

INTER-AMERICAN COURT OF HUMAN RIGHTS

IN THE MATTER OF

REQUEST FOR ADVISORY OPINION

SUBMITTED BY

THE GOVERNMENT OF THE UNITED MEXICAN STATES

OC-1-2022

Brief of *Amicus Curiae*: The International Human Rights Clinic at the University of Virginia

School of Law

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INTRODUCTION

The private firearm industry currently enjoys a vast degree of immunity, allowing it to continue illegal and unethical business practices with little accountability or tangible regulation. As an effect, the industry and its members are somewhat legally untouchable. Whereas this might not pose heavy risks if the companies involved produced more mundane goods, in the instant issue, the products being illegally manufactured and distributed are firearms. As such, they pose ever-present threats wherever they may be. The risk is especially high and dangerous, however, in regions that are particularly plagued with conflict and violence.

For several OAS member states, the situation outlined above is painfully familiar. The firearm industry is institutionally armed with protective legislation and techniques for avoiding accountability, making it incredibly difficult for victims of gun violence involving these products to seek relief or redress.

Although international regulatory regimes pertaining to firearm sales have heretofore proven ineffective, recent developments now provide the Court with the opportunity to establish and expand mechanisms for regulation, relief, and remedy. This opportunity emanates from an international framework that includes a heightened due diligence standard for conflict-affected regions. This standard, moreover, may function carefully and harmoniously with rights enshrined in the American Convention on Human Rights and the Guiding Principles on Business and Human Rights.

Drawing on the frameworks and norms that today's international arena offers, the Court may establish specific regulations for businesses and States to follow in investigating and preventing the kinds of harm prompting this request. Concurrently, it may create clear, affirmative remedies for victims of this harm to seek relief.

INTEREST OF AMICI

The International Human Rights Clinic at the University of Virginia School of Law and Professor and Clinic Director Nelson Camilo Sánchez Leon hereby present an amicus curiae brief to the Inter-American Court of Human Rights regarding the United Mexican States request for an advisory opinion submitted on 11 November 2022 in relation to the interpretation of Article 64(1) of the American Convention on Human rights (ACHR), within the context of the responsibility of private entities engaged in the manufacture and distribution of firearms in relation to violations of the protection of the rights to life and humane treatment, and the efforts that States must perform to ensure a fair trial for victims of the aforementioned commercial practices.

The International Human Rights Clinic has specialized expertise on the legal issues involved in Mexico's request for an advisory opinion from the Inter-American Court of Human

Rights (hereinafter “the Inter-American Court”).¹ The clinic provides students with opportunities to litigate human rights claims in international forums, advocate before the United States government and international organizations, document and publicize human rights violations, and research critical and pressing human rights issues.

SUMMARY OF ARGUMENT

In this advisory opinion request the Court will not merely address a legal question; the case holds the potential to redefine the contours of the application of a rights-based approach to the arms trade, bolster access to justice, and dissect the obligations of states. The Court's guidance on these issues will indubitably contribute to the overarching narrative of human rights and transitional justice, with reverberations that may be felt across the Americas and beyond. The three topics we would like to address in this brief are the following:

- I. **Reconceptualizing the Arms Trade through a Human Rights Lens:** Historically, the legal discourse surrounding the arms trade has predominantly been steeped in concerns relating to security, international relations, and commercial interests. Regrettably, this approach has often marginalized the essential human rights implications inherent to this trade. This case provides a platform for the Court to redirect the narrative, firmly placing human rights at the epicenter of regulatory discussions. By doing so, the Court may crystallize a transformative legal paradigm, illuminating the human face of the arms trade and emphasizing the imperative for rights-centric regulation.
- II. **Enhancing Access to Justice and Remedies for Human Rights Violations:** The proliferation of violence resulting from the unregulated arms trade leaves in its wake a plethora of human rights abuses. Through this case, the Court is uniquely positioned to expand upon and articulate principles related to access to justice and reparations for victims of this violence. Such guidance from the Court may pave the way for robust mechanisms to ensure justice, accountability, and comprehensive reparation, all of which stand at the core of the standards of the Inter-American human rights system.
- III. **The Responsibilities and Duties of States and Corporations in the Human Rights Framework:** Lastly, the Court is afforded the opportunity to engage in a rigorous examination of the complex interplay between states and private entities in the context of the arms trade. In doing so, the Court can elucidate the existing obligations under the human rights regulatory framework and foster a nuanced understanding of the shared duties and responsibilities. This examination may facilitate the creation of a coherent jurisprudence that holds both governments and corporations accountable for human rights violations, bridging the gap between commercial pursuits and the inviolable dignity of human beings.

¹ The legal brief's research and drafting were conducted by student Catherine M. Haddad, under the guidance of the Clinic's director.

