

# Due Diligence to Prevent Foreseeable Harm: The International Human Rights Agenda on Civilian Gun Violence

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## INTRODUCTION

The international human rights community is paying increasing attention to the adverse impacts of gun violence on the entire spectrum of human rights. Growing consciousness of the harm caused by civilian firearms violence, in particular, is leading intergovernmental organizations to consider the obligations of States under international human rights law regarding civilian acquisition, possession, and use of firearms. In practice, there is significant international consensus about the measures governments should take to exercise effective control over the possession and use of firearms. A large majority of governments already regulate civilian acquisition of firearms through licensing requirements to prevent their availability from persons most likely to misuse them. The United States remains an outlier on universal licensing requirements and opposes international human rights oversight of civilian acquisition, possession or use of firearms. Despite the U.S. opposition, the international community is moving cautiously toward the development of human rights standards to prevent civilian gun violence.

This article will explain how regulation of firearms came to be part of the United Nations' human rights agenda. First, the article will revisit the 2002-06 study and the 2006 principles on firearms and human rights endorsed by the U.N. Sub-Commission on the Promotion and Protection of Human Rights, especially as this work related to the due diligence obligation of States to prevent human rights violations committed by civilians. The analysis will then turn to recent normative developments on gun violence in the U.N. Human Rights Council and Human Rights Committee and conclude with a brief analysis of the path ahead on

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international standards regarding civilian acquisition, possession, and misuse of firearms.

### I. SUB-COMMISSION STUDY ON HUMAN RIGHTS AND SMALL ARMS

In 2002, the United Nations Sub-Commission on the Promotion and Protection of Human Rights (“Sub-Commission”) appointed the author<sup>1</sup> to prepare a comprehensive study on the prevention of human rights violations committed with small arms and light weapons.<sup>2</sup> The Sub-Commission’s study represented an initial step in examining the human rights implications of a post-Cold War world flooded by hundreds of millions of small arms and light weapons<sup>3</sup> that caused hundreds of thousands of deaths each year.<sup>4</sup> Small arms and light weapons moved to the center of the security and development agendas in the 1990s when it became clear that they were the tools of choice in complex civil wars and insurgencies, terrorism, and criminal violence.<sup>5</sup> The Sub-Commission’s study emphasized the need to address human security in addition to national security. The resolution authorizing the study asserted “the protection of human rights must be central to the development of further principles and norms regarding the transfer and misuse of small arms and light weapons and that human rights are not being given adequate

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1. Barbara A. Frey was the U.S. Alternate Member of the Sub-Commission from 2000-03 and thus eligible to undertake a study for the body. See *Faculty & Staff Directory*, UNIV. OF MINN., <https://cla.umn.edu/about/directory/profile/freyx001> (last visited Mar. 3, 2019).

2. U.N. Sub-Commission on Human Rights, *The Prevention of Human Rights Violations Caused by the Availability and Misuse of Small Arms and Light Weapons*, U.N. Doc. E/CN.4/Sub.2/RES/2002/25 (Aug. 14, 2002). For U.N. purposes small arms are defined as weapons designed for personal use and light weapons are designed for use by several persons acting as a crew. U.N. Gen. Assembly, *Report of the Panel of Governmental Experts on Small Arms*, ¶ 25, U.N. Doc. A/52/298, (Aug. 27, 1997).

3. See U.N. Gen. Assembly, *Report of the Panel of Governmental Experts on Small Arms*, ¶¶ 24–27, U.N. Doc. A/52/298, (Aug. 27, 1997).

4. See Barbara Frey, U.N. Sub-Commission on the Promotion and Protection of Human Rights, *The Question of Trade, Carrying and Use of Small Arms and Light Weapons in the Context of Human Rights and Humanitarian Norms*, ¶¶ 6, 7, U.N. Doc. E/CN.4/Sub.2/2002/39 (May 30, 2002) [hereinafter *Frey Working Paper*].

