

INTER-AMERICAN COURT OF HUMAN RIGHTS

**IN THE MATTER OF REQUEST FOR ADVISORY OPINION SUBMITTED BY THE GOVERNMENT OF
THE UNITED MEXICAN STATES**

**On “the activities of private companies engaged in the firearms industry and their effects in
human rights”**

Submitted in Spanish on 21 August 2023

Written observations submitted in accordance with Article 73.3 of the Rules of Procedure of the
Inter-American Court by

Omega Research Foundation

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and

The Center for Justice and International Law



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I. Introduction and purpose of the intervention

Omega Research Foundation (Omega) is a UK-based non-governmental organisation dedicated to conducting rigorous, objective, evidence-based research on the manufacture, trade and use of military, security and policing technologies. Omega formulates evidence-based policy options that have been incorporated into international standards on the use of force. Omega's research and expertise have contributed to the development of national and regional trade regulations and improved their implementation. Globally, Omega promotes the implementation of human rights standards relating to the use of force and the prevention of serious human rights violations.

The Center for Justice and International Law (CEJIL) is a regional non-governmental organisation, founded in 1991, whose main objective is to achieve the effective implementation of human rights standards in the Member States of the Organisation of American States, through the use of the Inter-American System for the Protection of Human Rights and other international protection mechanisms. Over the past 31 years, CEJIL has monitored and denounced human rights violations in the region, and has accompanied thousands of victims in vindicating their rights before the Inter-American Commission on Human Rights (hereinafter "IACHR") and the Inter-American Court of Human Rights (hereinafter "Honorable Court", "IACtHR", "Inter-American Court" or "Court").

On this occasion, Omega and CEJIL have the honour to submit to the Honourable Inter-American Court of Human Rights these written observations in connection with the request for an advisory opinion formulated by the United Mexican States on the obligations of States with regard to the right to life and personal integrity in relation to the activities of private arms companies.

Our intervention will focus on the following questions formulated by the Mexican State:

- 3) Are the obligations of the States to prevent violations of the right to life and humane treatment include actions aimed at a narrower regulation of the commercialization of firearms, given the nature and purposes of these products?
- 4) In case that States fail to investigate, prevent and/or sanction such careless, negligent and/or intentional marketing activities by private companies engaged in the firearms industry, can they be held responsible for violations of the rights to life and humane treatment?²

Mexico's request concerns the failure of States to oversee the activities of firearm companies, which has led to an influx of lethal weapons and subsequent violations of the rights to life and to personal integrity across the Americas. The undersigned organisations maintain that the human rights to life and personal integrity are also affected when States fail to regulate the activities of companies that supply less lethal weapons, which also have an impact on the effective enjoyment of these rights. Thus, the standards the Court develops in its Advisory Opinion on the questions submitted by Mexico and with respect to lethal weapons will guide, and to some extent apply *mutatis mutandis* to the less lethal weapons industry and to States' regulatory obligations in the

² IACtHR. Request for an Advisory Opinion presented by Mexico before the Inter-American Court of Human Rights on 11 November 2022.

less lethal weapons procurement process. In this regard, we believe it is important that the Inter-American Court take this reality into account when developing its analysis.

This brief argues that States' obligations to prevent torture and other ill-treatment and the arbitrary deprivation of life requires them to prohibit the trade, production and use of weapons other than firearms that are inherently abusive, as well as to establish comprehensive and effective human rights-based controls on the production, trade and use of permitted less lethal weapons. The latter can and often are misused, affecting the right to integrity and even amounting to torture or ill-treatment³. Hence, international obligations concerning the right to life and personal integrity require States to prohibit the first group of weapons and strictly regulate the second group of weapons.

A number of international bodies have made progress in developing standards for reporting on the illegitimate and illegal use of less lethal weapons, as well as promoting the prohibition of weapons that have no practical use other than to inflict torture or other ill-treatment. Initiatives are also beginning to take shape to limit and regulate the trade in weapons that may have a legitimate law enforcement purpose but are commonly used to inflict torture⁴. The United Nations (hereinafter "UN") has issued detailed guidance on the use of less lethal weapons⁵ and the UN General Assembly is considering regulating trade in instruments that can be used to perpetrate torture or other ill-treatment⁶. It is essential that the Americas emulate these advances by developing standards that contribute to the prevention of human rights violations and that this Honourable Court take these advances into account when establishing standards that regulate and apply to the arms trade in the context of this Advisory Opinion⁷.

Less lethal weapons, previously referred to as non-lethal weapons⁸, are intended to protect life and provide law enforcement officials⁹ with alternatives to the use of lethal weapons, when the use of force is warranted, but the use of firearms is not justified under either the principle of necessity or the principle of proportionality. However, the misuse of less lethal weapons has

³ UN, Office of the High Commissioner of Human Rights (OHCHR). *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. New York and Geneva, 2020. Disponible en: <https://www.ohchr.org/en/publications/policy-and-methodological-publications/united-nations-human-rights-guidance-less>. Section 5.

⁴ European Union. *Regulation (EU) 2019/125 of the European Parliament and of the Council concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment*. 16 January 2019.

⁵ UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. *Op cit.* 2020.

⁶ See: Omega Research Foundation. *International Controls on the Trade in the Tools of Torture*. 14 August 2023. Available at: <https://storymaps.arcgis.com/stories/2d9b2865e511428aa6b74cce84e984c5> (last checked on 18 August 2023).

⁷ See: " Amnesty International, Omega Research Foundation. *Ending the Torture Trade: the path to global controls on the Tools of Torture*. 11 December 2020. Available at: <https://www.amnesty.org/en/documents/act30/3363/2020/en/>; On this issue, the IACHR has briefly addressed State obligations to regulate the use of force by the police in contexts of protest and public order, but without specific discussion of the particular considerations underlying the use of less lethal weapons in the context of public order: IACHR. *Citizen Security and Human Rights*. OEA/Ser.L/V/II. 31 December 2009. Para. 115.

⁸ The term "less lethal" is used in this report, as the misuse of any weapon can have lethal consequences.

⁹ The term "law enforcement officials" includes all law enforcement officials, whether appointed or elected, who exercise police powers, especially powers of arrest or detention. See Resolution 34/169 of the UN General Assembly ("Code of Conduct for Law Enforcement Officials"), art. 1 (17 December 1979).

resulted in acts of torture and fatalities¹⁰. In the context of public gatherings and protests, the misuse and excessive use of less lethal weapons may violate people's right to freedom of association and expression. These abuses not only have a chilling effect on the enjoyment of the right to peaceful assembly, but also cause psychological and physical trauma, violating the right to personal integrity. Abuses with less lethal weapons also occur more widely during public security operations, such as arrests and detention settings and prison contexts¹¹. These abuses often disproportionately affect vulnerable or marginalised groups.

While certain less lethal weapons, as with firearms, may have legitimate uses by State security forces agents, these weapons have been widely misused by State agents - including private actors fulfilling law enforcement functions. This often occurs without adequate processes of accountability, access to justice or reparation. This misuse and the failure to investigate, prevent or punish such violations contravenes States' obligations to guarantee the right to life and the right to be free from torture and other cruel, inhuman or degrading treatment¹².

Less lethal weapons include chemical irritants, kinetic impact projectiles and other impact weapons, water cannons, acoustic weapons, stun grenades, instruments of restraint and electric shock weapons.¹³ While some less lethal weapons, such as pepper spray and direct contact electric shock devices, can be legally acquired by civilians in some jurisdictions, this report focuses on the trade of less lethal weapons for law enforcement and other State purposes.

This brief provides the Court with contextual elements and information on international and comparative law on less lethal weapons and their trade, highlighting the need for inter-American standards on the regulation of the trade in less lethal weapons in the Americas, with a view to informing the Court in its work on this advisory opinion.

II. Less lethal weapons, their nature and purpose

The debate as to whether or not certain weapons are permissible under international law has mainly been addressed by international humanitarian law in the context of war. In recent years, however, this question has been analysed under international human rights law, to the extent that “it is increasingly recognized that certain weapons and other means of law enforcement may be inherently cruel, inhuman or degrading by nature or design and, accordingly, that their use, production and trade would be incompatible with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment”¹⁴.