ARGUMENT

I. Problems, Gaps, and Limitations Exposed by the Request

A. The Overwhelming Problem of the Illegal Weapons Market

In our region and the world today exists an illegal weapons market that has overwhelmed the ability of several regional governments to effectively control the weapons used in committing crimes. Despite a strict framework of gun laws in Mexico, where merely fifty gun permits are issued per year², as many as 597,000 weapons cross the border into the country annually.³ These weapons are largely used to commit crimes, at a rate of once every thirty-one minutes, as found by the U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”). The ATF's research confirms and validates the pattern of the flow of firearms discussed in this brief, emphasizing that “gun trafficking often entails an unlawful flow of firearms from jurisdictions with less restrictive firearms laws to jurisdictions with more restrictive firearms laws, both domestically and internationally.”⁴

The inundation of illegal firearms has led to a significant increase in crime, including 130,000 homicides committed using firearms in the Americas in 2017 alone. INTERPOL's operation in March 2021 led to the arrest of approximately 4000 suspects across thirteen South American countries for their involvement in illegal firearms trafficking, recovering roughly 200,000 illegal firearms and components.⁵ However, governments like Mexico have few tools to tackle the source of the problem: determining responsibility for illegal weapons trade. The implausibility of attributing the violence to domestic purchasing is evident in the case of Mexico, where only one weapons distributor exists, guarded by the Army, selling an average of thirty-eight weapons per day.⁶

Unrestricted access to weapons and their use against civilians raises human rights concerns that could lead to state accountability. Mexico's request for an adversary opinion highlights this dire need. There exists a conspicuous absence of a legal framework to address this situation, as international laws governing arms trade have not been crafted with human rights considerations at their core. Furthermore, domestic legal provisions fall short of providing

² Mineo, Liz, “Stopping Toxic Flow of Gun Traffic from U.S. to Mexico,” *Harvard Gazette* (blog), February 18, 2022, <https://news.harvard.edu/gazette/story/2022/02/stopping-toxic-flow-of-gun-traffic-from-u-s-to-mexico/>.

³ Miles Kohrman, “Guns Recovered by Mexico’s Military Come Mostly From U.S. Makers,” *The Trace*, October 20, 2022, <https://www.thetrace.org/2022/10/how-many-american-guns-mexican-cartels/>.

⁴ William J. Krouse, “Gun Control: Straw Purchase and Gun Trafficking Provisions” (Congressional Research Service, August 9, 2022), <https://crsreports.congress.gov/product/details?prodcode=IF12190>.

⁵ “South American Countries Seize 200,000 Illegal Weapons during Interpol Operation,” *Diálogo Américas* (blog), May 4, 2021, <https://dialogo-americas.com/articles/south-american-countries-seize-200000-illegal-weapons-during-interpol-operation/>.

⁶ Gandoy Vázquez, Wilma and García Hidalgo, Ximena, “Mexico’s Bold Move Against Gun Companies,” *Arms Control Association*, September 2022, <https://www.armscontrol.org/act/2022-09/features/mexicos-bold-move-against-gun-companies>.

victims with direct avenues for seeking reparations, particularly from companies not domiciled within the jurisdiction where the weapons were utilized for criminal acts. The violations of international law are currently occurring throughout the Americas with no legal redress. Mexico and other countries in the region are seeking solutions to halt the documented flow of illegal weapons from members of the private firearms industry into OAS countries. They also seek to establish a framework to adequately respond to the aforementioned injustices, which are being performed frequently and with impunity.

B. Gaps in International Law

Despite an abundance of information regarding the negative effects of the unregulated arms market on security and human rights, the international community has struggled to establish a system that effectively controls the arms market and curtails human rights violations. Recent years have seen significant progress, notably with the creation of the Arms Trade Treaty (ATT) in 2013, which took effect in 2014.⁷

The ATT is a crucial global standard that seeks to bridge the mechanisms of the arms market and the concern for human rights, delineating the responsibilities of states in the arms trade. It sets international standards for regulating conventional arms trade, aiming to prevent illicit trade and reduce human suffering. Risk assessment measures designed to block transactions that could undermine peace and human rights are unique to the ATT.⁸ This treaty mandates that states assess the risk of arms exports potentially leading to serious human rights violations, thus instilling an obligation of due diligence. This innovative approach aligns with the jurisprudence of the Inter-American Human Rights Court regarding state due diligence. However, the system's effectiveness is marred by several challenges:

- **Ambiguity in Risk Concepts:** The ambiguity surrounding the concepts related to risk in the ATT has emerged as a critical concern in the international arms trade landscape.⁹ This lack of clarity stems from the vague language around risk thresholds used in arms agreements, with phrases like "clear risk," "overriding risk," "might be used," and others left undefined.¹⁰ The absence of specific guidance on what level of risk meets the thresholds for prohibiting an arms transfer allows states significant leeway in interpreting these concepts, which inevitably undermines the strength and consistency of the

⁷ "Arms Trade Treaty," UNODA Treaties Database, accessed August 20, 2023, <https://treaties.unoda.org/t/att>.

⁸ "The Arms Trade Treaty – UNODA," United Nations Office for Disarmament Affairs, accessed August 17, 2023, <https://disarmament.unoda.org/att/>.

