

INTERNATIONAL CRIMINAL LAW

ILLICIT ARMS TRAFFICKING WITHIN EU AND EU MEMBER STATES LEGAL FRAMEWORK

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On the night of October 1, 2017, between 10:05 and 10:15 p.m., a 64 year old man fired hundreds of rifle rounds from his suite on the 32nd floor of a hotel on a crowd of concertgoers at the Route 91 Harvest music festival on the Las Vegas Strip in Nevada, leaving 58 people dead and other 546 injured. An hour after the gunman shot himself. His motive is unknown¹.

How could this be happening? Probably there's a main factor: the regulation on arms in USA is too lax, excessively flexible, which is produced by something we could name as "arms culture". In fact, an important sector of the American society strongly believes that they do have the right to protect themselves, and that the best way to get it is by using firearms. This would explain sociological phenomena such as the powerful *National Rifle Association*, which is the only civil association from the USA that was invited to the negotiations on the UN Arms Trade Treaty, the same association that attempted to block that Treaty².

This "arms culture" is not unique to the USA, because in other countries (probably the whole European Union) we live under the cultural influence of the USA. Arms are symbols themselves, fetishes, that come and settle in our human understanding by prefabricated images that spread through a wide range of cultural goods: from toy guns to spy novels. It is not by chance that the film that made more money across the world in 2016 was *Captain America: Civil War*³.

The worship of certain arms has a presence even in products and objects whose theme or character should be, at least initially, beyond them: for instance, in a science fiction film about futurist technology (*Ghost in the Shell*) there are some good foregrounds of the Daisuke Aramaki's weapon, which is the main character's elderly tutor and chieftain. That handgun is an *Smith & Wesson Model 29*, exactly the same gun that Clint Eastwood made famous in *Dirty Harry* movies.

¹ https://en.wikipedia.org/wiki/2017_Las_Vegas_shooting

² <https://www.theguardian.com/commentisfree/2012/dec/28/nra-block-un-treaty-gun-control>

³ <http://www.imdb.com/list/ls031261985/>

One more example: the flag of Mozambique, adopted in 1983, includes the image of an assault rifle: the *Avtomat Kalashnikova Model 1947* (so well known as Kalashnikov or, more simply, as AK-47), which has achieved the first higher production position in history, the most illegally sold and also the cheapest one: According to *Global Financial Integrity*, nowadays it can be purchased for 600 dollars in Afghanistan, 1.200 dollars in Mexico or nearly 1.000 dollars in Belgium⁴. Indeed, Belgium seems to be the country where the perpetrators of the terrorist attack in Paris got their Balkan AK-47⁵. Nowadays, over 30 varieties and copies of the original Kalashnikov assault rifle are manufacturing in the world⁶.

The arms culture has also a presence in countries like Romania or Spain. As far as I know, in our countries we don't have such a powerful organization as the *National Rifle Association*⁷, but we do have other institutions such as the *Asociación Nacional del Arma*⁸ in Spain, or the *Asociatia Nationala a Detinatorilor de Arme din Romania*⁹. They both uphold the right to carrying a weapon within their statutes.

Knowing the accurate number of weapons within a country is not an easy task, but there are some figures that allows us to make a comparison, for instance, between Spain and Romania: According to *Gunpolicy.org*, the total amount of weapons in civilian hands in Romania in 2007 was 160.000¹⁰, whereas in Spain it was 4.500.000¹¹ (it means, nearly 30 times more weapons in Spain than in Romania taking in consideration that the Spanish population was just a little more than the double of the Romanian one). It is also interesting to highlight their world ranking position on selling weapons in that year: within 178 countries, Spain was the 18 and Romania was almost the last, being the 123.

It is also remarkable the differences between these two countries regarding to the homicides that have been perpetrated with a firearm. According to the information issued by *Eurostats*, in 2012 Romania had an intentional homicide rate that was slightly higher than the Spanish one per 100.00 population (1.9 for Romania and 0,8 for Spain). However, within the sum of the homicides, in Romania only a 2% were committed using a firearm, whereas in Spain this rate was a 14% (it means, 7 times higher)¹².

⁴ GLOBAL FINANCIAL INTEGRITY, *Transnational Crime and the Developing World*, 2017: http://www.gfintegrity.org/wp-content/uploads/2017/03/Transnational_Crime-final.pdf

⁵ N. MC CARTHY, "The cost of an AK-47 on the black market around the world", *Forbes*, 03/30/2017: <https://www.forbes.com/sites/niallmccarthy/2017/03/30/the-cost-of-an-ak-47-on-the-black-market-across-the-world-infographic/#5c211227442b>

⁶ <http://www.smallarmssurvey.org/weapons-and-markets/tools/weapons-id-database.html>

⁷ <https://home.nra.org/>

⁸ <http://www.anarma.org/>

⁹ <http://www.anda.com.ro/>

¹⁰ <http://www.gunpolicy.org/firearms/region/romania>

¹¹ <http://www.gunpolicy.org/firearms/region/spain>

¹² <https://homicide.igarape.org.br/>

How could these differences be explained? Maybe is the Spanish passion for hunting. Because the higher is the hunter's number, the higher are the hunting licenses. And in my country, we do have a huge amount of people who are fond of hunting. Indeed, in 2012, there were more than 2 million legal hunting rifles in Spain¹³.