¹⁰ Amnesty International. *Peru: Lethal racism: Extrajudicial executions and unlawful use of force by Peru's security forces*. 25 May 2023. Available at: <https://www.amnesty.org/es/documents/amr46/6761/2023/es/>

¹¹ IACHR - Special Rapporteurship for Freedom of Expression, *Protest and Human Rights*, September 2019. Paras. 122 - 123; UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. 2020. Pp. 21-24.

¹² Articles 4 and 5 of the American Convention.

¹³ UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. 2020; Amnesty International, *Understanding Policing, A resource for human rights activists*, 2006, p. 131, https://www.amnesty.nl/content/uploads/2017/01/book_1_0.pdf.

¹⁴ UN General Assembly. *Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*. 2017. A/72/178. Para. 48.

Less lethal weapons are those designed to carry, within the limitations of their expected or reasonably foreseeable use, a lower risk of death or serious injury than firearms¹⁵. Their primary purpose is to provide law enforcement officials with alternatives to lethal weapons, for the purpose of incapacitating or controlling individuals with a lower risk of lethal injury¹⁶.

While some less lethal weapons may have a legitimate law enforcement purpose when used in accordance with international and national law, the misuse of these weapons by law enforcement officials has also been documented. They have been used around the world as tools of torture and other ill-treatment in public security operations, in the context of arrests, in protests, and in custodial settings such as prison systems.

We would like to highlight the existence of two distinct categories of less lethal weapons and equipment widely used by law enforcement that may violate the human rights of individuals: 1) inherently abusive weapons, and 2) weapons that may have a legitimate law enforcement purpose but which are often misused to torture, otherwise ill-treat or kill individuals¹⁷.

A. Inherently Cruel and Abusive Weapons and Equipment

According to the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a weapon is to be considered as “inherently cruel, inhuman or degrading if it is either specifically designed or of a nature (that is, of no other practical use than) to: (a) employ unnecessary, excessive or otherwise unlawful force against persons; or (b) inflict pain and suffering on powerless individuals”.¹⁸

The United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement (hereinafter "UN Guidance on Less Lethal Weapons") provides a non-exhaustive list of unlawful weapons and other related equipment that violate international human rights law and should not be used by State actors, including:

- Spiked batons.
- Lasers designed to cause permanent blindness.
- Directed energy weapons liable to cause serious injury.
- Metal chains (shackles).
- Leg or wrist irons.
- Thumbscrews or thumbcuffs.
- Weighted instruments of restraint.
- Spiked or electrified instruments of restraint.

¹⁵ UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. 2020. p. 45; International Committee of the Red Cross. *The use of force in law enforcement operations*. 2022. p. 5. Available at: <https://www.icrc.org/en/document/use-force-law-enforcement-operations>.

¹⁶ Amnesty International. *Peru: Lethal racism: Extrajudicial executions and unlawful use of force by Peru's security forces*. *Op. cit.*

¹⁷ Omega Research Foundation. *International Controls on the Trade in the Tools of Torture*. *Op. cit.*

¹⁸ UN General Assembly. *Extra-custodial use of force and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*. *Op. cit.* Para. 51.

The use of these weapons and related equipment carries a high risk of causing severe pain and suffering, and even death. They therefore pose foreseeable risks of violating the human right to be free from torture.

For example, body-worn electric shock devices are designed to be attached or affixed to the body of a person in custody, allowing the application of an electric shock via remote control. Their activation causes an extremely painful electric shock, often causing the wearer to collapse to the ground. Even when they are not activated, they maintain the wearer in constant fear of instant pain for as long as they are worn. As such, the wearing of body-worn electric shock devices is inherently degrading to the dignity of the person. The use and manufacture of body-worn electric shock devices has been documented in the US and in other regions¹⁹.

These and related weapons and equipment are inherently abusive, causing unnecessary, excessive or unlawful pain and suffering, and even death, and States must prohibit their manufacture, trade and use in order to meet their obligations to protect and respect human rights.

B. Weapons that may have a legitimate purpose but which are frequently used to inflict torture and other ill-treatment

Some less lethal weapons may have legitimate uses, although they are often misused, thereby infringing internationally recognised human rights. Examples of less lethal weapons are batons (also known as truncheons or clubs), some chemical irritant devices such as pepper spray, standard handcuffs and certain kinetic impact projectiles²⁰. Trade in such equipment must be carefully controlled to ensure that it is not transferred to those who will misuse it. Effective oversight and control mechanisms, as well as strict regulation of the procurement process, are therefore essential to prevent human rights violations.

The following is a brief description of some of the less lethal weapons most commonly used in the region and a sample of cases of abuse.

1. *Hand-held striking weapons*

Hand-held striking weapons include police batons and are made of plastic, rubber, wood or metal²¹. Their intended mode of use is to strike a person to cause physical pain or threaten to cause physical pain in order to compel compliance or deter action. They may also be used

¹⁹ Omega Research Foundation. *Briefing Paper: Use of Tools of Torture in OSCE participating States*. 2017. Pp. 6-8. Available at: <https://omegaresearchfoundation.org/publications/briefing-paper-use-tools-torture-osce-participating-states>.

²⁰ International Network of Civil Liberties Organizations (INCLIO) and Physicians for Human Rights (PHR) in collaboration with the Omega Research Foundation (Omega). *Lethal in Disguise 2: How Crowd-Control Weapons Impact Health and Human Rights*. Available at: <https://lethalindisguise.org/#:~:text=When%20states%20respond%20violently%20to,injuries%2C%20disabilities%20and%20even%20death>; Omega Research Foundation. *Visual guide to law enforcement and security equipment*. Available at: <https://omegaresearchfoundation.org/identification-tools/visual-guide-law-enforcement-and-security-equipment>.

²¹ UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. Para. 7.1.1.

defensively to block a blow or as an immobilisation tool to restrain limbs. The UN Guidance on less lethal weapons emphasises that police batons and other blunt weapons should be used with a minimum level of force, while avoiding lethal injury²². These guidelines also note that the use of a baton against a person who does not pose a threat or exhibit violent behaviour may constitute cruel, inhuman or degrading treatment, or even torture²³. Injuries caused by police batons vary depending on the type of baton and how it is used. They can include dislocations and fractures, soft tissue injuries, rupture of vital organs and concussion, as well as other serious head injuries or even death²⁴.

Law enforcement officials can easily misuse blunt weapons, as documented in Colombia in 2019, when the National Police used police batons with excessive force to repress peaceful protest, against both participants and bystanders, severely beating people during their arrest and detention²⁵. Another example is the abusive use of a range of less lethal weapons in detention contexts in Brazil by prison staff. Brazil's National Preventive Mechanism documented that batons are used, sometimes systematically, to hit the fingers of detainees, causing fractures and other deformities. This practice has been justified by some authorities as a way of reducing potential attacks by prisoners on prison staff²⁶.

2. Chemical irritants and related equipment

Chemical irritants, such as CS ("tear gas") and Capsicum oleoresin ("pepper spray"), are chemical weapons commonly used to deter individuals or disperse crowds. They are dispersed via weapon-launched or hand-thrown projectiles and grenades, hand-held, shoulder-worn, and backpack sprayers, and by water cannon²⁷. Due to their indiscriminate nature, these chemical irritants present a high risk of harming bystanders or peaceful protesters who do not engage in violent behaviour²⁸. The health effects of chemical irritants are usually transient and include chest tightness, irritation of the skin, eyes and upper respiratory tract, coughing and profuse tearing. More severe reactions have been documented, including severe blistering or burns, vomiting and respiratory difficulties²⁹. Depending on factors such as dose exposure, access to treatment and underlying health conditions, chemical irritants can cause life-threatening injuries³⁰. The US military has documented that people exposed to tear gas are more likely to

²² UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. Para. 7.1.2.

²³ UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. Para. 7.1.5.

²⁴ UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. Para. 7.1.4.

²⁵ Human Rights Watch. Colombia: Abuses Amid Massive Demonstrations. 10 March 2020. Available at: <https://www.hrw.org/news/2020/03/10/colombia-abuses-amid-massive-demonstrations>.

²⁶ Mecanismo Nacional de Prevenção e Combate à Tortura (MNPCT). Relatório de Missão ao Ceará de 24 de fevereiro a 01 de março de 2019. Para. 47; MNPCT. Relatório de Inspeções realizadas no Estado do Rio Grande do Norte (2022), para. 151. Disponível em: <https://mnpctbrasil.wordpress.com/relatorios/> (Last consulted 18 August 2023).