⁹ "Arms Trade Treaty – UN Human Rights Experts Urge All States to Ratify It and Consider Disarmament," OHCHR, December 23, 2014, <https://www.ohchr.org/en/press-releases/2014/12/arms-trade-treaty-un-human-rights-experts-urge-all-states-ratify-it-and>.

¹⁰ Borja Álvaro Álvarez Martínez, "A Balance of Risks: The Protection of Human Rights in International Arms Trade Agreements," *Security and Human Rights* 29, no. 1–4 (December 12, 2018): 199–215, <https://doi.org/10.1163/18750230-02901008>.

provisions. Different states may have differing interpretations of what constitutes an unacceptable risk, leading to inconsistencies in how the laws are applied. This ambiguity is not accidental, but reflects the resistance of some states, including major arms exporters like the U.S., to stringent limitations on arms exports during the negotiations of these agreements.¹¹ States are often caught between competing interests of protecting their arms industries and preventing human rights abuses. This tension leads to compromises that result in vague language, enabling states to exploit textual ambiguity to argue that risks do not meet the threshold to block exports valuable to their arms industries or to upholding other interests.¹²

- **Enforcement Issues:** Despite the ATT's positioning of States as the gatekeepers of the arms trade, its enforcement presents several, overlapping challenges.¹³ An independent assessment has shown that the enforcement and implementation of the ATT face a multifaceted set of challenges that hamper its effectiveness.¹⁴ The transition from diplomatic negotiation to the practical application remains obstructed due to limited operational engagement by relevant officials. The ATT Secretariat's restricted status and size inhibit its ability to provide proper support, while an imbalance between exporters and importers and a decline in participation across all states threatens to create inequities within the system.¹⁵ The application of risk mitigation measures suffers from a lack of transparency and the potential for misapplication. Furthermore, there's a pressing need for sustained engagement and universalization, as participation has fallen, especially among non-exporters, and the Geneva base has posed additional challenges.¹⁶ The treaty lacks a dedicated review process to adapt to emerging issues, and reduced civil society access and unclear risk thresholds have led to concerns over transparency and the undermining of human rights aims.¹⁷
- **Missing Key Ratifications:** As of December 2022, 113 states have ratified or acceded to ATT, including six of the world's top 10 arms producers: France, Germany, Spain, China, the United Kingdom, and Italy.¹⁸ Despite this broad participation, the treaty's impact is substantially weakened by the absence of ratifications from significant arms exporters such as Russia and the United States. Within the context of the OAS, the following

¹¹ Id.

¹² Id.

¹³ "Responsible Business Conduct in the Arms Sector: Ensuring Business Practice in Line with the UN Guiding Principles on Business and Human Rights - Information Note by the UN Working Group on Business and Human Rights," OHCHR, accessed August 17, 2023, <https://www.ohchr.org/en/documents/tools-and-resources/responsible-business-conduct-arms-sector-ensuring-business-practice>.

¹⁴ Bauer, Sibylle and Bromley, Mark, "Implementing the Arms Trade Treaty," May 2015, <https://www.sipri.org/sites/default/files/files/misc/SIPRIBP1505.pdf>.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ "Arms Trade Treaty," UNODA Treaties Database, accessed August 20, 2023, <https://treaties.unoda.org/t/att>.

member states have yet to ratify the treaty: Bolivia, Colombia, Cuba, Ecuador, Haiti, Nicaragua, the United States, and Venezuela.¹⁹ The continued non-participation of these countries in the ATT may pose challenges to the full realization of the treaty's goals.

- **Lack of Provisions for Reparations or Legal Remedies:** Focused on prevention through risk analysis, the treaty neglects to outline states' specific responsibilities for providing justice, remedies, or reparations to victims of international obligation violations.
- **Uncertainty Regarding Private Companies' Duties or Liability:** The ATT holds states responsible for its implementation, but the role and obligations of private entities involved in the arms trade remain unclear. This ambiguity extends to non-binding frameworks like the Wassenaar Arrangement, a voluntary export control regime that struggles with similar enforcement problems.²⁰

In conclusion, the ATT represents a vital step in international arms regulation, yet it is plagued by complexities and ambiguities that hinder its efficacy. These challenges underscore the necessity for coherent international collaboration to foster a cohesive and effective approach to the pressing issues of the global arms trade.

C. Gaps in Domestic Responses to Accountability for Gun Violence

In the Americas, the ravages of gun violence—injuries, death, familial destruction—find their bitter echo in a grievous justice gap. This gap is emblematic of the hurdles faced by victims seeking remedies, particularly in the United States, the region's largest producer and marketer of firearms. The interplay of domestic legislation and a complex network of private firearms manufacturers and distributors becomes a formidable obstacle to realizing human rights.

The labyrinth of U.S. laws, strategically designed to shield the gun industry, creates further barriers that victims of gun violence must confront. Their struggle for justice is a fraught endeavor. The lack of affirmative remedies forces victims to rely on tenuous legal theories such as public nuisance and negligence, and the situation is further compounded by immunity laws that bar specific actions.

