and 263 or 263-1 |
| Aiding in any offence established in article 5 | Articles 27, 29, and 263 or 263-1 |
| Abetting in any offence established in article 5 | Articles 27, 29, and 263 or 263-1 |
| Facilitation in any offence established in article 5 | Articles 27, 29, and 263 or 263-1 |
| Counselling the commission of any offence established in article 5 | Articles 27, 29, and 263 or 263-1 |

Ukraine, if it is committed outside of it. In such case, the subject of criminal liability for such offence in accordance with the Criminal Code of Ukraine may be (Criminal Code of Ukraine 2001):

- citizen of Ukraine – as a general rule (unless otherwise prescribed by an international agreement of Ukraine);
- foreigner – as an exception (if it is: a) prescribed by an international agreement of Ukraine; b) whether the committed offence is a grave or especially grave crime, in particular, against the interests of Ukraine).

In cases prescribed by international treaties, it is understood that the committed crimes belong to international crimes or crimes of an international nature, and a foreigner who has committed these crimes does not enjoy immunity from criminal liability and may be extradited to Ukraine. The concept of a crime against the interests of Ukraine is evaluative. In a particular situation, such crimes may include offences against public safety, as prescribed in Article 263 of the Criminal Code of Ukraine, which constitutes a grave crime according to the classification of crimes provided

in Article 12 of the Criminal Code of Ukraine. Furthermore, in accordance with Article 6 of the Criminal Code of Ukraine, carrying, storage, acquisition, transfer or sale of firearms may be recognised as committed on the territory of Ukraine, if they were at least commenced or continued or completed or terminated on the territory of Ukraine. In such cases, reference to Articles 7 and 8 of the Criminal Code of Ukraine is not required (Criminal Code of Ukraine 2001).

On the other hand, if past practice is any guide, pre-trial investigation bodies and courts do not always apply and correctly interpret the necessary provisions of the General Part of the Criminal Code of Ukraine. Therefore, there is a possibility of resorting to an approach, according to which Article 263 of the Criminal Code of Ukraine should directly stipulate the liability for illegal import into Ukraine and export from Ukraine, transit through its territory of firearms, its parts and components and ammunition (for example, Articles 199, 268, 300, 301, 321-1 of the Criminal Code, which establish liability, in particular for the import into Ukraine and the export from its territory of counterfeit medicines, as well as the importation of counterfeit money, waste and secondary raw materials,

pornographic works, works promoting a cult of violence and cruelty, racial, national or religious intolerance and discrimination, etc.). Ultimately, the Criminal Code of Ukraine (Criminal Code of Ukraine 2001) is consistent with Article 5 of the UN Protocol on Firearms (Protocol against the illicit... 2001).

On the other hand, the Criminal Code of Ukraine establishes responsibility for other crimes related to firearms, ammunition to it, which are not covered by the UN Protocol on Firearms, in particular for:

- theft, misappropriation, extortion, seizure by fraud – if they are committed in relation to firearms (except smoothbore hunting weaponry), ammunition; acquisition of the same items by means of abuse of office by an official, as well as actions specified in Part 1 Article 262 of the Criminal Code, committed repeatedly or by prior conspiracy by a group of persons; robbery to steal the same items; their extortion, combined with violence dangerous to life and health, as well as any actions prescribed in Parts 1 or 2 of this article, if they are committed by an organised group (Article 262) (Criminal Code of Ukraine 2001);
- negligent storage of firearms or ammunition, if it resulted in death or other serious consequences (Article 264);
- smuggling, i.e. movement across the customs border of Ukraine outside customs control or with concealment from customs control, of weapons or ammunition (except for smoothbore hunting weaponry or ammunition), parts of firearms (Article 201);
- violation of the procedure for international transfers of goods subject to state export control, which may include firearms (Article 333);
- theft, misappropriation, extortion of weapons, ammunition, seizure by fraud committed by a serviceman; the same acts committed by a military official with abuse of office, either repeatedly, or by prior conspiracy by a group of persons, or that caused significant harm; robbery for the purpose of seizing weapons, ammunition, extortion of these items, combined with violence dangerous to the life and health of the victim (Article 410);
- intentional destruction or damage of weapons, ammunition by a serviceman (Article 411),

negligent destruction or damage (Article 412) and their loss or damage (Article 413) (Criminal Code of Ukraine 2001).