²⁷ Omega Research Foundation. *International Controls on the Trade in the Tools of Torture*. *Op. cit.*

²⁸ Physician for Human Rights and International Network of Civil Liberties Organizations. *Lethal in disguise*. Available at: <https://lethalindisguise.org/crowd-control-weapons/chemical-irritants/> (Last consulted 17 June 2023).

²⁹ Omega Research Foundation. *International Controls on the Trade in the Tools of Torture*. *Op. cit.*

³⁰ Physician for Human Rights and International Network of Civil Liberties Organizations. *Lethal in disguise*. *Op. cit.*

suffer from respiratory illnesses³¹. The use of certain launched projectiles containing chemical irritants carries the added risk of causing penetrating wounds, concussions, other head injuries and even death if they strike a person directly.

During the nationwide protests in Peru from 2022 to 2023, State security forces brutally cracked down on protestors, including with live ammunition and tear gas.³² According to witness accounts, on 15 December 2022, Peruvian military forces launched tear gas and red smoke from helicopters and then used live ammunition against demonstrators in the Alfredo Mendivil Duarte National Airport in Ayacucho, resulting in the deaths of four individuals and injuring more than 50 people.³³ During a series of anti-government protests beginning in June 2022, police forces in Ecuador launched tear gas cartridges directly at protestors, as well as launching cartridges near areas where children and injured people were sheltering. Officials attributed at least one death to the impact of a tear gas projectile.³⁴ In Chile in 2020, police shot two protestors in the face with tear gas cartridges, leaving one blind in one eye and the other permanently blinded in both eyes.³⁵

3. Kinetic impact projectiles

Kinetic Impact Projectiles (KIPs), often called rubber bullets or pellets are usually made of rubber, plastic, or wood³⁶. They can be launched from a range of weapons, with shotguns, grenade launchers and compressed air among the most frequently used in the region. Though designed to cause blunt trauma, they can also penetrate the skin, especially when fired at close range or at sensitive areas of the body, especially the head, face and eyes, not in accordance with usage recommendations³⁷. The UN Guidance on Less lethal Weapons in Law Enforcement clearly establishes that KIPs should only be aimed at the lower abdomen or legs of individuals in order to minimize the risk of serious injury or death³⁸. In general, KIPs are not appropriate tools for crowd-management because of the risk of impacting unintended targets and causing

³¹National Library of Medicine. *O-chlorobenzylidene malononitrile (CS riot control agent) associated acute respiratory illnesses in a U.S. Army Basic Combat Training cohort*. Julio 2014. Disponible en: <https://pubmed.ncbi.nlm.nih.gov/25003867/>. University of Toronto- Faculty of Law. *The Problematic Legality of Tear Gas Under International Human Rights Law*. 2020. Disponible en: <https://ihrp.law.utoronto.ca/sites/default/files/media/Legality%20of%20Teargas%20-%20Aug25%20V2.pdf>

³²Amnesty International. *Peru: Lethal racism: Extrajudicial executions and unlawful use of force by Peru's security forces*, *Op cit*.

³³Amnesty International. *Peru: Lethal racism: Extrajudicial executions and unlawful use of force by Peru's security forces*, *Op cit*.

³⁴Human Rights Watch. *World Report 2023: Ecuador*. Available at: <https://www.hrw.org/world-report/2023/country-chapters/ecuador>

³⁵ Amnesty International. *Eyes on Chile: police violence and command responsibility during the period of social unrest*. Available at: <https://www.amnesty.org/en/latest/research/2020/10/eyes-on-chile-police-violence-at-protests/>

³⁶Physician for Human Rights and International Network of Civil Liberties Organizations. *Lethal in disguise*. *Op. cit*.

³⁷ Haar RJ, Iacopino V, Ranadive N, et al. *Death, injury and disability from kinetic impact projectiles in crowd-control settings: a systematic review*. 2017. Available at: <https://bmjopen.bmj.com/content/7/12/e018154> (last consulted 18 August 2023).

³⁸ UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. Para. 7.5.2.

disproportionate harm. Use in places of detention or other enclosed spaces runs the risk of impacting with excessive energy, with the associated risk of causing disproportionate harm.

The UN Guidance on Less lethal Weapons in Law Enforcement explicitly singles out multiple kinetic impact projectiles, such as rubber pellets dispersed via shotgun rounds or grenades, as weapons whose use generally cannot comply with the principles of necessity and proportionality.³⁹

During recent years, there has been a surge in the abuse of KIPs in public protests in the Americas. For example, during protests in Colombia in 2019, 18-year-old Dilan Cruz was shot in the head with a bean bag projectile (fabric bag filled with metal pellets) by Colombia's *Escuadrón Móvil Antidisturbios* (ESMAD); he passed away two days later from severe brain damage⁴⁰. Elsewhere, Chile's National Human Rights Institute reported that 460 protesters suffered ocular injuries during the *Estallido Social* in 2019-20⁴¹. Multiple projectile rounds were responsible for many of these injuries, including the ocular trauma suffered by 182 of the 259 patients treated at the Eye Trauma Unit in Hospital del Salvador between 18 October and 30 November 2019⁴². Indeed, multiple projectile munitions are highly inaccurate and unpredictable, and cannot be used in a way that minimises damage and injury. Therefore, any type of kinetic impact projectile that, by design, presents a danger of causing undue injury or damage should be prohibited.

Hunting ammunition, such as birdshot and buckshot, which are small metal projectiles contained in shotgun cartridges, has been incorrectly designated as less lethal and used by law enforcement in some jurisdictions. After recent political protests in Peru, Amnesty International recorded cases of injuries and deaths caused by lead pellets⁴³. One protestor died from the injuries caused by 72 lead pellets impacting his torso. A forensic ballistic expert examination of a sample of the pellets reported that these had come from a "12 GAUGE shotgun cartridge (which) can hold approximately 200 pellets"⁴⁴. The use and trade of hunting ammunition for law enforcement should be prohibited.

The use of certain grenade launchers, such as the so-called "Venom" which was originally manufactured for use by the US military, carries a high risk of indiscriminately affecting protesters and bystanders. By way of example, Colombian law enforcement officials repeatedly used the VENOM multiple grenade launcher against protesters during the 2021 mass

³⁹ UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. Para. 7.5.6.

⁴⁰ Physician for Human Rights and International Network of Civil Liberties Organizations. *Lethal in disguise*. *Op. Cit.* Pág. 52.

⁴¹ Instituto Nacional de Derechos Humanos - INDH. *Reporte general de datos sobre violaciones a los derechos humanos: Datos desde 17 de octubre de 2019 e ingresados hasta el 13 de marzo de 2020*. 2020. Available at: <https://www.indh.cl/bb/wp-content/uploads/2020/04/Reporte-INDH-19-de-marzo-de-2020.pdf>. (last consulted 18 August 2023).

⁴² Rodríguez, Á., Peña, S., Cavieres, I. *et al.* *Ocular trauma by kinetic impact projectiles during civil unrest in Chile*. 2021. Disponible en: <https://rdcu.be/djRSS>

⁴³ Amnesty International. *Peru: Lethal racism: Extrajudicial executions and unlawful use of force by Peru's security forces*, *Op cit.* pp.41-42.

⁴⁴ Amnesty International. *Peru: Lethal racism: Extrajudicial executions and unlawful use of force by Peru's security forces*, *Op cit.* pp.41-42.

demonstrations⁴⁵. The death of Sebastián Quintero Múnera, on 14 May 2021, occurred when he was reportedly struck by a projectile launched by the VENOM system⁴⁶. In this regard, the IACHR expressed its concern about the police use of "anti-riot weapons—like the Venom rocket launcher—that have an indiscriminate impact on mostly peaceful protests"⁴⁷. The use and trade for public security purposes of launchers that impart an excessive and uncontrollable level of force should be prohibited.

4. *Projectile electric shock weapons*

Projectile electric shock weapons, frequently referred to by the brand name “Taser”, launch darts attached to the weapon by thin wires. On impact, the darts deliver an electric shock cause the target’s muscles to contract uncontrollably (known as neuromuscular incapacitation) and extreme pain. Most models can also display a spark across the electrodes and can be used as direct contact stun weapons, administering a painful localized electric shock.