At the heart of this complex legal landscape is the Protection of Lawful Commerce in Arms Act (PLCAA). Passed in 2005, PLCAA bestows broad immunity upon manufacturers, sellers, and importers of “quality products” within the gun industry, encompassing firearms, ammunition, and component parts.²¹ This expansive legislation restricts certain civil liabilities and creates a legal climate where arms companies operate with impunity. By doing so, it indirectly fosters conditions that may enable international illicit arms trades. Moreover, the limitations of U.S. laws leave international victims, who suffer from the far-reaching impacts of

¹⁹ *Id.*

²⁰ “The Wassenaar Arrangement at a Glance | Arms Control Association,” Arms Control Association, accessed August 17, 2023, <https://www.armscontrol.org/factsheets/wassenaar>.

²¹ “Gun Industry Immunity,” Giffords Law Center to Prevent Gun Violence, accessed August 17, 2023, <https://giffords.org/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/>.

arms trade facilitated by U.S. entities—manufacturing companies, distributors, vendors, etc., without legal recourse.

Despite PLCAA's overarching protection, the law contains six exceptions that permit plaintiffs to pursue relief. Among these, the predicate exception draws significant attention. It delineates that PLCAA does not bar actions wherein a manufacturer or seller violated applicable state or federal laws related to the product's sale or marketing, with such violation being a proximate cause of the harm sought to be redressed.²² Courts have interpreted this exception to permit common-law actions linked to knowingly violating applicable firearms sale or marketing laws. Thus, while PLCAA grants substantial protection to the U.S. gun industry, it does not entirely extinguish their accountability.²³

However, while providing a narrow pathway for claims, the predicate exception is itself embedded in legislation that arms the U.S. weapons industry with broad immunity. It remains restrictive and inadequate, serving merely as a defense to a defense rather than a substantial cause of action or affirmative remedy. Its jurisdictional confinement within the U.S. fails to protect international victims of gun violence, perpetrated using U.S. weapons illicitly trafficked abroad.

The Court must forge affirmative and tailored legal avenues to address this justice gap. The present request for an advisory opinion presents the Court with both an opportunity and an obligation to bridge this procedural and legal void. By articulating standards for expanding access to justice and remedy under international law, the Court can empower States and companies with the enforcement structures needed to uphold human rights. In so doing, the Court would affirm the sanctity of life and ensure that the justice gap is filled for all victims of gun violence in the region, irrespective of their geographic location.

II. Opportunities presented by the Request to expand human rights protection

A. The Court has the Opportunity, Expertise, and Jurisdiction to Harmonize Two International Regimes in Particular.

In the dynamic landscape of international law, the Inter-American Court of Human Rights has played a pioneering role. Notably, this will not mark the first occasion in which the Court has been tasked with interpreting international human rights law norms in conjunction with other international legal regimes. In the past, the Court has adeptly maneuvered the complex

²² Vivian S Chu, "The Protection of Lawful Commerce in Arms Act: An Overview of Limiting Tort Liability of Gun Manufacturers" (Congressional Research Service, n.d.), <https://sgp.fas.org/crs/misc/R42871.pdf>.

²³ Andrea Joy Campbell and Elizabeth N Dewar, BRIEF OF MASSACHUSETTS, CALIFORNIA, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAI'I, ILLINOIS, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, AND VERMONT AS AMICI CURIAE IN SUPPORT OF APPELLANT AND REVERSAL, No. NO. 22-1823 (n.d.).

interplay between inter-American standards and international norms governing humanitarian law, environmental law and investment law.

The Court's jurisprudence has made a profound contribution to the international discourse on how diverse regimes of international law should be construed to augment protection, especially for individuals. This focus has been instrumental in shaping modern international law.

With the advisory opinion currently under the Court's consideration, a fresh opportunity has arisen to trailblaze a novel understanding of state obligations. This opportunity emerges within the intricate context of another international legal system—that of arms control.

We respectfully propose that the Court's examination should embrace the following salient aspects:

Unity of Purpose between Human Rights Law and Arms Control Law:

An innate harmony exists between international human rights law and international arms control law. Both are grounded in similar foundational principles: their shared aim is to prevent actions that could endanger human lives. Both human rights law and arms control law, moreover, are intertwined in their pursuit of the prevention of harm to human individuals. Their fundamental principles resonate with one another, underlining their mutual humanitarian goals.

Member states that subscribe to both the inter-American standards and international arms control law are obliged to implement both sets of obligations in harmony, thereby expanding the application of international arms control law. This must be done in line with obligations stemming from the Inter-American framework, with special attention to the pro persona principle recognized by inter-American jurisprudence. Essentially, regional states must interpret their arms control obligations in a manner that broadens the protection system for victims of violence. This includes general and specific prevention measures related to state institutions and regulation of standards that private companies must adhere to.

IACHR's jurisprudence better addresses the human impacts of non-compliance:

While both regimes are predicated on analogous principles, the normative framework governing the protection of human rights within the Inter-American system exhibits greater precision in delineating the responsibilities arising from non-compliance with international commitments. This specificity manifests not merely in the interpretation of the responsibility regime of the contracting states but also in the articulation of obligations that engender responsibilities to third parties. In this context, it would be judicious for the Inter-American Court to seize this opportunity to elucidate how this overarching jurisprudence on responsibility is applicable to the particularized scenario of the international arms market and its consequent effects.