Regarding the compliance of the provisions of the Criminal Code of Ukraine (Criminal Code of Ukraine 2001) with the Palermo Convention (United Nations Convention... 2000). In accordance with paragraph 3 Article 34 of the Palermo Convention and paragraph 2 Article 1 of the United Nations Protocol on Firearms (Protocol against the illicit... 2001), each State Party may take more stringent or severe measures than those established in this Convention to prevent and combat transnational organized crime; the provisions of the Convention shall apply *mutatis mutandis* to this Protocol, unless otherwise established therein. In accordance with the Law of 4 February 2004, Ukraine ratified and, at least for the most part, albeit in its own way, implemented the Palermo Convention, Article 5 of which stipulates, inter alia, for the obligation to criminalise the following intentional acts:

- conspiracy to commit a serious crime that pursues the goal of obtaining material gain, combined with the commission of any action to achieve this goal by at least one of the participants in the conspiracy;
- the act of a person who, being aware of either the purpose and general criminal activity of an organised criminal group, or its intentions to commit serious crimes, takes an active part in criminal activity of such group or other activities of an organised criminal group, realising that their participation will contribute to the above criminal purpose, or organises, directs, aids, incites, facilitates or counsels on a serious crime committed with the participation of an organised criminal group.

Thus, Article 28 of the Criminal Code of Ukraine provides, in particular, for the following forms of criminal associations (Criminal Code of Ukraine 2001):

- a) organised group – when several people (three or more) took part in the preparation or commission of a crime, who were previously organised into a stable association for the commission of this and other crime(s), united by a single plan with the division of functions of group members, aimed at achieving this plan, known to all members of the group;
- b) a criminal organisation – when the crime was committed by a stable hierarchical association of

several persons (five or more), members or structural parts of which conspired to organise joint activities to directly commit grave or severely grave offences by members of this organisation, or leadership or coordination of criminal activity of other persons, or ensuring the functioning of both the criminal organisation and other criminal groups.

As for the organised group, it is mentioned in fifty articles of the Special Part of the Criminal Code of Ukraine, where the attribute "the commission of this offence by an organised group" is used as aggravating or especially aggravating. As for the criminal organisation, several articles of the Criminal Code of Ukraine stipulate liability for the creation of a criminal organisation or criminal community, participation in them, for the creation, participation in special types of criminal organisations and participation in them, etc. These are Articles 255, 256, 257, 258-3 of the Criminal Code of Ukraine, etc. (Criminal Code of Ukraine 2001)

All crimes committed by an organised group or criminal organisation are usually serious or particularly serious crimes. Thus, the creation of a criminal organisation for the purpose of committing a serious or particularly serious crime, the management of such an organisation or participation in it are in themselves crimes, regardless of whether the goal was to obtain material gain, and whether these actions were combined with at least one of the participants in the conspiracy of any action to achieve this goal. Thus, according to Article 6 of the Criminal Code of Ukraine, all persons who have committed a crime on the territory of Ukraine shall be subject to criminal liability under this Code. The same article defines that a crime shall be recognised as committed on the territory of Ukraine, if it was started, continued, ended, or terminated on the territory of Ukraine; the crime shall be recognised as committed on the territory of Ukraine, if its perpetrator or at least one of the accomplices acted on the territory of Ukraine.

CONCLUSIONS

1. In Ukraine, it is essential to adopt the Law "On Arms Trafficking", which, among other things, should clearly define concepts of "firearms", "parts and components", "ammunition", "illicit manufacturing", "illicit trafficking", etc., which would be relevant for the criminal legislation of Ukraine as well.

2. The current Criminal Code of Ukraine, contrary to the UN Protocol on Firearms, does not stipulate liability for destruction of markings on firearms, as well as, accordingly, for attempting and complicity in such actions; illicit trafficking in parts and components of firearms; illicit trafficking in firearms in a cross-border context, i.e. import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition to it from the territory of Ukraine or to the territory of Ukraine from another state (except when these items belong to the goods subject to state export control, and the responsibility for violation of the order of their transfer is stipulated in Article 333 of the Criminal Code of Ukraine). Finally, the Criminal Code of Ukraine is consistent with Article 5 of the UN Protocol on Firearms.
3. Ukraine has duly complied with the provisions of the Palermo Convention on the Liability of Organised Crime Participants for Crimes Related to the Illicit Trafficking of Weapons.

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