Projectile electric shock weapons can, in limited and extreme circumstances, be used legitimately to incapacitate individuals at a distance without recourse to lethal force⁴⁸. Nevertheless, these weapons are prone to abuse, for example via prolonged or repeated shocks, and can cause serious health effects such as cardiac arrest, or even death. Furthermore, secondary injuries arising from falls caused by the temporary loss of muscle control can themselves be severe. Individuals with underlying health conditions are more at risk of severe injury or death if they are exposed to projectile electric shock weapons⁴⁹. Employment of these weapons in direct contact mode carries a particularly high risk of abuse. For this reason, the UN Committee against Torture recommended that “use [of projectile electric shock weapons] in drive stun mode” should be prohibited⁵⁰.

The misuse of projectile electric shock weapons for torture and other ill-treatment has been documented in numerous countries. One instance from the United States that occurred in 2016 demonstrates how readily these devices can be misused. 18-year old Jordan Norris was in state custody when he was placed in a restraint chair, with straps restraining his arms, chest, waist and legs. While in this position of extreme vulnerability, he was gagged and two deputies held him down while a third used a taser four times in direct contact mode against his chest, while

⁴⁵ Temblores, Indepaz y PAIIS. *Informe de Temblores, Indepaz y Paais a la CIDH sobre las violaciones a los derechos humanos cometidas por la fuerza pública contra la población civil colombiana en el marco del Paro*. 2021. Disponible en: <http://www.derechos.org/nizkor/////colombia/doc/duque54.html#disparos> (last consulted 18 August 2023)

⁴⁶ International Network of Civil Liberties Organizations (INCLEO) and Physicians for Human Rights (PHR) in collaboration with the Omega Research Foundation (Omega). *Lethal in Disguise 2: How Crowd-Control Weapons Impact Health and Human Rights*. *Op. cit*

⁴⁷ IACHR. Press release. *IACHR Condemns Serious Human Rights Violations in the Protest Context in Colombia, Rejects All Forms of Violence, and Stresses that the State Must Comply with its International Obligations*. 25 May 2021. Available at: https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/137.asp

⁴⁸ UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. Para. 7.4.3.

⁴⁹ UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. Para. 7.4.6.

⁵⁰ UN Committee against Torture. *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland*. UN Doc. CAT/C/GBR/6. 16 May 2019. Para. 29.

threatening Norris that he would keep on activating the device until the batteries died. A video surveillance camera recorded the officer using the device threatening Norris that he would keep on activating the device until the batteries died. This incident was recorded by a surveillance camera⁵¹.

In another case that caused widespread indignation, police officers in Colombia arrested Javier Ordoñez in 2020 for allegedly violating COVID-19-related restrictions. Video footage of the arrest shows two police officers using projectile electric shock devices in direct contact mode to apply repeated electric shocks to Ordoñez for approximately five minutes, while he begs them to stop. He was taken into custody, where the abuse continued and he died several hours later as a result of blunt trauma injuries⁵².

Electric weapons are being increasingly adopted in the region, including recently in Argentina, where, despite opposition from human rights groups⁵³, the government of the city of Buenos Aires announced that its police forces will start using them in 2023⁵⁴. These cases demonstrate the importance of carefully controlling the use of and trade in projectile electric shock weapons, and of requiring the manufacturers of these weapons to remove the direct contact mode.

5. *Misuse of less lethal weapons in the region and heightened risks to vulnerable groups*

Certain individuals and groups are particularly vulnerable to becoming victims of violations committed with less lethal weaponry. Such is the case of sectors of society that have been historically discriminated against and excluded, and who often end up in detention or prison systems due to various factors of structural discrimination. This is also the case for individuals who, through social protest, demand rights or denounce human rights violations and are more at risk of seeing their rights to life and personal integrity threatened by the use of less lethal weapons by law enforcement officials. Moreover, this is intensified in emergency situations and declarations of states of emergency, as was the case during the COVID-19 pandemic.

Thus, the proliferation and misuse of less lethal weapons by police and military forces in the Americas has caused numerous human rights violations, including in the context of social

⁵¹Amnesty International, Omega Research Foundation. *Ending the Torture Trade: the path to global controls on the Tools of Torture*. 11 December 2020. P. 9. Available at: <https://www.amnesty.org/en/documents/act30/3363/2020/en/>

⁵² Amnesty International. *Colombia: Amnesty International condemns torture and excessive use of force by police*. 11 September 2020. Available at: <https://www.amnesty.org/en/latest/news/2020/09/colombia-amnistia-condena-tortura-uso-excesivo-fuerza-2/>. (last consulted 18 August 2023)

⁵³ Chequeado. *Pistolas taser: qué son, cómo funcionan y qué pasó con las que compró la Ciudad y la Nación*. 16 de febrero de 2023. Available at: <https://chequeado.com/el-explicador/pistolas-taser-que-son-como-funcionan-y-que-paso-con-las-que-compro-la-ciudad/>; Telam. *El CELS responde a Larreta: las Taser se venden como "no letales" pero son "menos letales"*. 29 May 2023. Available at: <https://www.telam.com.ar/notas/202305/629744-taser-cels-larreta-armas-represion.html>

⁵⁴ Government of the City of Buenos Aires. *Rodríguez Larreta y Burzaco presentaron las pistolas Taser que usará la Policía de la Ciudad*. 29 May 2023. Available at: <https://buenosaires.gob.ar/noticias/rodriguez-larreta-y-burzaco-presentaron-las-pistolas-taser-que-usara-la-policia-de-la>

protests⁵⁵. By way of example, in Nicaragua during the protests that began on 18 April 2018, the State's response was characterised by "the excessive use of force, mostly, through the use of firearms and excessive use of less lethal weapons"⁵⁶. Similarly in Colombia, police in 2021 used "less lethal weapons indiscriminately, such as tear gas and water cannon and other materials against demonstrators in various parts of the country"⁵⁷. Likewise, since the beginning of the social protests in Chile in October 2019, the IACHR documented the unnecessary and disproportionate use of various less lethal weapons during peaceful demonstrations, including "to the detriment of adults, older adults, girls, boys and indigenous adolescents"⁵⁸. In Chile, the IACHR verified the differentiated effects suffered by women and LGBTI persons in the context of the disproportionate use of force and the commission of torture and other cruel, inhuman or degrading treatment⁵⁹.

Indigenous, Afro-descendant and campesino communities continue to be disproportionately affected by high levels of policing and unlawful use of force⁶⁰. This is rooted in historical patterns of discrimination and racism that subsequently manifest themselves as State violence, undermining the rights of these communities to peaceful protest and freedom from racial discrimination⁶¹.

Women are also exposed to violence by public security forces in disproportionate and differentiated ways that reflect historical patterns of gender-based discrimination, such as when they are punished for protesting and expressing dissent. This violence is accentuated if women are subject to multiple forms of discrimination and exclusion, such as being part of indigenous peoples, among others, making them more likely to be victims of disproportionate use of force⁶², including through the use of less lethal weapons. In Mexico, public security forces have used chemical irritants abusively against women at several protests⁶³. There was widespread

⁵⁵ Omega Research Foundation, Amnesty International. "My Eye Exploded": the Global Abuse of Kinetic Impact Projectiles. 2023. Available at: <https://www.amnesty.ie/wp-content/uploads/2023/03/Amnesty-MY-EYE-EXPLODED-REPORT.pdf>

⁵⁶ IACHR. *Gross Human Rights Violations in the Context of Social Protests in Nicaragua*. 21 June 2018. Para. 5. Available at: <https://www.oas.org/en/iachr/reports/pdfs/Nicaragua2018-en.pdf> (last consulted 18 August 2023).

⁵⁷ Amnesty International. *Colombia: Amnistía Internacional denuncia la respuesta militarizada y represión policial de manifestaciones*. 4 May 2021. Available at: <https://www.amnesty.org/es/latest/news/2021/05/colombia-amnistia-denuncia-respuesta-militarizada-represion-policial/> (last consulted 18 August 2023).

⁵⁸ IACHR. *Situación de derechos humanos en Chile*. 24 January 2022. Available at: https://www.oas.org/es/cidh/informes/pdfs/2022_Chile.pdf. Paras. 155 – 156.

⁵⁹ Ibid. Para. 135.