5. See, e.g., U.N. Gen. Assembly, *Foreword by the Secretary-General to the Report of the Panel of Governmental Experts on Small Arms*, U.N. Doc. A/52/298, annex (Aug. 27, 1997).

consideration in other contexts.”<sup>6</sup>

The timing of the Sub-Commission’s study coincided with the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, a parallel process in the General Assembly to address the proliferation of small arms globally. The formal conference process culminated in a three-week diplomatic conference in July 2001 at the New York headquarters that achieved a political consensus by which States committed to establish adequate national controls on manufacture, acquisition and transfer of small arms and light weapons.<sup>7</sup> The Programme of Action focused on preventing *illegal* transfer—firearms that ended up in the hands of unauthorized non-state actors—and not on the harm caused by domestically sanctioned possession or use. At the Small Arms Conference, States focused their attention on the threat of small arms to their own national security, not on the ways that States themselves were carrying out violations with firearms or acquiescing in firearms-related violence by private actors.<sup>8</sup> As such, the Conference did not reach consensus on a norm that prohibited the use of firearms to violate human rights.<sup>9</sup> Joost Hiltermann of Human Rights Watch observed at the time, “[t]he omission of human rights from the U.N. Conference on Small Arms and the resulting Programme of Action should be seen as a deliberate effort by states to shirk their responsibility as states for the proliferation and misuse of weapons. Governments like to blame others for this problem: arms traffickers, brokers, rebels, but rarely themselves.”<sup>10</sup>

Keeping in mind the developments in the General Assembly, the Sub-Commission’s study undertook to address this human rights gap regarding firearms. The Sub-Commission’s rapporteur employed a three-part human

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6. U.N. Sub-Commission on Human Rights, *supra* note 2.

7. See Rep. of the U.N. Conf. on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, U.N. Doc. A/CONF.192/195 (Jul. 9–20, 2001).

8. Edward J. Laurance, *Shaping Global Public Policy on Small Arms: After the UN Conference*, 9 BROWN J. WORLD AFF. 193, 198-99 (2002).

9. *Id.* at 197.

10. Joost Hiltermann, Exec. Dir. of the Arms Div. of Human Rights Watch, The UN Conference on Small Arms: Diplomatic Success, Humanitarian Failure, Remarks at Humanitarian Coalition on Small Arms Meeting (Nov. 18–20, 2001), [https://reliefweb.int/sites/reliefweb.int/files/resources/C2EF49C121082011C1256C40002C4DCA-iansa-small-nov01.htm#\\_Toc12165138](https://reliefweb.int/sites/reliefweb.int/files/resources/C2EF49C121082011C1256C40002C4DCA-iansa-small-nov01.htm#_Toc12165138).

rights analysis regarding small arms: (1) their misuse by State agents, (2) their misuse by armed individuals and groups when the State fails to exercise due diligence, and (3) their transfer with knowledge that they are likely to be used to commit serious violations of international human rights law.<sup>11</sup> The study noted that human rights impacts of firearms were apparent and ubiquitous. Guns were the tools used to facilitate an entire range of human rights violations, including arbitrary executions, sexual assault, enforced disappearance, torture, forced displacement, and forced recruitment of children soldiers.<sup>12</sup> Communities awash in guns also suffered violations of economic and social rights; easy access to firearms contributed to the collapse of economic productivity, erosion of social services and the disintegration of traditional social bonds.<sup>13</sup> Yet, until the Sub-Commission's study, few human rights organizations had documented the role of guns in these violations<sup>14</sup> and the United Nations' human rights bodies had not explicitly considered how human rights law should apply to the availability and misuse of small arms and light weapons.

A key argument for a human rights diagnosis of small arms and light weapons was that the gun itself was a multiplier of human rights violations. The rapporteur explained the multiplier effect in her preliminary report to the Sub-Commission, pointing out, "[a] single weapon, misused, can change the fate of an individual, a family, or even an entire community. A flood of small arms can shift the entire balance of power in a community, leading to a lack of personal security that destroys the rule of law."<sup>15</sup> The rapporteur noted that the presence of a weapon could transform the scale and the pace of human rights violations. Given technological developments in the field, the rapporteur explained firearms

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11. Barbara Frey (Special Rapporteur), *Preliminary Rep. on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, ¶ 9, U.N. Doc. E/CN.4/Sub.2/2003/29 (June 25, 2003) [hereinafter *Preliminary Report*].

12. *Frey Working Paper*, *supra* note 4, ¶¶ 7, 8.

13. *Preliminary Report*, *supra* note 11, ¶¶ 12, 13, 34.

