


DEVELOPMENTS IN THE FIELD

Corporate Duties of the Arms Industry at the Inter-American Court of Human Rights: A Tale of Risk and Attribution

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Abstract

This piece outlines the engagement of the Inter-American Court of Human Rights with the United Nations (UN) Guiding Principles on business and human rights in light of the Advisory Opinion requested by Mexico on the obligations of the firearms industry. It outlines how the Court has relied on the distinction between positive and negative human rights duties, which has led it to constantly find states responsible for omissions (failing to ensure rights) instead of actions (carried out by private actors, including corporations). For the Court, such a distinction translates into the possibility that corporations can violate human rights directly.

Keywords: arms trade; attribution to non-state actors; corporations; Inter-American Court of Human Rights

I. Introduction

On 11 November 2022, Mexico requested an Advisory Opinion from the Inter-American Court of Human Rights (IACtHR or Court) on the activities of the firearms industry with a focus on their responsibility for human rights impacts and violations.¹ The request is based on the interpretation of the right to life, the right to humane treatment and the right to a fair trial, all enshrined in the American Convention on Human Rights (ACHR) and the International Covenant on Civil and Political Rights (ICCPR).² The resulting Advisory Opinion could contribute to changing the understanding of corporate duties under international law,³ while other law-making processes such as negotiating a business and human rights treaty are underway.⁴ This piece explores the extent to which the court could elaborate on such duties through Mexico's request for an Advisory Opinion based on its previous endorsement of the United Nations Guiding Principles on Business and Human Rights (UNGPs).

¹ Estados Unidos Mexicanos, 'Solicitud de Opinión Consultiva,' 11 November 2022.

² *Ibid.*

³ On the interaction between soft law and hard law see Andrea Spagnolo, 'To What Extent Does International Law Matter in the Field of Business and Human Rights?' in *Legal Sources in Business and Human Rights* (Leiden: Brill, 2020) 74–96.

⁴ Walter Arévalo and Andrés Rousset, 'Compliance with Advisory Opinions in the Inter-American Human Rights System' (2023) 117 *AJIL Unbound* 298–302.

II. The Transnational Arms Industry Against the Backdrop of Mexico's Request

In 2021, Mexico brought legal proceedings against the American firearms industry in United States (US) federal courts for negligent business practices which, according to Mexico, contribute to arms trafficking across the border.⁵ Alongside these proceedings, Mexico requested an Advisory Opinion from the IACtHR on the human rights obligations of arms producers, presumably aiming to pressure the industry into improving their due diligence procedures.

In its Advisory Opinion request, Mexico argued that the armed violence on its territory is correlated to trafficked firearms coming from the US and to the 'deliberate and informed decisions to design, advertise, distribute and sell weapons in ways that [companies] know, with utmost certainty, will attract and supply criminals in Mexican territory'.⁶ Accordingly, the first question in Mexico's request to the Court relates to the international responsibility of companies for facilitating illicit trafficking by means of negligent marketing activities.⁷

The Court has previously dealt with corporate involvement in human rights abuses, often in the context of extractive industries.⁸ However, the implicit facts behind the request presented by Mexico pose a colossal challenge. When a private entity violates human rights, the Court has relied on the state to bring private actors into compliance, and this has normally been done by relying on the state's duty to regulate, exercise oversight and supervise or monitor certain activities. The Court has applied this to a variety of cases, which encompass the regulation of fireworks manufacturing activities,⁹ psychiatric health services,¹⁰ blood banks¹¹ and even artisanal dive fishing.¹²

In the case of the arms industry, such a standard duty to prevent through regulation and oversight cannot fully solve the problem, as the main producer is not bound by the ACHR duties under Article 1(1). The idea of extraterritorial regulation would also be problematic,¹³ given that it refers to the home state's control over its corporations acting abroad. Mexico could not reach US corporations in the US, and US gun companies have no subsidiaries in Mexico. For this reason, it is unsurprising that Mexico has shifted its attention to the international responsibility of corporations.¹⁴ This focus invites further elaboration of corporate duties under international law, an issue largely absent from the Court's considerations.¹⁵ To understand how the Advisory Opinion could engage with this question, it is necessary to recall the endorsement of the UNGPs by the Court.