⁶⁰ See: IACHR – REDESCA. *Norte de Centroamérica Personas defensoras del medio ambiente*. OEA/Ser.L/V/II. Doc. 400/22. 16 December 2022. Para. 93. Available at: https://www.oas.org/es/cidh/informes/pdfs/2023/NorteCentroamerica_MedioAmbiente_ES.pdf

⁶¹ Amnesty International. *Perspectiva regional: América*. Available at: <https://www.amnesty.org/es/location/americas/report-americas/> (last consulted 18 August 2023); UN General Assembly. International Convention on the Elimination of All Forms of Racial Discrimination. Adopted on 21 December 1965. Entered into force 4 January 1969. Article 5; IACtHR. *Case of Norin Catriman Et AL. v. Chile*. Merits, reparations and costs. Judgment of 29 May 2014. Paras. 196-206.

⁶² UN Committee on the Elimination of Discrimination against Women. *Concluding observations on the seventh periodic report of Chile*. 14 March 2018. CEDAW/C/CHL/CO/7.

⁶³ Amnesty International. *El derecho a la protesta está bajo amenaza en México*. 18 May 2022. Available at: <https://www.amnesty.org/es/latest/news/2022/05/derecho-protesta-bajo-amenaza-mexico/>; Amnesty International. *México: La era de las mujeres: Estigma y violencia contra mujeres que protestan*. 3 March 2021. Available at: <https://www.amnesty.org/es/documents/amr41/3724/2021/es/>.

condemnation of the actions of law enforcement officials in Bucaramanga, Colombia, when images were released of an agent using his electric shock projectile weapon in direct contact mode against a woman on her genitals during an eviction⁶⁴.

In custodial contexts, such as prisons, immigration detention centres and others, people are highly vulnerable to torture and other ill-treatment, including with the use of less lethal weapons⁶⁵. In addition, the use of less lethal weapons such as tear gas and batons against migrant and refugee populations during migrant passage by border security agents has been documented⁶⁶.

III. Regulatory framework for trade in less lethal weapons to prevent torture and protect the right to life

International and regional norms on the trade in less lethal weapons have become particularly important in light of the paucity of national controls. It is these international and regional norms, some of which have been reinforced through iterative review processes, that can be used by the IACtHR to inform how to address the trade in less lethal weapons in its Advisory Opinion. The analysis of the human rights impacts of the misuse of less lethal weapons begins with the inter-American and international jurisprudential framework⁶⁷ that limits the use of force for the protection of the rights to personal integrity (including the absolute prohibition of torture)⁶⁸, the right to life⁶⁹ and other rights.

A. Applicable legal framework at the Inter-American level

In relation to the right to life, this Court has established that this is a "fundamental human right, and the exercise of this right is essential for the exercise of all other human rights"⁷⁰ and therefore States must ensure "that their security forces, which are entitled to use legitimate force,

⁶⁴ Infobae. *Mujer denunció uso de pistola taser en sus partes íntimas por parte de la Policía*. 3 August 2021.

Available at: <https://www.infobae.com/america/colombia/2021/08/03/mujer-denuncio-uso-de-pistola-taser-en-sus-partes-intimas-por-parte-de-la-policia/>.

⁶⁵ Amnesty International. *Perspectiva regional: América*. *Op. Cit.*; UN. Press release. *UN experts call for new approaches to policing in the United States following deaths of Keenan Anderson and Tyre Nichols*. 10 February 2023. Available at: <https://www.ohchr.org/en/press-releases/2023/02/un-experts-call-new-approaches-policing-united-states-following-deaths> (last consulted 18 August 2023).

⁶⁶ Aldiadallas. *Reporte: Agentes de la Patrulla Fronteriza usan menos las armas de fuego*. 5 March 2019. Available at: <https://www.dallasnews.com/espanol/al-dia/inmigracion/2019/03/05/reportes-agentes-de-la-patrulla-fronteriza-usan-menos-las-armas-de-fuego/> (last consulted 18 August 2023)

⁶⁷ UN General Assembly. Resolution 34/169. *Code of Conduct for Law Enforcement Officials*. 17 December 1979. Art. 5; UN-OHCHR. United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement. *Op cit.* Para. 1.4.

⁶⁸ IACtHR. *Case of the Barrios Family v. Venezuela*. Merits, reparations and costs. Judgment of 24 November 2011. Series C No. 237. Paras. 50-52; IACtHR. *Case of Tibi v. Ecuador*. Judgment of 7 September 2004. Para. 143.

⁶⁹ IACtHR. *Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 5 July 2006. Series C No. 150. Para. 66.

⁷⁰ IACtHR. *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala*. Merits. Judgment of 19 November 1999. Series C No. 63. Para. 144.

respect the right of life of the people under their jurisdiction”⁷¹. Thus, according to the Court “the active protection of the right to life involves every State institution, including those charged with its security, whether it be the Armed Forces or the police”⁷². Therefore, “any deprivation of life that is caused by the use of illegitimate, excessive or disproportional force is contrary to the Convention”⁷³.

The established jurisprudence of the Universal System⁷⁴ and of this Honourable Court establishes the prohibition of torture, in all its forms, as a *ius cogens norm*, and therefore it has non-derogable status and is binding in all circumstances, including “war, the threat of war, the struggle against terrorism, and any other crimes, state of siege or of emergency, internal disturbances or conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies”⁷⁵.

The Inter-American Court, like other regional courts, has analysed cases of alleged unlawful use of force using the framework of the rights to life and personal integrity. In conducting such analysis, the Court has relied on the principles and standards set out in various UN instruments, particularly the Code of Conduct for Law Enforcement Officials (hereinafter "UN Code of Conduct"), and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (hereinafter "UN Basic Principles")⁷⁶.

The UN Basic Principles state that the use of force of any kind should only be considered as a last resort “if other means remain ineffective or without any promise of achieving the intended result”⁷⁷. Meanwhile, the UN Code of Conduct requires law enforcement officials to “respect and protect human dignity and maintain and uphold the human rights of all persons”⁷⁸. The principles governing the use of force - legality, precaution, necessity, proportionality, non-discrimination and accountability - are derived from these and other legal provisions and apply not only to lethal force, but also to the use of less lethal weapons⁷⁹. These principles have been adopted and applied by both organs of the Inter-American Human Rights System (hereinafter

⁷¹ IACtHR. *Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 5 July 2006. Series C No. 150. Para. 66.

⁷² IACtHR. *Case of Coc Max et al. (Xamán Massacre) v. Guatemala*. Merits, Reparations and Costs. Judgment of 22 August 2018. Series C No. 356. Para. 107.

⁷³ Ibid.

⁷⁴ UN Human Rights Committee. *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*. 4 November 1994. UN Doc. CCPR/C/21/Rev.1/Add.6. Para. 10. Available at: <https://www.refworld.org/docid/453883fc11.html>

⁷⁵ IACtHR. *Case of Tibi v. Ecuador*. Judgment of 7 September 2004. Para. 143.

⁷⁶ IACtHR. *Case of Nadege Dorzema et al v. Dominican Republic*. Judgment of 24 October 2012. Merits, reparations and costs. Series C, No. 251. Para. 78; IACtHR. *Case of the Landaeta Mejías Brothers et al. v. Venezuela*. Judgment of 27 August 2014. Preliminary objections, merits, reparations and costs. Series C, No. 281. Para. 124.

⁷⁷ UN. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba. 7 September 1990. Principle 4; UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. *Op cit.* 2020. Párr. 2.2.

⁷⁸ UN General Assembly. Resolution 34/169. *Code of Conduct for Law Enforcement Officials*. 17 December 1979.

⁷⁹ UN, OHCHR. *United Nations Human Rights Guidance on the Use of Less Lethal Weapons in Law Enforcement*. *Op cit.* 2020. Párr. 2.1.

"IAHRS") and form part of the Inter-American standards on the use of force. These principles are particularly relevant to this submission, as they provide an analytical framework for determining whether or not certain weapons can play a legitimate role in the work of State security forces. These principles help to establish the kind of constraints that should be applied to the manufacture, marketing and use of different weapons.

States must refrain from conduct that violates life and integrity⁸⁰, but they also have a duty of due diligence, which requires them to protect individuals from arbitrary deprivation of life, torture and other ill-treatment⁸¹, for example, by creating regulatory and institutional frameworks that monitor and limit the use of lethal and less lethal force⁸². These positive obligations also extend to monitoring other activities that may contribute to serious human rights violations. The UN Human Rights Committee has affirmed that States' obligations under the right to life enshrined in Article 6 of the Covenant on Civil and Political Rights go beyond strictly regulating the use of less lethal weapons, but also include ensuring that these weapons are subject to strict testing, evaluation and monitoring parameters⁸³. Also particularly relevant is the language used by the Human Rights Committee on States' obligations regarding the right to life and corporate activities:

States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory or in other areas subject to their jurisdiction. They must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities undertaken by corporate entities based in their territory or subject to their jurisdiction, are consistent with article 6, taking due account of related international standards of corporate responsibility⁸⁴.