14. See generally, Int'l Action Network on Small Arms, *Implementation of the UN Program of Action on Small Arms and Light Weapons*, at 2-4 (2017).

15. *Preliminary Report*, *supra* note 11, ¶ 8.

are growing more lethal and easier to use for even unsophisticated and untrained users, raising further human rights concerns.<sup>16</sup>

### III. DUE DILIGENCE OBLIGATIONS TO PREVENT CIVILIAN FIREARM VIOLENCE

The first two submissions by the rapporteur explored the State's responsibility to prevent violations by State agents under human rights and humanitarian law and considered the gender implications of small arms availability and misuse in a human rights context.<sup>17</sup> In 2006, the rapporteur's final report analyzed, inter alia, the question of the State's human rights obligations to prevent armed violence by private actors.<sup>18</sup> In doing so, the report reviewed the jurisprudence of the United Nations human rights enforcement mechanisms on the question of the State's due diligence obligations to prevent harm by non-state actors.<sup>19</sup> The rapporteur found the general comments of various treaty bodies<sup>20</sup> to be particularly relevant as well as the recommendations of the Special Rapporteur on extrajudicial, summary, or arbitrary executions<sup>21</sup> with

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16. *Id.* ¶ 14.

17. See Preliminary Report, *supra* note 10; Barbara Frey (Special Rapporteur), *Progress Report of Barbara Frey, Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, U.N. Doc. E/CN.4/Sub.2/2004/37 (June 21, 2004).

18 Barbara Frey (Special Rapporteur), *Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, U.N. Doc. A/HRC/Sub.1/58/27/Add.1 (July 27, 2006) [hereinafter *Final Report*].

19. *Id.* ¶¶ 10 – 14.

20. See, e.g., Office of the High Comm'r for Human Rights, *CCPR General Comment No. 6: Article 6 (Right to Life)*, ¶ 4 (Apr. 30, 1982) (asserting that states parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces); Office of the High Comm'r for Human Rights, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, ¶ 6 (Nov. 2, 1999) (“The State party must ensure that the rights guaranteed in article 12 are protected not only from public but also from private interference”); Comm. on the Elimination of All Forms of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence Against Women*, ¶ 9 (1992) (“Under general international law and specific human rights covenants States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”)

21. Philip Alston (Special Rapporteur), *Civil and Political Rights Including the Questions of Disappearance and Summary Executions*, ¶ 47, U.N. Doc. E/CN.4/2006/53 (Mar. 8, 2006) (“States have a legal duty to exercise ‘due diligence’ in protecting the lives of individuals from attacks by

regard to prevention and punishment of violations by private actors.

The Sub-Commission's rapporteur on small arms drew special attention to the Human Rights Committee's general comment No. 31 (2004) on the nature of the general legal obligations imposed on States Parties to the International Covenant on Civil and Political Rights ("Covenant"). The Human Rights Committee interpreted the requirements of article 2, paragraph 1 of the Covenant to "respect and ensure" rights,<sup>22</sup> noting

The positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.<sup>23</sup>

The Human Rights Committee had recognized that, in certain circumstances, a State could violate Covenant rights by "permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."<sup>24</sup> The Human Rights Committee's case law at the time,<sup>25</sup> and its responses to the reports of States' Parties to the Covenant,<sup>26</sup> also supported an interpretation of due diligence that encompassed the need for reasonable firearms regulations to prevent

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criminals, including terrorists, armed robbers, looters and drug dealers").

22. International Covenant on Civil and Political Rights, art. 2, ¶ 1, Dec. 19, 1966, 999 U.N.T.S. 14668.

23. Human Rights Comm., *General Comment No. 31*, ¶ 6, CCPR/C/21/Rev.1/Add. 13 (May 26, 2004).

24. *Id.* ¶ 8. See, e.g., Human Rights Comm., *Communication No. 195/1985, William Eduardo Delgado Páez v. Colombia* (Aug. 23, 1990) (finding that Colombia violated art. 9(1) when it failed to take reasonable and appropriate measures to protect the complainant, who reported death threats to military authorities, the teachers' union, the Ministry of Education and the President of Colombia.).