⁵ *Estados Unidos Mexicanos v Smith & Wesson, et al.*, U.S. D. Mass., filed August 4, 2021. For commentary on the latest decision see William Dodge, 'Mexico's Claims Against Gun Manufacturers Suffer a Personal Jurisdiction Setback,' *Transnational Litigation Blog* (August 14, 2024), <https://tlblog.org/mexicos-claims-against-gun-manufacturers-setback-a-personal-jurisdiction-setback/> (accessed 24 August 2024).

⁶ *Estados Unidos Mexicanos*, note 1, p. 8.

⁷ *Estados Unidos Mexicanos*, note 1, p. 5.

⁸ Alejandra Gonza, 'Integrating Business and Human Rights in the Inter-American Human Rights System' (2016) 1:2 *Business and Human Rights Journal*, 357.

⁹ *Workers of the Fireworks Factory v Brazil*, Preliminary Exceptions, Merits, Reparations and Costs, IACtHR Series C No. 407, 15 July 2020, para 115.

¹⁰ *Ximenes-Lopes v Brazil*, IACtHR Series C No. 149, 4 July 2006, para 141.

¹¹ *Gonzales Lluy et al. v Ecuador*, IACtHR Series C No. 298, 1 September 2015, para 117.

¹² *Miskito Divers v Honduras*, IACtHR Series C. No. 432, 31 August 2021, para 57.

¹³ Inter-American Commission on Human Rights, 'Thematic Report on Business and Human Rights: Inter-American Standards,' (2019), para 111.

¹⁴ *Estados Unidos Mexicanos*, note 1, 5.

¹⁵ Gonza, note 8.

III. The Inter-American Court's Endorsement of the UNGPs

In contentious proceedings, the IACtHR has used the UNGPs in multiple ways,¹⁶ and always approvingly.¹⁷ They have been used as part of the applicable law,¹⁸ to reinforce the conclusion that the state had the obligation to adopt necessary measures preventing rights violations committed by private actors;¹⁹ as an interpretative framework for treaty law;²⁰ and even as a means of implementing reparations.²¹

The IACtHR has mirrored the language of the UNGPs and accepted that states should impose on companies an obligation to implement proportional measures that mitigate risk 'in view of their resources and possibilities.'²² By introducing the language of risk mitigation and differential treatment dependent on the companies' financial capabilities, the Court has followed the rationale of human rights due diligence in the UNGPs. In the UNGPs framework, the main goal of risk assessment through human rights due diligence is to avoid negative impacts stemming from corporate failure to consider the human rights implications of their activities.²³ Problematically, though, while corporate responsibility also implies avoiding complicity in human rights abuses,²⁴ it does not offer a coherent legal framework to cases where there is corporate knowledge of those harms. Regardless, in the context of the state duty to regulate businesses, the IACtHR has emphasized—not without ambiguity—that 'this obligation must be assumed by companies and regulated by the state.'²⁵

Briefly, the IACtHR has embraced the UNGPs and assigned to them significant normative effects.²⁶ However, much of the Court's referral to the UNGPs has related to Pillar I, which is a restatement of the most uncontroversial state duties around the protection and fulfilment of human rights. The Court's considerations have rarely elaborated on potential corporate duties, direct obligations or corporate accountability.²⁷ While each case concerns a different industry, a common pattern in all of these cases is that the action or inaction of private actors has led to the international responsibility of the state. The purpose of Mexico's request, however, is to underscore that the arms industry is, by its alleged negligence or 'bad faith,'²⁸ impacting human rights, even if the state has failed to prevent those impacts and violations. How then is the Court supposed to provide an account in which the state is not the only actor attracting responsibility, when all its jurisprudence has made the state the actor responsible for a non-state actor's violations?