States must therefore ensure that companies, including arms manufacturers, operating on their territory comply with due diligence requirements to avoid directly contributing to violations of the right to life outside their territory.

The UN Convention against Torture provides that States must “take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction”⁸⁵. An interpretation consistent with the purposes of the international legal framework against torture and its status as a jus cogens norm, leads to the conclusion that such measures must also aim to ensure that activities occurring within a State's territory or subject to its jurisdiction, but which may directly and foreseeably impact on the human right not to be subjected to torture outside its territory, must also be compatible with the absolute prohibition of torture and other ill-treatment.

⁸⁰ IACtHR. *Case of Caesar v. Trinidad y Tobago*. Judgment of 11 March 2005. Para. 70.

⁸¹ IACtHR. *Case of Montero-Aranguren et al (Detention Center of Catia) v. Venezuela*. *Op cit.* Para. 64.

⁸² See, for example: UN Human Rights Committee. *General comment No. 36. Article 6: right to life*. U.N. Doc. CCPR/C/GC/36. 3 September 2019. Paras. 7, 13-14.

⁸³ See, for example, *Ibid.* Para. 14. See versión in English.

⁸⁴ UN Human Rights Committee. *General comment No. 36. Article 6: right to life*. *Op cit.* Para. 22.

⁸⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly on 10 December 1984. Entered into force 26 June 1987. Article 2.

The Inter-American Court has pointed out that impunity in cases of torture and other serious human rights violations “will not be eliminated unless it is accompanied by the determination of the general responsibility - of the State- and individuals- and the specific criminal responsibility of its agents or of individuals, which are complementary”⁸⁶. For the IACtHR, the duty of prevention encompasses “all those measures of a legal, political, administrative and cultural nature that ensure the safeguard of human rights, and that any possible violation of these rights is considered and treated as an unlawful act, which, as such, may result in the punishment of the person who commits it, as well as the obligation to compensate the victims for the harmful consequences”⁸⁷.

This obligation to prevent is one of means or conduct and is not shown to be breached simply because a right has been violated⁸⁸. The IACtHR has determined that this duty requires States to exercise “due diligence in the protection (including the preventive protection)”⁸⁹. Moreover, in cases where risks to life and personal integrity are the consequence of conduct by private parties under its jurisdiction, the State's obligation to prevent violations of these rights may require the State to regulate and oversee such private entities⁹⁰.

B. Progress in the regulation of less lethal weapons at the international level

In 2001, the United Nations Commission on Human Rights adopted a resolution calling on States “to take appropriate effective legislative, administrative, judicial or other measures to prevent and prohibit the production, trade, export and use of equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment”⁹¹. This text, with some minor modifications, has been included in what has become the UN General Assembly biennial Omnibus Torture Resolution⁹².

In 2002 the African Commission on Human and Peoples’ Rights (ACHPR) adopted the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (“Robben Island Guidelines”). The Guidelines set out standards concerning the criminalization of torture, combatting impunity for the crime of torture, and outline investigative procedures. These Guidelines also explicitly address the role of trade in tools of torture, setting out that “States should prohibit and prevent the use, production and trade of equipment or substances designed to inflict torture or ill-

⁸⁶ IACtHR. *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of 28 January 2009. Series C No. 195. Para. 298.

⁸⁷ IACtHR. *Case of González et al. (“Cotton Field”) v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of 16 November 2009. Series C No. 205. Para. 252.

⁸⁸ Ibid.

⁸⁹ IACtHR, *Case of the Pueblo Bello Massacre v. Colombia*. Judgment of 31 January 2006. Para. 151

⁹⁰ IACtHR. *Case of Ximenes-Lopes v. Brazil*. Judgment of 4 July 2006. Para. 141.

⁹¹ UN Commission on Human Rights. Torture and other cruel, inhuman or degrading treatment or punishment, Resolution 2001/62 (2001). 25 April 2001. Available at: https://ap.ohchr.org/documents/alldocs.aspx?doc_id=4840. (last consulted 18 August 2023).

⁹² UNM General Assembly. Resolution adopted by the General Assembly on 15 December 2022. UN Doc. A/RES/77/209. Available at: <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/77/209&Lang=S> (last consulted 18 August 2023).

treatment and the abuse of any other equipment or substance to these ends”⁹³. In 2020, the African Commission on Human and Peoples’ Rights adopted a “Resolution on the prohibition of the use, production, export and trade of tools used for torture,” calling on States to address any gaps in laws, policies and practice which impede the implementation of Guideline 14, as well as encouraging States to engage in the UN General Assembly process examining the feasibility, scope and parameters for possible common international standards on the torture trade⁹⁴.

In 2006, the European Union introduced unprecedented multilateral trade controls via Council Regulation No 1236/2005 Concerning Trade in Certain Goods which Could be Used for Capital Punishment, Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment⁹⁵. The EU ‘Anti-torture Regulation’, which is binding on all EU Member States, prohibits the export and import of goods that have no practical use other than for the purpose of capital punishment or for the purpose of torture and other ill-treatment, and it requires Member States to control the trade in a range of policing and security equipment misused for such purposes. The Regulation has been strengthened on several occasions and now covers other related activities, including brokering services and advertising⁹⁶. The Regulation’s prohibited list includes goods that can only be used for capital punishment, such as guillotines, or for torture or other ill-treatment, such as spiked batons. The controlled list includes goods that could be used for torture or other ill-treatment, such as oleoresin capsicum (OC) or certain instruments of restraint. These lists are kept under review by the European Commission.

In 2019, the United Nations General Assembly passed a resolution calling on the Secretary-General to conduct a survey to gather “the views of Member States on the feasibility and possible scope of a range of options to establish common international standards for the import, export and transfer of goods used for (a) capital punishment, (b) torture or other cruel, inhuman or degrading treatment or punishment”⁹⁷. The Resolution also required the Secretary-General to establish a Group of Governmental Experts to evaluate “the feasibility, scope of the goods to be included and draft parameters for a range of options to establish common international standards”⁹⁸. The resultant 2022 report addressed the international legal framework regarding

⁹³ The African Commission on Human and Peoples’ Rights, The Association for the Prevention of Torture, and Regional Office of the United Nations High Commissioner for Human Rights. *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa - The Robben Island Guidelines*. 2002. Part I. Guideline 14. Available at : <https://www.apt.ch/en/resources/publications/robben-island-guidelines-2002>.

⁹⁴ The African Commission on Human and Peoples’ Rights. *Resolution on the prohibition of the use, production, export and trade of tools used for torture*. ACHPR/Res.472 (LXVII). 2020.

⁹⁵ European Union. *Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment*. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02005R1236-20180214&qid=1550220705126&from=EN> (last consulted 18 August 2023).

⁹⁶ The most recent consolidated version of the Regulation is: Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (codification). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1550829571808&uri=CELEX:32019R0125> (last consulted 18 August 2023).

⁹⁷ United Nations General Assembly. Resolution adopted by the General Assembly on 28 June 2019. *Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards*. A/Res/73/304. 2 July 2019. Available at: <https://www.un.org/en/ga/73/resolutions.shtml>.

⁹⁸ Ibid.

torture, existing measures at national, regional, and international levels, the feasibility of common standards, and their possible scope. The Report recognized the importance of both prohibiting inherently abusive equipment and regulating the trade in law enforcement equipment that could be misused for torture and other ill-treatment⁹⁹. This process is ongoing at the UN General Assembly.

In 2021, the Council of Europe adopted its own Recommendation (CM/Rec(2021)2) which provides a framework for States to better regulate the trade in goods which could be used for “capital punishment, torture or other cruel, inhuman or degrading treatment”. This framework requires that States establish, implement, and regularly review their policies on trade in inherently abusive goods and those that could be used for torture or capital punishment. According to the Recommendation, Member States should “prohibit the import, export or transit, from, to or through their jurisdiction, of goods and equipment” that is inherently abusive, and control the export or transit of goods that could be misused to torture people¹⁰⁰. The Recommendation sets out non-exhaustive lists of “inherently abusive goods and equipment” and “controlled goods and equipment”¹⁰¹.