The judgments in cases such as *Vera Rojas v. Chile* are pivotal in defining the responsibilities of states concerning private companies that produce and market arms under the

ATT.²⁴ Within the context of the obligations articulated in Articles 1(1) and 2 of the American Convention, the Court has stressed the duty of States to prevent human rights violations by private companies.²⁵ This includes the adoption of legislative measures to prevent, investigate, and remedy such violations.²⁶ States are responsible for regulating companies to ensure their compliance with human rights norms within the inter-American system, including adherence to the American Convention and the Protocol of San Salvador.²⁷

The Court's perspective on regulation comports with and stresses the Guiding Principles on Business and Human Rights, emphasizing that companies, regardless of size or sector, must conduct activities that neither cause nor contribute to human rights violations.²⁸ Moreover, they must take steps to redress violations, with potential differentiation in legislation based on activity and risk to human rights.²⁹

In addition to these principles, the Court has outlined specific measures States must take. These include ensuring that companies establish: (a) human rights protection policies; (b) due-diligence processes to identify and correct violations and ensure dignified work; (c) remediation processes for violations, particularly those affecting impoverished or vulnerable individuals.³⁰ The Court also urges States to promote good corporate governance practices focusing on compliance with human rights laws and including stakeholder participation and reparation for those affected.³¹

Furthermore, the Court underscores the right to prompt legal recourse for protection against human rights violations, as enshrined in the American Convention. Consequently, States must create effective mechanisms to redress human rights violations and eliminate barriers that hinder access to justice, including cultural, social, physical, and financial impediments.³² This is seen as vital in ensuring that even the most vulnerable individuals have proper access to legal and other remedies.

OAS Member Must Uphold their Multiple Human Rights Commitments

²⁴ Sebastián Smart, "Expanding and Contracting the UN Guiding Principles: An Analysis of Recent Inter-American Human Rights Court Decisions," *Journal of Human Rights Practice*, August 4, 2023, 1–13, <https://doi.org/10.1093/jhuman/huad025>.

²⁵ "Basic Documents - American Convention," Inter-American Commission on Human Rights, accessed August 17, 2023, <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>.

²⁶ *Id.*

²⁷ Theresia Degener and Yolán Koster-Dreese, "Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights: Opened for Signature: 17 November 1988 Entry into Force: Not yet (1994) According to Article 21," ed. Theresia Degener and Yolán Koster-Dreese, *Protocol of San Salvador*, January 1, 1995, 679–91, https://doi.org/10.1163/9789004479890_052.

²⁸ *Frequently Asked Questions about the Guiding Principles on Business and Human Rights* (United Nations, 2015), <https://doi.org/10.18356/79c110b0-en>.

²⁹ *Id.*

³⁰ REDESCA, Panamericana Union, and Organization of American States, eds., *Informe Empresas y Derechos Humanos: Estándares Interamericanos* (Washington, DC: OEA, 2019).

³¹ *Id.*

³² *Id.*

Human rights obligations are incumbent upon all OAS member states, although variations might exist depending on the ratification of specific regional human rights treaties. Even without ratifying particular arms control agreements such as the Arms Trade Treaty (ATT), all states are bound by commitments in the Organization of American States Charter. Moreover, the recognition conferred upon the American Declaration on the Rights of Man by the Inter-American Court underscores that these obligations are universal within the region.

It is pertinent, therefore, for the Court to elucidate this point and specifically emphasize these requirements and responsibilities. Such clarification would eliminate any ambiguity regarding the obligations of states, irrespective of their engagement with specific treaties. It emphasizes that the commitment to uphold human rights and adhere to foundational principles is not optional; it is an integral part of membership in the OAS.

By affirming these obligations, the Court would send a clear message to all member states about the primacy of human rights. It would also strengthen the collective resolve to work towards a comprehensive system of protection and accountability, ensuring that no state perceives itself as exempt from these core principles and duties.

B. The Court has the Opportunity to Build on its Work by Clarifying Standards and Identifying Avenues for Victims of Gun-trafficking-related Harm to Obtain Remedies and Reparations.

The Inter-American Court, renowned as a leading judicial authority, commands the expertise to steer states in crafting domestic institutions to aid victims of violence emanating from illicit arms trafficking. Its comprehensive and precedent-setting jurisprudence addresses justice and remedy, meticulously defining both procedural and substantive obligations for states.

Building on this solid foundation, the Inter-American Court now has a unique chance to advance the practical realization of these standards by providing tailored guidance to its member states. A fruitful path for such guidance can be gleaned from the domestic legislation of several U.S. states, which have pioneered innovative legal solutions to combat gun violence as well as gun industry immunity laws. Although gun violence continues to pose a significant challenge across the region, the Court has the ability to recognize and draw valuable insights from these American legal innovations. By doing so, it can develop tangible principles and exemplary practices, elevating the access to remedies for victims of gun violence and forging a more unified and effective regional response.