It could also be taken into consideration the hardness of the regulation on the issue: the harder the regulation is on arm control, the less of firearms presence on the streets thus the less intentional homicides with firearms would take place. In fact, Spain has a sever regulation on it, but maybe it could be more lax about the hunters. Nevertheless, the Romanian regulation on arms possession and use nowadays is even harder¹⁴, up to the point of that it is said to be the hardest within Europe¹⁵.

The apparent hardness on regulating the possession of arms in Spain does not keep my country from being one of the main characters within the illegal trafficking on these objects inside Europe: according to the study on firearms made by the UNODC in 2015, Spain expressed that the 99.45% of the firearms that were seized in 2013 inside its territory had been made in our country. Next fact is also very flashy: the 22, 30% of the weapons that were seized in Romania were manufactured in Spain and the 25, 60% came from Spain¹⁶.

Otherwise, Spain is also a leader within the legal arms trade, overall of defence weapons. According to *Stockholm International Peace Research Institute (SIPRI)*, my country is the seventh within the list of main great weapons exporting for the last period that has been analysed (2011-2015)¹⁷ and during 2016 Spain beat its own defence equipment exportation record. So this country earned a total amount of 4.051,8 million euros (that is to say, nearly a 9% more than in 2015)¹⁸.

Spain is not an isolated situation within Europe. In fact the European Parliament recognized in a report from August this year that "international transfers of major weapons between 2012-2016 reached their highest volume for any five-year period since the end of the Cold War, and were 8.4 % higher than the figure for the 2007-2011 period"; and "exports from the EU28 amounted to 26 % of

¹³ https://elpais.com/elpais/2016/10/14/media/1476445454_561039.html

¹⁴ See A. M. MANTA, "Un climat controlat în România, regimul armelor și al munițiilor/A climate controlled in Romania, the regime of weapons and ammunitions", *Revista de investigare a criminalității*; Bucharest Vol. 9, Iss. 1, (2016): 621-631

¹⁵ <http://www.digi24.ro/stiri/actualitate/evenimente/romania-are-cea-mai-aspra-lege-a-arme-lor-din-europa-477487>

¹⁶ UNODC, *Study on Firearms 2015. A study on the transnational nature of and routes and modus operandi used in trafficking in firearms*, Vienna, United Nations, 2015: http://www.unodc.org/documents/firearms-protocol/UNODC_Study_on_Firearms_WEB.pdf

¹⁷ See SIPRI, *Yearbook 2016: Armaments, Disarmament and International Security*, Oxford University Press, 2016.

¹⁸ http://www.mineco.gob.es/stfls/mineco/prensa/ficheros/noticias/2017/170512_informe_2016.pdf

the global total in 2012-2016, which makes the EU28 collectively the second largest arms supplier in the world after the USA (33 %) and followed by Russia (23 %)... according to the most recent report by the Working Party on Conventional Arms Exports (COARM), EU countries were granted arms export licences with a total value of EUR 94.40 billion in 2014¹⁹.

I have just mentioned some of the facts that I consider as the most important in order to evaluate the arms trafficking matter within the European legal framework, using to do so the comparison between these two European countries: Romania and Spain. I'm trying to state briefly now, the main rules that deal with the arms control in Europe. But as a prior step, it is necessary to mention two policy instruments from United Nations that have so much influence within the European regulation on firearms.

Until the 21st century, the United Nations had only taken care about military hardware and especially about weapons of mass destruction (this is, nuclear, chemical or biological). Moreover, small and light firearms (which are commonly used to commit homicide) appear as an interesting issue when the United Nations starts to pay attention to a new problem emerged from the globalization. I am referring to transnational organized crime, which in the 21st century started to become a real threat for the stability, sovereignty and independence of the countries themselves.

That's the reason why the UN General Assembly approved the *Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components*²⁰ in 2001 (although it is in force since 2005). This is a "hard law" instrument²¹, attached to the *Convention against transnational organised crime*²². The Firearms Protocol aims at promoting and strengthening international cooperation and developing cohesive mechanisms to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition (firearms). By ratifying or acceding to the Firearms Protocol, States make a commitment to adopt and implement a series of crime-control measures that aim at: (a) establishing as criminal offence the illicit manufacturing of and trafficking in firearms in line with the Protocol's requirements and definitions; (b) adopting effective control and security measures, including the disposal of firearms, in order to prevent their theft and diversion into the illicit circuit (c) establishing a system of government authorizations or licensing intending to ensure legitimate

¹⁹<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0264+0+DOC+XML+V0//EN>

²⁰ https://www.unodc.org/documents/organized-crime/Firearms/12-56168_Firearm_booklet_ebook.pdf

²¹ See K. L. CARLSON, "Fighting Firearms with Fire in the OAS: A Critical Evaluation of the Inter-American Convention Against the Manufacturing of and Trafficking in Firearms, Ammunition, and Other Related Materials": <http://www.corteidh.or.cr/tablas/r29320.pdf>

²² See R. S. CLARK, "The United Nations Convention Against Transnational Organized Crime", *Wayne L. Rev.* 50 (2004): 161.

manufacturing of, and trafficking in, firearms; (d) ensuring adequate marking, recording and tracing of firearms and effective international cooperation for this purpose.