25. Human Rights Comm., *Communication No. 859/1999, Jiménez Vaca v. Colombia* (Mar. 25, 2002) (finding a violation of Covenant article 6, paragraph 1, in part, because the State did not use due diligence in investigating who was responsible for an attempt on the complainant's life, thus preventing him from living safely in Colombia.). For a case of a more recent vintage with a similar conclusion, see Human Rights Comm., *Human Rights Committee Communication No. 1862/2009, Peiris v Sri Lanka* (Apr. 18, 2012) (finding the complainant's husband death was attributable to the State where police threatened harm and failed to take appropriate preventative action).

26. See Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, U.N. Doc. CCPR/C/79/Add 50 (Apr. 6, 1995).

foreseeable harm.

The rapporteur's legal analysis of due diligence obligations was enhanced by the responses she received from governments to a 2004 questionnaire authorized by the Commission for all U.N. member states regarding their laws, policies, and practices concerning firearms.<sup>27</sup> Forty-one states responded to the questionnaire, a relatively high response rate for Sub-Commission surveys.<sup>28</sup> The rapporteur's analysis of the responses paid special attention to what licensing requirements responding States imposed upon civilian acquisition and use of firearms. All responding States reported that they had licensing requirements for civilian possession of small arms. Among those States, however, the factors considered as a basis for licensing to civilians varied to some degree and responding States provided few details about what evidence would disqualify an individual from receiving a license to own a firearm. While all regulating States considered criminal record and age before approving a license for civilian possession of a firearm, slightly fewer considered the psychological profile (84%) or domestic abuse record (73%) of the applicant. A majority of States (58%) required a demonstration of technical capability as part of the licensing process.<sup>29</sup>

Based on States' practices and the U.N.'s due-diligence jurisprudence, the rapporteur concluded in her final report that the minimum effective measures States should adopt to prevent small arms violence must go beyond mere criminalization of acts of armed violence and include some level of licensing.<sup>30</sup> While every State criminalized murder with a firearm, States must go further to ensure effective protection through "some machinery of control",<sup>31</sup> to prevent violations of core rights with

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27. U.N. Comm'n on Human Rights, Rep. on the Sixtieth Session, U.N. Doc. E/CN.4/2004/127, at 348 (2004); QUESTIONNAIRE ON SMALL ARMS, LIGHT WEAPONS AND AMMUNITION, <https://drive.google.com/drive/folders/0B3nSY2eu5Q9VLuh3ZHBwVnJdVE> (accessed Feb. 7, 2019).

28. COUNTRY RESPONSES TO QUESTIONNAIRE, <https://drive.google.com/drive/folders/0B3nSY2eu5Q9VUmhxQ3pMFVpdkE> (last visited Feb. 7, 2019). Generally a questionnaire such as this generally receives between twenty and thirty responses.

29. Final Report, *supra* note 18, at Annex 1.

30. *Id.* ¶ 16.

31. This concept was elaborated by the Human Rights Committee, *General Comment 7, Article 7 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted*

firearms.<sup>32</sup> The report concluded that human rights bodies should pay more attention to impacts of firearms on human rights, and should recommend that States enforce a minimum licensing requirement designed to keep small arms and light weapons out of the hands of persons who were most likely to misuse them.<sup>33</sup>

The rapporteur recommended that relevant human rights bodies should inquire about State practices on firearms as part of their evaluation of States' periodic reporting.<sup>34</sup> The rapporteur recommended that, based on the jurisprudence regarding due diligence, international human rights treaty bodies should require States to enforce a minimum licensing requirement designed to keep small arms and light weapons out of the hands of persons who are likely to misuse them.<sup>35</sup>

Based upon the responses received to the questionnaire, the report put forward recommendations for minimum licensing criteria that would comply with due diligence obligations. The rapporteur found that, while criteria for licensing varied from State to State, most licensing procedures considered, at a minimum: (1) age; (2) past criminal record including any history of interfamilial violence; (3) proof of a legitimate purpose for obtaining a weapon; and (4) mental fitness. The rapporteur incorporated these ideas in a set of draft principles described next.