As previously highlighted, the U.S.'s Protection of Lawful Commerce in Arms Act (PLCAA) stands as a complex barrier to justice, creating broad legal immunity for the firearms industry and hindering victims' rights. Yet, hope emerges from the innovative efforts of several U.S. states such as Colorado, Hawaii, New York, Delaware, New Jersey, California, and Washington. These states have created and championed local measures to assist victims, with California's Firearm Industry Responsibility Act of 2022 representing a prime example.

In 2022, California enacted the Firearm Industry Responsibility Act, which requires members of the firearm industry to abide by a standard code of conduct and to “establish, implement, and enforce reasonable controls” to prevent certain specified harms.³³ The “reasonable controls” are intended to: (1) prevent selling or distributing a firearm-related product to a straw purchaser, trafficker, person who is legally disqualified from owning a firearm, or a person whom the individual distributing the weapon has “reasonable cause to believe is at a substantial risk of using a firearm-related product to harm themselves or another person, or of using a firearm-related product unlawfully,” (2) prevent the loss or theft of a firearm or related product from the firearm industry member, (3) “ensure the firearm industry member complies with all provisions of California and federal law and does not promote the unlawful manufacture, sale, possession, marketing, or use of a firearm-related product,” (4) require members of the firearm industry to “take reasonable precautions to ensure they do not sell, distribute, or provide a firearm-related product to a downstream distributor or retailer of firearm-related products who fails to comply with the firearm industry standard of conduct,” and (5) prohibit members of the firearm industry from manufacturing, advertising, importing, or providing for wholesale or retail sale any firearm-related products that are “abnormally dangerous and likely to cause an unreasonable risk of harm to public health and safety in California,” among other related harms.³⁴

The provisions of California’s act clearly demonstrate knowledge of the various business practices the firearm industry has relied on to avoid legal repercussion. Simultaneously, they create means to address these practices and ensure victims have access to legal remedies despite the U.S. firearm industry’s institutional immunity. In so doing, the act explicitly authorizes victims and designated public officials to bring civil lawsuits against the firearm industry for violations pertaining to the previously discussed standard of conduct. Specifically, the law states that any person who has been harmed in California “because of a firearm industry member’s conduct [in violation of the standard of conduct set forth in § 3273.51 of the California Civil Code] may bring an action in a court of competent jurisdiction.”³⁵ The Attorney General, a city attorney, and/or a county counsel may also bring such a civil action.

These emerging state legislations in the U.S. accentuates an urgent need for analogous remedies across OAS member states. Considering the protective legislation that several U.S. states have enacted, the Court has a golden opportunity to inspire and lead all OAS members to enable similar remedies.

In sum, the Court must attentively consider these domestic legislations, skillfully adapting their principles to forge a resilient international framework. This initiative could herald

³³ “Gun Industry Immunity in California,” *Giffords* (blog), accessed August 17, 2023, <https://giffords.org/lawcenter/state-laws/gun-industry-immunity-in-california/>.

³⁴ *Id.*

³⁵ “Section 3273.52 - Acts or Omissions Actionable; Civil Actions; Relief, Damages, Attorney’s Fees; Rebuttable Presumption,” § 3273.52 California Civil Code §, accessed August 17, 2023, <https://casetext.com/statute/california-codes/california-civil-code/division-3-obligations/part-4-obligations-arising-from-particular-transactions/title-20-firearm-industry-responsibility-act/section-327352-acts-or-omissions-actionable-civil-actions-relief-damages-attorneys-fees-rebuttable-presumption>.

a new epoch of responsibility and reparation, where victims' rights stand at the forefront, transcending industry immunity and political divides. Such an integration would signal a transformative shift in the legal and political landscape, positioning the rights of victims at the forefront of the analysis.

III. Suggesting Solutions: The Present Issue Necessitates Deepening Jurisprudence on the Responsibilities of Businesses

A. An Effective Solution Demands Allowing Several International Frameworks and Policies to Complement and Coordinate with One Another, such as the American Convention on Human Rights and the Guiding Principles on Business and Human Rights.

While the IACHR Court has begun integrating international human rights and business standards with the norms of the ISHR, there remains room for strategic improvement and enhanced specificity regarding the responsibilities of States and businesses alike. Until now, the Court has primarily focused on States' duties to execute oversight power,³⁶ emphasizing "the State's obligation to protect."³⁷ The Court now has the opportunity to expand upon its previous guidance to bring "the corporate responsibility to respect and the public and private means of remediation" into the conversation.³⁸ In so doing, the Court will provide a more informed and multidimensional approach for ameliorating the arms crisis afflicting the region, and will offer more targeted, comprehensive access to justice for victims. The UN Working Group on Business and Human Rights provided further context on the numerous complications surrounding access to justice in a 2022 Information Note on "Responsible business conduct in the arms sector":

"That arms continue to be exported into contexts of severe human rights violations results from the confluence of several factors—a lack of accountability for States that ignore human rights provisions in arms control laws for national security or commercial reasons; an arms sector regulatory framework that grants States leeway to interpret human rights conditions permissively; a culture of secrecy and nontransparency around arms exports worldwide; corruption in the arms sector; and a lack of human rights due diligence (HRDD) conducted by arms companies, as well as a failure by States to require them to do so."³⁹

³⁶ "Responsible Business Conduct in the Arms Sector: Ensuring Business Practice in Line with the UN Guiding Principles on Business and Human Rights - Information Note by the UN Working Group on Business and Human Rights," OHCHR, accessed August 17, 2023, <https://www.ohchr.org/en/documents/tools-and-resources/responsible-business-conduct-arms-sector-ensuring-business-practice>.