¹⁶ On advisory proceedings there has been a passing reference, see IACtHR Advisory Opinion OC-23/17, 15 November 2017, 60.

¹⁷ For a less endorsing approach see *Spoltore v Argentina*, IACtHR Series C No. 404, 9 June 2020, Concurring Opinion of Judge Pazmiño, para 4.

¹⁸ Para 226 signals that the Court endorsed the UNGPs as applicable law in the particular case and based its findings on sources not limited to binding instruments.

¹⁹ *Workers of the Fireworks Factory v Brazil*, note 9, para 150. In the Separate Opinion of Judge Mac-Gregor, it is evident the way in which the UNGPs are conceived as applicable law, see para 11.

²⁰ *Miskito Divers v Honduras*, note 12, para 47; *Vera v Chile*, IACtHR Series C No. 439, 1 October 2021, para 84; *La Oroya v Peru*, IACtHR Series C No. 511, 27 November 2023, para 110. See Sebastián Smart, 'Expanding and Contracting the UN Guiding Principles: an Analysis of Recent Inter-American Human Rights Court Decisions' (2023), *XX Journal of Human Rights Practice*, 1–13.

²¹ *La Oroya v Peru*, note 20, 142.

²² *Vera v Chile*, note 20, para 88.

²³ HRC 'Protect, Respect and Remedy: a Framework for Business and Human Rights' A/HRC/8/5, (7 April 2008) para 62.

²⁴ *Ibid*, para 73.

²⁵ *Olivera Fuentes v Peru*, IACtHR Series C No. 484, 4 February 2023, para 98.

²⁶ See María C Londoño et al, 'The IACtHR and Multinational Enterprises: Toward BHR in the Americas?' (2017) *The Law and Practice of International Courts and Tribunals*, 16.

²⁷ Gonza, note 8, 362.

²⁸ *Estados Unidos Mexicanos*, note 1, 10.

IV. The Limited Engagement with Direct Corporate Duties

Aside from the lack of personal jurisdiction over corporations,²⁹ the key to understanding the IACTHR's extensive use of the UNGPs and its limited elaboration of corporate duties and responsibilities lies in its jurisprudence regarding attribution of conduct. The lack of personal jurisdiction has meant that litigation is directed towards states even when private actors violate human rights.³⁰ But the Court has never suggested, as is so often misunderstood by states,³¹ that the conduct of private actors is being attributed to them or that the Court is shifting the liability of companies towards states.³²

The obligation to ensure human rights (of *erga omnes* nature),³³ known for some time as state due diligence, was initially interpreted to assess the problem of non-state actors violating human rights, which in the 1990s was still debatable.³⁴ The link between Article 1 (1) ACHR and the interpretation of the words 'to respect and ensure respect' with the triple duty to prevent, investigate and punish was established from the very first contentious case before the Court.³⁵ This interpretation of the obligation of states to ensure (positive obligation) translates negative obligations that protect rights into positive duties. In other words, rights that would ordinarily only demand state restraint would now demand action. Accordingly, obligations protecting them become capable of being breached by public omissions.³⁶ This is to be distinguished from those analyses in which an omission 'enabled' rights violations to take place (i.e., tolerance scenarios).³⁷ The Court constantly recalls that this is not automatic, as there has to be an attributable omission,³⁸ and the breach does not suffice to trigger the state's international responsibility.³⁹ The test or central issue for the Court has been 'whether the violation is the result of a state's failure to fulfil its duty to respect and guarantee those rights.'⁴⁰

The attribution of one or several public omissions to the state becomes relevant in the context of an obligation demanding positive action (prevention), whereas private actors can simultaneously breach the most basic negative obligations. The consequence of having both a positive and negative obligation protecting a right is that attribution of the private act does not take place, so strictly speaking the state is not responsible for those acts but for failing to impede them (by means of regulation, oversight or investigation).⁴¹ In the context of the arms trade and human rights, this dichotomy has generated arguments around state

²⁹ American Convention on Human Rights, 'Pact of San Jose,' (adopted 22 November 1969, entered into force 18 July 1978), Articles 61(1); 62(3) and 64; *Miskito Divers v Honduras*, note 12, para 46.