In turn, successive UN Special Rapporteurs on torture have recognized the importance of addressing the trade in law enforcement equipment that can be used for torture¹⁰². The current UN Special Rapporteur on Torture is set to present a report to the UNGA in October 2023, focusing on “the nature, scope and regulation of the production and trade of law enforcement equipment and weapons and the relationship with torture and other cruel, inhuman or degrading treatment or punishment”¹⁰³.

At the national level and by way of example, it is worth analysing the experience of Brazil based on research carried out by the Omega Research Foundation on the regulation of the trade in arms and equipment that can be used for torture and other ill-treatment. As mentioned previously, very few countries effectively regulate the trade in less lethal weapons. Brazil is the leading arms exporter in Latin America, with a particularly strong presence in the small arms and live ammunition markets. While less lethal weapons comprise a relatively small part of its overall

⁹⁹ UN General Assembly. Report of the Group of Governmental Experts on torture-free trade. *Towards torture-free trade: examining the feasibility, scope and parameters for possible common international standards*. A/76/850. 30 May 2022. Available at: <https://www.ohchr.org/en/documents/reports/a76850-towards-torture-free-trade-examining-feasibility-scope-and-parameters>

¹⁰⁰ Council of Europe Committee of Ministers. *Recommendation of the Committee of Ministers to member States on measures against the trade in goods used for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment*. Adopted by the Committee of Ministers on 31 March 2021 at the 1400th meeting of the Ministers' Deputies. Available at: https://search.coe.int/cm/pages/result_details.aspx?objectId=0900001680a1f4e5 (last consulted 18 August 2023).

¹⁰¹ Ibid.

¹⁰² Omega Research Foundation. *International Controls on the Trade in the Tools of Torture*. *Op. cit.*

¹⁰³ UN Special Rapporteur on torture. *Call for input: The nature, scope and regulation of the production and trade of law enforcement equipment and weapons and the relationship with torture and other cruel, inhuman or degrading treatment or punishment*. 7 July 2023. Available at: <https://www.ohchr.org/en/calls-for-input/2023/call-input-nature-scope-and-regulation-production-and-trade-law-enforcement> (last consulted 18 August 2023)

defence trade, evidence suggests that it has grown steadily and Brazilian manufacturers of law enforcement equipment export their products to other countries in the region and beyond¹⁰⁴.

Brazil, a member of the Alliance for Torture-Free Trade, has recently developed a new national control regime with its National Policy for the Export and Import of Defence Products (PNEIPRODE). This Policy covers conventional weapons, firearms and several less lethal weapons, including “incapacitating electric weapons” and “less lethal ammunition launchers equal to or greater than 40mm”¹⁰⁵. The Policy requires the Ministry of Foreign Affairs and the Ministry of Defense to evaluate the possibility of the weapons covered being used to violate human rights when deciding whether to grant export licenses¹⁰⁶.

Some other less lethal weapons that are not covered by PNEIPRODE, such as chemical irritants, stun grenades, and kinetic impact ammunition, are considered “controlled products” and their export and import is subject to a lower level of scrutiny than others, with the Brazilian military not explicitly required to factor in the likelihood of exported goods being used to commit human rights violations when deciding whether or not to grant a license¹⁰⁷. Furthermore, some law enforcement equipment that could be used for torture, such as instruments of restraint and hand-held striking weapons, are not covered by either regime¹⁰⁸.

Despite its recent development, Brazil's experience shows the existence of important gaps in the oversight of the trade of this type of equipment. It is likely that other efforts in the region to control the trade in weapons that could be used for torture, have, at best, similar deficiencies to those just analysed. This is relevant, as Brazil is by no means the only exporter of law enforcement equipment in the Americas.

In order to rectify the lack of national regulation and Inter-American standards that direct and guide practices around the purchase and acquisition of equipment that could be used to violate fundamental rights, it is crucial that the IACtHR, in line with the progressive standards developed by the bodies analysed above, similarly provide guidance on the issue of trade in less lethal weapons through a human rights-based framework. It is imperative that the Court take the opportunity presented by this request for an advisory opinion and issue clear standards that guarantee the protection of the rights to life and personal integrity in the context of the trade in less lethal weapons.

¹⁰⁴ Omega Research Foundation. *The manufacture, trade and regulation of law enforcement and security equipment in Brazil*. 2020. P. 47. Available at: <https://omegaresearchfoundation.org/publications/manufacture-trade-and-regulation-law-enforcement-and-security-equipment-brazil> (last consulted 18 August 2023).

¹⁰⁵ Omega Research Foundation. *The manufacture, trade and regulation of law enforcement and security equipment in Brazil*. 2020. *Op cit.* Pp. 56-57.

¹⁰⁶ Omega Research Foundation. *The manufacture, trade and regulation of law enforcement and security equipment in Brazil*. 2020. *Op cit.* P. 57.

¹⁰⁷ Omega Research Foundation. *The manufacture, trade and regulation of law enforcement and security equipment in Brazil*. 2020. *Op cit.* Pp. 58-59.

¹⁰⁸ Omega Research Foundation. *The manufacture, trade and regulation of law enforcement and security equipment in Brazil*. 2020. *Op cit.* P. 59.

IV. State obligations in relation to corporate activities and responsibilities of business enterprises in the context of trade in equipment that can be used for torture and other ill-treatment

In the area of business and human rights, States have an obligation to respect and guarantee internationally recognised rights¹⁰⁹ and business enterprises have a responsibility to respect human rights.

A. State obligations concerning corporate activities

In order to analyse the possibility of States incurring international responsibility, it is necessary to analyse both dimensions of their obligations regarding business and human rights: the obligation to respect rights and the obligation to guarantee rights as set out in Articles 1(1) and 2 of the American Convention on Human Rights¹¹⁰.

1. *Obligation to respect*

In relation to the obligation to respect, the IACHR has specified that “in certain cases, the action or inaction of business entities may generate direct State responsibility through the duty to respect”¹¹¹. The IACHR has analysed some elements that contribute to the discussion on the determination of international responsibility for conduct attributable to third parties, such as companies. While the Commission establishes that these do “not automatically apply in the evaluation of the possible international responsibility of the State, they may guide its factual and legal analysis according to the facts of each specific case”¹¹². Thus, a State may incur international responsibility for the conduct of an enterprise if: (i) the non-State conduct was carried out on the instructions of the State; (ii) the enterprise is empowered to exercise elements of governmental authority; or (iii) the State adopts such corporate conduct as its own¹¹³.

These scenarios can be expanded under the doctrine of complicity when there is evidence of acquiescence, tolerance, permissibility and collaboration by the State in relation to business conduct. Thus, when assessing compliance with the State's obligation to respect human rights as regards business activities, including the design, production and marketing of equipment and weapons whose purpose is to cause torture, the level of State involvement in the business activity must be analysed, as well as the level of State tolerance and acquiescence that allowed the non-State actor to continue with the human rights-violating conduct.

2. State obligation to guarantee

¹⁰⁹ IACtHR. *Case of the Miskito divers (Lemoh Morris et al.) v. Honduras*. Judgment of 31 August 2021. Paras. 42-43.

¹¹⁰ Ibid. Paras. 42 and 45; UN Human Rights Council. *Guiding Principles on Business and Human Rights: Implementing the UN Framework to 'Protect, Respect and Remedy'*. A/HRC/17/31. Resolution 17/4 of the Human Rights Council. 16 June 2011; IACHR - REDESCA. *Business and Human Rights: Inter-American Standards*. OEA/Ser.L/V/II CIDH/REDESCA/INF.1/19 1 November 2019.

¹¹¹ IACHR - REDESCA. *Business and Human Rights: Inter-American Standards*. *Op. Cit.* Para. 70.

¹¹² IACHR - REDESCA. *Business and Human Rights: Inter-American Standards*. *Op. Cit.* Para. 77.

¹¹³ IACHR - REDESCA. *Business and Human Rights: Inter-American Standards*. *Op. Cit.* Para. 70.