The other key instrument from the UN about arms control is the Arms Trade Treaty²³ that was finally approved in 2013 (in force since 2014), despite the negotiations had begun in the nineties. Some NGOs like *Amnesty International* or *Intermon Oxfam*, certain personalities worldwide (several Nobel Peace Prize people among other) and some international organizations as the European Union itself, they all had an important role within this negotiating process. So much so that it can be said that without their effort, the Arms Trade Treaty could have never been developed, because there were a lot of pressures from certain civil organizations (as The National Rifle Association) and of course, from the arms industry, because all of them thought the treaty would mean a danger to their huge economic benefits. The section 1 of the treaty specifies that *“The object of this Treaty is to: – Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms; – Prevent and eradicate the illicit trade in conventional arms and prevent their diversion; for the purpose of: – Contributing to international and regional peace, security and stability; – Reducing human suffering; – Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties”*.

In terms of the European Union, the arms control within its territory has been a complex issue from its very beginnings and not just because the laws on firearms from the different countries had (and still have) enormous differences, but overall because of the economic interests from the countries that focused (and focus) on manufacturing and exporting military hardware. Thus, article 346 of the Treaty on the Functioning of the European Union establishes that: *“1. The provisions of the Treaties shall not preclude the application of the following rules: [...] b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes”*. This means that arms manufacturing and trading that could be justified on the national defence of the different member states it's out of the European Union internal market rules.

The situation changed substantially with the Lisbon Treaty, in force since 2009, which increased significantly the powers of the European Union with reference to the area of freedom, security and justice. So, according to article 83.1 of the Treaty on the Functioning of the European Union: *“The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the*

²³ <https://www.un.org/disarmament/convarms/att/>

areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime”.

Anyway, it has been a long time until the European Union has begun to use these new powers. In fact, within the so-called Stockholm programme, which defines strategic guidelines for legislative and operational planning within the area of freedom, security and justice for the period 2010-2014, the Council decided to let out of its priorities the arms illegal trading.

Until this year 2017, the European Union has had little legal instruments in order to control the arms trading. The most important ones are:

- *The Council Directive of 18 June 1991 on control of the acquisition and possession of weapons*²⁴, that was developed as a corrective action on internal trade, with the aim of combine some freedom of movement for certain firearms within the Community territory with certain guarantees of security that are necessary to these objects (firearms). To this end, it established the minimum requirements that the member states should impose to the acquirement and possession for certain arms within their territories at the same time the conditions for transferring firearms among the member states were regulated too. This Directive was changed in 2008 in order to adapt its content to the UN Firearms Protocol.

- 20 years later, the *Regulation (EU) n° 258/2012 of the European Parliament and of the Council implementing Article 10 of the United Nations’ Firearms Protocol, and establishing export authorisation, and import and transit measures for firearms, their parts and components and ammunition*²⁵ was approved.

A main factor that has caused that in the last few years the European policy on firearms control has become more active: Terrorist attacks that have taken place in the European territory since 2015, most of them perpetrated using small firearms that had been obtained illegally, for example, in Belgium. As a result, two directives that have changed the picture meaningfully, have been enacted.

In first place the *Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017, on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*²⁶, which is the first binding legal act that the European Union has taken according to section 83.1 Treaty on the Functioning of the European Union. This Directive “*establishes minimum rules concerning the definition of criminal offences and sanctions in the area of terrorist offences, offences related to a terrorist group and offences related to terrorist activities, as well as measures of protection of, and support and assistance to, victims of*

²⁴ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1991.256.01.0051.01.ENG

²⁵ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012R0258>

²⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017L0541>

terrorism" (article 1). According to this, the member states have an obligation to punish as terrorist crimes, among others, these behaviours:

1. "Manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapons", where committed with one of the aims listed in article 3, paragraph 2: "(a) seriously intimidating a population; (b) unduly compelling a government or an international organisation to perform or abstain from performing any act; (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation".

2. Providing instruction "on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques", with the knowledge of the fact such skills provided are intended to be used for the purpose of committing or contributing to the commission of one terrorist offences, or receiving instruction on the same illicit activities, for the same purpose.

Secondly, there is the *Directive (EU) 2017/853 of the European Parliament and of the Council of 17 May 2017*²⁷, which has changed again the *Directive 91/477/EEC*. The changes made affect substantially to prevention and control on arms transferring, indeed, almost all the drafting of the original precepts from the *Directive 91/477/EEC* have been modified. That's why it's so likely that all the countries within the EU would have to address again the change of their own national control systems on weapons before September 2018, because that's the deadline given for the transposition of this Directive.

²⁷ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_2017.137.01.0022.01.ENG