³⁰ See Smart, note 20.

³¹ See *Pueblo Bello v Colombia*, IACTHR Series C No. 140, 31 January 2006, para 115.

³² As suggested by Smart, note 20, 345.

³³ *Pueblo Bello Massacre v Colombia*, note 31, para 111; *Workers of the Fireworks Factory v Brazil*, note 9, Judge MacGregor Separate Opinion, para 7; *Juridical Status and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 (2003), para 140.

³⁴ See Stephanie Farrior, 'State Responsibility for Human Rights Abuses by Non-State actors' (1998) 92 *Proceedings of the Annual Meeting (American Society of International Law)*.

³⁵ Antônio A Cançado-Trindade, 'The developing case law of the Inter-American Court of Human Rights' (2003), 3:1 *Human Rights Law Review*, 9.

³⁶ For a recent restatement see *Noguera et al. v Paraguay*, Merits, Reparations and Costs, IACTHR Series C No. 401, 9 March 2020, para 65.

³⁷ See *Mapiríán Massacre v Colombia*, IACTHR Series C. No.134, 15 September 2005, para 110. This is also to be distinguished from scenarios where the state has empowered a corporate actor as in the *Ximenes Lopez v Brazil* or *Maya Indigenous Community* cases.

³⁸ See *Miskito Divers v Honduras*, note 12, para 44.

³⁹ *Pueblo Bello v Colombia*, note 31, para 111.

⁴⁰ *Velázquez-Rodríguez v Honduras*, IACTHR Series C No. 04, 29 July 1988, para 173.

⁴¹ See Humberto Cantú, 'Business and Human Rights in the Inter-American System,' in Anthony Ewing (ed.), *Teaching Business and Human Rights* (Cheltenham: Edward Elgar, 2023) 234.

prevention of gun violence;⁴² prevention of negligent arms transfers,⁴³ the impact on women's rights caused by diversion and negligent transfers⁴⁴ and the impact of firearms in the hands of children⁴⁵ and youth.⁴⁶ Could the Court rely on this distinction and the UNGPs to solve the problem Mexico presents in its request?

V. The Problem of a UNGPs Approach for Due Diligence in the Arms Industry

Although the IACtHR's careful use of attribution enables it to elaborate on corporate duties, its previous endorsement of the UNGPs leaves it with little leeway. An Advisory Opinion anchored in corporate human rights due diligence⁴⁷ may not quite match Mexico's expected solution. Corporations involved in the arms trade would have to assess the (long ago identified) risks of their products being trafficked or diverted.⁴⁸ On the former, the involvement of private actors in trafficking would serve a supplier or a manufacturer in its consideration of commercial partners for retail so that they would cut commercial ties with those with proven or potential involvement in trafficking.⁴⁹

In contrast, risk considerations and human rights due diligence as set forth in the UNGPs may be ineffective in shaping the behaviour of those that knowingly advertise to cartels and to thousands of local gun dealers that recklessly sell firearms that will be trafficked, precisely because they do so despite of the risk. The 'ant trade'⁵⁰ happens to be the main source of guns that end up in Mexico from the US.⁵¹ These cases may not be solved by a voluntary approach and may require the invocation of liability that captures corporate involvement in international crimes (like complicity), or even the idea of corporate duties. Moreover, the UNGP's voluntary approach assumes that the private actor is willing to address an adverse human rights impact even while being unaware of the full extent of its causal contribution to the damage (UNGP 22). The same assumption cannot be made when companies intentionally try to circumvent the consequences of their acts. Therefore, the Court will have to find solutions beyond the endorsement of the UNGPs.