The obligation to guarantee is the second dimension of States' duties in relation to corporate conduct, which can inform assessments as to whether a State incurs international responsibility. This obligation, as regards business and human rights, requires States to take an active role in the prevention, investigation, prosecution, punishment and reparation of human rights violations caused by corporate and commercial conduct¹¹⁴. This relates to a broader obligation to ensure the full realisation of rights. This obligation not only requires the State to refrain from committing human rights violations, but also to take sufficient measures to ensure that rights are respected in their respective jurisdictions¹¹⁵.

This obligation includes: “(i) the duty to regulate and adopt provisions in domestic law, (ii) the duty to prevent human rights violations in the framework of business activities, (iii) the duty to supervise such activities, and (iv) the duty to investigate, punish, and ensure access to integral reparations for victims in said contexts”¹¹⁶.

Therefore, when assessing the fulfilment of States' obligation of guarantee in relation to business activities related to the design, manufacture and trade of instruments which can be used to commit acts of torture or other ill-treatment, it should be assessed, for example, whether the State took positive measures to regulate in its domestic law the activities of companies producing and trading in these goods in order to prevent acts of torture and violations of the right to life. In addition, it should be analysed whether the State carried out actions to control these business activities, including through the oversight and control of the trade and production of weapons that are susceptible to being used to commit torture. If acts of torture or other ill-treatment or executions have indeed been perpetrated with these goods, it should be assessed whether the State effectively investigated, prosecuted, punished and ensured access to reparations for the violations that were committed in connection with these business activities.

Central to assessing compliance with the obligation to guarantee is an understanding of States as commercial parties in the transactions involving less lethal weapons. For it is states that access these markets as buyers - so that the less lethal weapons are subsequently used by their security forces - or as sellers to other States - when they themselves manufacture them.

Thus, in addition to carrying out control and oversight of the trade in less lethal weapons with regard to business enterprises, States must establish regulatory processes based on due diligence standards that control the purchase and sale of less lethal weapons by the States themselves. This entails governments regulating themselves over their less lethal weapons procurement processes and restricting their actions in these transactions. Regulation on the purchase of less lethal weapons should include prohibiting the purchase of inherently cruel equipment and strictly regulating the purchase of less lethal weapons that may have a legitimate purpose but are commonly used to inflict torture.

¹¹⁴ IACHR - REDESCA. *Business and Human Rights: Inter-American Standards. Op. Cit.* Paras. 80-83

¹¹⁵ See: IACtHR, *Case of the Miskito divers (Lemoh Morris et al.) v. Honduras. Op. cit.* Paras. 43-44.

¹¹⁶ IACHR - REDESCA. *Business and Human Rights: Inter-American Standards. Op. Cit.* Para. 86; IACtHR. *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil.* Preliminary objections, merits, reparations and costs. 15 July 2020. Para. 118.

In addition, they should, at a minimum, be guided by the principle of maximum transparency, comprehensively set out the types of less lethal weapons that have legitimate purposes, and provide for independent evaluation and monitoring mechanisms to assess the weapons that are purchased¹¹⁷.

B. The corporate duty to respect human rights

Non-State actors, such as companies and other corporations “are bound by specific international legal norms, including customary international legal norms such as the prohibition of genocide, torture, and other crimes against humanity”¹¹⁸. Thus, non-State actors, such as corporations, have obligations arising from various sources of international law, such as customary law and general principles of law, especially in relation to jus cogens norms including the absolute prohibition of torture¹¹⁹. In this regard, the UN special rapporteur on torture and other cruel, inhuman and degrading treatment has established that “for the absolute and non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment to retain its practical relevance, however, it must also provide for practical protection against violations on the part of non-State actors”¹²⁰.

Similarly, in the context of business and human rights, companies and other corporations have a responsibility to respect human rights, including the rights to life and personal integrity under instruments such as the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights¹²¹ and the UN Guiding Principles on Business and Human Rights (Guiding Principles)¹²². Notably, both IAHR bodies have adopted the Guiding Principles in their decisions and reports, making them part of the Inter-American standards on business and human rights.

In light of these developments, companies have various duties, including to refrain from violating the human rights of third parties at any level of engagement, to mitigate adverse impacts on internationally recognised human rights that their products and business operations

¹¹⁷ CEJIL, Centro de Derechos Humanos de la Facultad de Derecho de la Universidad de Buenos Aires (UBA), Fundación Konrad Adenauer. *Uso de la fuerza en el marco de protestas sociales: aportes prácticos a partir de un análisis comparado de normativas nacionales*. 2020. Pp. 288-290. Available at: <https://cejil.org/wp-content/uploads/2022/09/Uso-de-las-fuerzas-en-el-marco-de-las-protestas-sociales.pdf>

¹¹⁸ Protocol on the investigation and effective response to threats against human rights defenders, (Esperanza Protocol). P. 15. Available at: <https://esperanzaprotocol.net/wp-content/uploads/2022/06/Esperanza-Protocol-EN-2.pdf>

¹¹⁹ See: Carrillo Santarelli, N. *Direct International Human Rights Obligations of Non-State Actors: A Legal and Ethical Necessity*. Wolf Legal Publishers. 2017.

¹²⁰ UN General Assembly. *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*. UN Doc. A/HRC/34/54. 14 February 2017. Para. 44.

¹²¹ UN. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. E/CN.4/Sub.2/2003/38/Rev.2. 13 August 2003.

¹²² UN. Human Rights Council. *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*. Op. Cit.

may have¹²³, to carry out due diligence processes to prevent, mitigate and address human rights violations arising from their business activities, and to remedy these violations¹²⁴.

In addressing business activity involving the production and trade of equipment and less lethal weapons that can be used to commit torture, it is necessary to look first at the absolute prohibition of torture as it applies to business enterprises, as well as in light of the applicable business and human rights standards.

Thus, based on the analysis throughout this paper, the design, production and trade of inherently cruel and abusive weapons and equipment should be prohibited and business enterprises have a responsibility to refrain from engaging in commercial activities involving these products. Furthermore, States have an obligation to regulate the prohibition of these products and to establish mechanisms to ensure that this is effectively enforced, as well as ensuring access to reparations for victims. Otherwise, they may incur international responsibility.

In the case of weapons that may have a legitimate purpose but are frequently used to inflict torture and other ill-treatment, States have an international obligation that requires them, at a minimum, to prevent these goods from being used to inflict torture, to regulate and adopt domestic law provisions to establish limits and controls on the trade in these goods. They must also investigate, prosecute, punish and redress violations to life and personal integrity perpetrated with these weapons. Failure by States to do so can give rise to international responsibility. For their part, companies that produce and market these products must carry out due diligence processes to mitigate, prevent and redress human rights violations resulting from their business operations.

V. Conclusion

The Advisory Opinion requested by Mexico refers to the lack of oversight by States in relation to the activities of firearms companies, which results in violations of the rights to life and personal integrity in the region. The undersigned organisations maintain that the human rights to life and personal integrity are also affected when States fail to regulate the activities of companies that supply less lethal weapons and when they lack internal regulation that establishes restrictions and controls on the acquisition of these weapons. The lack of regulation of less lethal weapons facilitates their production, trade and use in violation of the rights to life and personal integrity.

There is a universal and regional trend to recognise that certain less lethal weapons are inherently cruel, inhuman and degrading because of their nature, design and intended purpose, making their production and trade incompatible with the prohibition of torture and the protection of the right to life. Moreover, there are other less lethal weapons that may have legitimate purposes related to public security, but are commonly misused in violation of international standards on the protection of the right to life and the prohibition of torture, and therefore their trade must be regulated to prevent their acquisition by institutions that would misuse them.

¹²³ IACtHR. *Case of the Miskito divers (Lemoh Morris et al.) v. Honduras*. Judgment of 31 August 2021. Para. 47.

¹²⁴ *Ibid.*

It is crucial that the Court, in line with its normative developments and considering the progressive standards developed by various international bodies at the regional and universal level, provide guidance on the issue of trade in less lethal weapons through a human rights-based framework. It is essential that the Court take the opportunity presented by this request for an advisory opinion and issue clear standards that guarantee the protection of the rights to life and personal integrity in the context of the trade in less lethal weapons.

We reiterate the expressions of our highest consideration and esteem, in the hope that our intervention will be useful during the development of an Advisory Opinion by the honourable judges of this Inter-American Court of Human Rights.

Respectfully,



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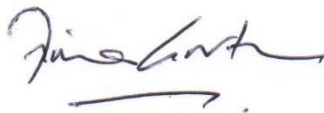
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