³⁷ Sebastián Smart, "Expanding and Contracting the UN Guiding Principles: An Analysis of Recent Inter-American Human Rights Court Decisions," *Journal of Human Rights Practice*, August 4, 2023, 1–13, <https://doi.org/10.1093/jhuman/huad025>.

³⁸ *Id.*

³⁹ "Responsible Business Conduct in the Arms Sector: Ensuring Business Practice in Line with the UN Guiding Principles on Business and Human Rights - Information Note by the UN Working Group on Business and Human Rights," OHCHR, accessed August 17, 2023,

In ruling on this issue, the Inter-American Court has the opportunity to require these companies to carry out their obligation of human rights due diligence. In order to adequately provide proper remedy, therefore, the Court must recognize that relying on the States to create these mechanisms on their own has proven inconsequential and will fail in this case to remedy the situation or to offer remedy to those whom it has harmed. As the Human Rights Committee has emphasized, “stronger application of the [UN Guiding Principles on Business and Human Rights] across the arms sector—by both States and businesses—is critical to helping to prevent, mitigate, and remedy negative human rights impacts that this sector currently enables.”⁴⁰ The Court now has an opportunity to issue detailed guidance about what businesses’ responsibilities for responding to and remedying negative human rights consequences are, rather than continuing to rely solely on States to produce these details and instructions.

One such ruling that may offer insight on this issue is the Court’s decision in *Employees of the Fire Factory of Santo Antonio de Jesus and their Relatives v. Brazil*. In this case, the Court “[recognized] that the Guiding Principles must be analysed in light of the American Convention on Human Rights.”⁴¹ Analyzing in this manner allows the Guiding Principles to function in tandem with certain key human rights principles of the American Convention, such as the right to life, which States are not to interpret narrowly and are to regard with the utmost importance.⁴² Accordingly, the Court in *Employees v. Brazil* also recognized that “the first pillar of the Guiding Principles, namely the obligation of States to protect, includes the obligation to supervise the role of private entities and that a failure to do so entails the international responsibility of the State.”⁴³ This decision marked a bold yet appropriate move by the Court to ensure that private entities are being monitored and held accountable for potentially harmful practices. However, as the matter before the Court demonstrates, States are unable to adhere to the demands of this obligation when there are private entities operating outside of their countries to illegally bring weapons into their countries, acting explicitly and strategically to avoid government oversight.

In the present case, it is crucial for the Inter-American Court to turn its attention towards Pillar III of the UN Guiding Principles on Business and Human Rights, a provision specifically concerned with access to remedy. While the Court's previous decisions have recognized and adhered to Pillars I and II, addressing the State's duty to protect and the corporate responsibility to respect human rights, Pillar III remains notably underexplored. The Court should suggest a balanced approach where, without relaxing its rich jurisprudence on state-based reparations, it highlights third-party responsibilities to remedy harm and illuminates underlying state obligations to make sure there are effective systems to hold these third parties to account. The

<https://www.ohchr.org/en/documents/tools-and-resources/responsible-business-conduct-arms-sector-ensuring-business-practice>.

⁴⁰ *Id.*

⁴¹ Sebastián Smart, “Expanding and Contracting the UN Guiding Principles: An Analysis of Recent Inter-American Human Rights Court Decisions,” *Journal of Human Rights Practice*, August 4, 2023, 1–13, <https://doi.org/10.1093/jhuman/huad025>.

⁴² “OHCHR | General Comment No. 36 on Article 6: Right to Life” (United Nations Human Rights, Office of the High Commissioner), accessed August 17, 2023.

⁴³ *Id.*

global arms trade, characterized by its intricate network of legal and illicit activities, necessitates a comprehensive approach that includes both judicial and non-judicial remedies for adverse human rights impacts. Pillar III, with its focus on effective mechanisms for grievances, offers a blueprint for such an approach. This blueprint is not merely an abstract legal principle, but is rather a pragmatic pathway to ensure accountability and redress within the complex sphere of international arms trade. The Court's engagement with Pillar III would not only unlock the potential to remedy existing human rights violations but also set a critical precedent for integrating the contemporary regime of business and human rights.

B. The Court Must Clarify States' Obligations on this Matter, Ensuring they Employ a Higher Level of Due Diligence Considering the Conflict-affected Nature of the Region.