In contrast, the UNGPs risk-based approach may serve a greater function in the case of diversion, given that there is no implied recklessness as there is in trafficking 'facilitation.' However, while the positive/negative duties approach of the Court allows for a direct violation of human rights by private actors, the case of diversion would result in legal action against the state from which the guns were diverted (normally the host state, in this case, Mexico), not the seller or the home state. Therefore, the application of the duty to prevent may eclipse the role of private actors, regardless of the UNGPs approach, which calls for the independent actions of companies under Pillar II.

⁴² Human Rights Council, 'Prevention of Human Rights Violations Committed with Small Arms and Light Weapons' A/HRC/Sub.1/58/27 (8 August 2006), para 42.

⁴³ Human Rights Council, 'Impact of Arms Transfers on the Enjoyment of Human Rights' A/HRC/35/8 (3 May 2017) para 20.

⁴⁴ Human Rights Council, 'Impact of arms transfers on human rights' A/HRC/44/29 (19 June 2020) para 25.

⁴⁵ Human Rights Council, 'Impact of the civilian acquisition, possession and use of firearms by children and youth' A/HRC/49/41, (19 January 2022), para 36.

⁴⁶ Human Rights Council, 'Impact of the Civilian Acquisition, Possession and Use of Firearms' A/HRC/53/49 (5 May 2023), para 33.

⁴⁷ *Vera v Chile*, note 20, para 88.

⁴⁸ HRC, note 23, principle 15(b).

⁴⁹ *Ibid*, principle 13(b).

⁵⁰ Ant trade or ant trafficking is a type of arms trafficking where many individuals transport weapons in small consignments to supply large market demand and reduce the risk of law enforcement detections, see UNODC, 'Global Study on Firearms Trafficking 2020,' p. 11.

⁵¹ John L Poland, *The Iron River of Weapons to Mexico: Its Sources and Contents* (Stop US Arms to Mexico, 2024).

VI. Conclusion

The IACTHR's forthcoming Advisory Opinion on the arms industry could set a new chapter for business and human rights.⁵² The potential elaboration of corporate duties or responsibilities will most likely be influenced by the Court's previous endorsement of the UNGPs, which has focused on Pillar I and has been limited to holding states accountable for failing to prevent private actors from violating human rights. While the role of private actors involved in abuse has been partially neglected,⁵³ the fact that the Court has relied upon the attribution of omissions, instead of attributing distant private acts, has left intact the possibility and a conceptual understanding of private actors violating rights directly.

In doing so, the Court has not compromised an approach in which those corporate actors may have, under international law, certain duties,⁵⁴ a possibility that the Charter of the Organization of American States appears to conceptually underwrite.⁵⁵ And while a due diligence approach may not fully solve the cases in which private actors act despite knowledge of related human rights impacts (which encompasses the main backdrop of Mexico's request) uncertainty remains on whether the Court will focus on the state or elaborate an alternative for companies' under international law.

Competing interest. There are no competing interest for this publication

⁵² The Court's considerations could serve to inform what is to be understood as 'facilitate a serious violation of international human rights law' in Article 7(1)(ii) of the Arms Trade Treaty, (adopted 2 April 2013, entered into force 24 December 2014) 3013 UNTS 269 ATT.

⁵³ The motivation and identity of the private actor can be unknown, see *Velázquez-Rodríguez v Honduras*, note 40, para 173.

⁵⁴ Otherwise, corporate actors would be susceptible to violating rights but only forbidden to do so under domestic law.

⁵⁵ Charter of the Organisation of American States (adopted 30 April 1948, entered into force 13 December 1951) Article 36; Gonza note 8, 360. This is a point recurrently highlighted by former president of the IACTHR, Dinah Shelton.

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