

United Nations Convention against Transnational Organized Crime

Eleventh Meeting of the Working Group on Firearms

Vienna, Austria, 4 April 2024

Panel presentation on Implementation of article 5 (Criminalization) of the Firearms Protocol by León Castellanos-Jankiewicz ¹

Thank you, Mr. Chairperson.

It is an honor for me to deliver this presentation as a panelist representing Latin America and the Caribbean. I thank the Permanent Representative of Mexico, Ambassador José Antonio Zabalgoitia for graciously agreeing to keep the session open until today so that I could present my remarks.

My presentation will focus on private security companies in relation to issue (e) listed in the Background paper prepared by the Secretariat, namely, “additional offences that have proved to complement the implementation of the Firearms Protocol at the national level”.² My remarks will lead me to recommend that Parties to the Protocol should adopt national legislation which encompasses forms of both transnational and domestic firearms trafficking conducted by private actors.

¹ This presentation is made in a personal capacity and does not represent the views of any organization or entity. Dr. León Castellanos-Jankiewicz is currently Senior Researcher at the Asser Institute for International and European Law, The Hague, and Supervisor of the International Law Clinic on Access to Justice for Gun Violence at the University of Amsterdam Faculty of Law.

² Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Firearms, Vienna, 3 and 4 April 2024, Implementation of article 5 (criminalization) of the Firearms Protocol, Background paper prepared by the Secretariat, UN Doc. CTOC/COP/WG.6/2024/3, 23 January 2024.

Private security companies pose a distinct challenge to the national implementation of the Firearms Protocol because these corporations represent a risk of domestic diversion, whereas the Protocol's criminalization provisions in Article 5 focus on transnational trafficking. Indeed, UNODC has recently noted that "domestic legislation needs to be more detailed...in order to fully capture and address the variety of situations related to the diversion and trafficking both within and across national boundaries".³

There is no fixed definition of diversion under international law, but it is often understood as the physical rerouting or the appropriation of conventional or small arms and related items contrary to relevant national and or international law. The UN has stressed that diversion can occur under an international transfer or in several domestic scenarios, which encompass post-delivery scenarios where lawfully licensed firearms are lost, sold, or borrowed to a different end user or for originally unintended end use.

Broadly speaking, there are two ways in which a private security company can contribute to human rights or other abuses through diversion: first, when private security companies knowingly participate in any activity (e.g. import, transport, storage, transfer, brokering) leading to diversion, and second, due to the companies' negligence and lack of oversight. Moreover, security is largely privatized around the world, to the extent that in certain regions such as Latin America private security guards outnumber public police officers.⁴

While a textual, stand-alone reading of article 5 could lead to the conclusion that the Firearms Protocol applies exclusively to cases of purely international trafficking, article 11 (a) of the Protocol also requires States Parties to take appropriate measures to require the security of firearms, their parts and components and ammunition at the time of import. Private security

³ UN Office on Drugs and Crime, 'Digest of Firearms Trafficking and Related Crimes Cases. A review of cases and good practices emerging from national jurisprudence', Vienna, 2023, p. 37.

⁴ Mark Ungar, "The Privatization of Citizen Security in Latin America: From Elite Guards to Neighborhood Vigilantes", *Social Justice*, 2007-08, Vol. 34, No. 3/4 (109-110).

companies engage in imports either directly or through intermediaries such as distributors, dealers and brokers. On the basis of article 11, the risk of domestic diversion can be considered when scrutinizing the importing activities of private security companies. By making reference to import, the Protocol may therefore be understood as including within its scope the obligation to take legislative measures dedicated to prevent the diversion of firearms by private security companies and other non-state actors in the context of importing activities. This interpretation would improve accountability further up in the supply chain.

An attempt has already been made to cover the scenario where private security companies engage in diversion that does not amount to transnational trafficking. Article 11 of the draft of a possible Convention on Private Military and Security Companies prepared by the UN Working Group on the use of mercenaries in 2011 explicitly required private security companies to secure firearms and their components in order to prevent diversion.⁵ Even though that instrument has yet to be adopted, it does not mean that action cannot be taken.

In the context of exporting states, the Arms Trade Treaty, also refers to the concept of preventive measures in direct reference to the Firearms Protocol under article 7, which requires States to assess the potential that conventional arms or items could be used to commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a party. This means that the risk of diversion by non-state actors and private security companies can and should be considered by exporting States as well.

Bringing non-state actors such as private security companies within the scope of the criminalization provisions of article 5 is increasingly urgent for three reasons. First, it is well-known that over 850 million of the approximately 1 billion firearms in worldwide circulation

⁵ Human Rights Council, Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council, UN Doc. A/HRC/WG.10/1/2 of 13 May 2011.

are in private hands. Second, it is also common knowledge that over three quarters of firearms held by civilians are unregistered, and therefore represent a high risk of diversion. In Europe alone, there are 35 million illegally held firearms, accounting for 56% of the total.⁶ Finally, and most importantly, the largest share of gun deaths worldwide occurs outside armed conflicts and involves civilian perpetrators.⁷

Ultimately, applying the Firearms Protocol in a way that includes demand-side factors such as the role of private security companies in diversion, “could accelerate progress in preventing SALW-related human suffering”. Indeed, a recent report published by the EU Non-Proliferation and Disarmament Consortium has found that there has been a tendency to address technical supply-side factors related to weapons themselves, rather than demand-side factors, which can be more political or socially complex. But addressing demand-side factors can highlight root causes and reduce the need for states and other actors to use armed force in the first place.⁸

To conclude, I recommend that Parties to the Protocol adopt national legislation which encompasses forms of both transnational and domestic firearms trafficking conducted by private actors with a focus on private security companies. This represents an opportunity for improved implementation of the Protocol that can neutralize the risks of trafficking and diversion, and promote the human rights due diligence from production to end-use.

Thank you.

/END

⁶ ‘Council and Parliament strike deal on safer firearms trading’, Council of the EU, Press release, 14 March 2024.

⁷ Callum Watson and Aline Shaban, ‘What Happened to Demand? Getting Small Arms Control Back on Track’, EU Non-Proliferation and Disarmament Consortium, Non-Proliferation and Disarmament Papers, No. 88, March 2024, p. 2.

⁸ ‘What Happened to Demand?’ (n 7), p. 5.