Additionally, the Court should explicitly adhere to the internationally accepted principle that in cases of areas experiencing widespread or armed-conflict, companies must exercise a higher level of due diligence to ensure the human rights of the people in the region are being protected. Recognizing the necessity for this higher standard, the UN Working Group on Business and Human Rights has recently highlighted that this improved model adheres to the concept of proportionality that the Guiding Principles were constructed to uphold. Hence, due to the risk of gross human rights abuses that conflict-affected areas pose, the UN Working Group asserts that “action by States and due diligence by business should be heightened accordingly.”⁴⁴

In addition, the UN Working Group has taken care to answer the ensuing question of when heightened due diligence is warranted, offering triggers and indicators as well as specific situational factors for businesses to pay attention to. Among these, they have emphasized the danger posed by situations of armed conflict and other forms of instability, as well as weakness or absence of State structures. Regarding the latter, the UN Working Group issued general language that perfectly describes the dilemma that has been confronting several OAS member countries:

“Human rights are protected by States through the establishment of frameworks and institutions. States are fully bound by their obligations even when such structures are inadequate or simply do not exist. However, reality dictates an acknowledgment that their ability to fulfill those obligations is significantly diminished and that the human rights regime cannot be expected to function as intended. This aspect of State weakness is significant, as many businesses operate, with willful blindness, on the basis that such States will act in the same way as States that are well governed.”⁴⁵

⁴⁴ Un Secretary-General and UN Human Rights Council Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, “Human Rights and Transnational Corporations and Other Business Enterprises :: Note /: By the Secretary-General,” *United Nations General Assembly*, July 21, 2020, 1–23.

⁴⁵ *Id.* at 5.

Allowing businesses to continue conducting their operations in areas of “law-free zones,” the UN Working Group explains, leaves the population vulnerable to entities that may wish to exploit the dysfunction and disorganization of State machinery. Accordingly, the UN Working Group has instructed that businesses are to “engage in heightened human rights due diligence that incorporates tools from atrocity prevention and conflict prevention to augment their existing due diligence frameworks,” as well as to “actively participate in truth and reconciliation processes and provide reparations and guarantees of non-repetition as part of their commitment to building peace.”⁴⁶ In addition, companies are to be alert and investigate potential conflict-affected settings to prevent human rights abuses or participation in human rights abuses when conducting their business.

For private weapons companies distributing or otherwise manufacturing their weapons in a way intended to reach the region, it is not hard to see that many OAS member states are conflict-affected. In other words, it does not take an expert to know that sending a high volume of weapons to Mexico, for example, will likely result in violence and harm. Continuing with the example of Mexico, where half a million weapons enter the country annually despite restrictive gun laws and widespread violence, it is impossible for one to distribute weapons into the region without possessing an awareness that the weapons will more likely than not contribute to or be implicated in this violence. Businesses continuing to manufacture and distribute weapons into Mexico and other OAS member countries have a duty to perform due diligence in preventing and responding to human rights abuses, which, for many of these countries, is understandably inevitable at this point.

The UN Working Group, possessing an awareness of the nature of these dynamics, has issued “a call to action for human rights”:

“As conflicts increase in intensity, complexity and scope, ... the international peace and security architecture must move beyond a static assumption that business is good for peace through its presence, and instead access and act upon the impacts—both positive and negative—that business has in conflict and peace.”⁴⁷

Applying the heightened human rights due diligence to the instant issue is not only necessary and proper considering the conflict-affected nature of several countries in the region, but it is also imperative in halting illegal gun violence and allowing victims to affirmatively access justice. Through engaging with the previously outlined business and human rights standards, looking to innovative access to justice laws within the U.S., and utilizing them alongside international human rights provisions such as the right to life, the Court can build off of the extensive work it has already begun in strengthening human rights in the region in regard to this matter. In so doing, it can apply specific standards for halting, responding to, and enabling recovery from the gun violence the region has been suffering for decades.

CONCLUSION

⁴⁶ *Id.* at 23.

⁴⁷ *Id.* at 9.

Several OAS member countries face rampant violence due to illegal arms trafficking and the activities of private companies, leaving individuals grappling with inadequate international and domestic legal networks to seek justice. These inadequacies stem from systemic disorganization, lack of clear targets, and a failure to prioritize human rights in efforts to combat arms distribution.

The current Request before the Court presents a critical opportunity to integrate a human rights perspective into the regulation of the international firearms market. Although previous attempts have been made, enforcement challenges persist. The Court can now align international human rights standards, state obligations, and corporate responsibilities, leading to a comprehensive response to the multifaceted harms caused by illicit arms. By referencing the pioneering laws enacted by several U.S. states that challenge the firearms industry's exemption, the Court may provide guidance to other OAS members confronting similar issues.

In addressing this matter, the Court can effect lasting change, communicating that private companies will no longer act with impunity. This is a significant step towards upholding human rights in the region and holding responsible parties accountable for the widespread devastation they have caused.

Please accept the assurances of my highest consideration,

A handwritten signature in purple ink, consisting of a stylized loop at the top and a vertical line extending downwards.

Nelson Camilo Sánchez León
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