#### IV. REVISITING THE PRINCIPLES ON FIREARMS AND HUMAN RIGHTS

During the course of the study, 2002-06, the rapporteur worked with members of the Sub-Commission to draft a set of model principles

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by *Human Rights Treaty Bodies*, at ¶ 1, U.N. Doc. HRI/GEN/1/Rev.1 at 7 (1994). The Human Rights Committee replaced General Comment 7 with General Comment 20 in 1992, but the concept of effective machinery of control remained central to its articulation of the State's obligation, *id.* Human Rights Committee, *CCPR General Comment No. 20, Article 7 (Prohibition of Torture, or other Cruel, Inhuman or Degrading Treatment or punishment)*, at ¶ 2 (Mar. 10, 1992) (stating "It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.").

32. Final Report, *supra* note 18, ¶ 15.

33. *Id.* ¶¶ 42, 46.

34. *Id.* ¶ 16.

35. *Id.* ¶ 16-17.

entitled, “Principles on the prevention of human rights violations committed with small arms” (“Principles”). The Principles aimed to provide States with a human rights framework for reviewing their small arms policies and practices. The Principles met a gap in international discussions on small arms which mainly took place in UN bodies that were either unfamiliar with international human rights law or chose to address the issues regarding small arms in a technical manner—overlooking the UN’s central commitment to human security, human dignity and human rights. The Sub-Commission endorsed the Principles in 2006 as a contribution to protecting the right to life, and indeed the entire spectrum of human rights, and transmitted them to the Human Rights Council for further consideration and adoption.<sup>36</sup> The Council, in its session serving as the successor to the U.N. Commission on Human Rights, failed to act on the Principles. Despite this, with their endorsement by the Sub-Commission, the Principles constituted a soft law statement of norms that delineated the State’s obligations to prevent human rights violations committed with firearms.

The Principles have two parts. Part A contains nine principles addressing the human rights obligations regarding the use of firearms by State agents, and Part B contains six principles on State responsibilities regarding the possession and use of firearms by private actors.<sup>37</sup> The document begins with the threshold legal principle, “Governments and State officials, especially law enforcement officials, shall not use small arms to violate human rights.”<sup>38</sup> The commentary to the Principles noted that this general obligation on the part of State officials included an affirmative responsibility to use due diligence to ensure that the right to

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36. U.N. Human Rights Council, *Draft Report of the Sub-Commission on the Promotion and Protection of Human Rights*, Res. 2006/22, U.N. Doc. A/HRC/Sub.1/58/L.11/Add.1 (Aug. 24, 2006).

37. See U.N. Econ. & Soc. Council, *Progress Report Submitted by Ms. Barbara Frey, Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, Add., U.N. Doc. E/CN.4/Sub.2/2004/37/Add.1 (June 21, 2004) (providing commentary with sources for the Principles); U.N. Econ. & Soc. Council, Commission on Human Rights, *Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, Note by the Secretariat, U.N. Doc. E/CN.4/Sub.2/2005/35 (June 15, 2005) (providing revised commentary) [hereafter “Commission on Human Rights Report.”]

38. Principles, *supra* note 37, at 8 (quoting Principle 1).

life, liberty, and security of the person is not violated.<sup>39</sup>

Part A of the Principles sets forth human rights standards to guide law enforcement practices related to firearms. Part A draws upon other established principles, including the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,<sup>40</sup> the U.N. Code of Conduct for Law Enforcement Officials,<sup>41</sup> and the U.N. Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions and extends them explicitly to regulate the possession and use of firearms.<sup>42</sup> The Small Arms Principles were intended to assist Member States in ensuring and promoting proper use of firearms by State agents, especially law enforcement officials, with respect to their unequivocal role to protect the right to life, liberty and security of the person,<sup>43</sup> including:

- Adopting rules and regulations on the use of force with firearms (principle 2);
- Strict enforcement of those rules and regulations, including a clear chain of command, and punishment of violations as criminal offences (principle 3);
- Procedures for storage, management and responsible disposal of surplus small arms (principle 4);
- Selection and training of law enforcement officials (principle 5);
- Special attention to human rights as part of that training, including the preference for alternative means to force (principle 6);

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39. Commission on Human Rights Report, *supra* note 37, at 3.

40. Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (Sept. 7, 1990).

41. G.A. Res. 34/169, annex, Code of Conduct for Law Enforcement Officials, at 186 (Dec. 17, 1979).

42. Economic and Social Council Res. 1989/65, annex, at 52 (May 24, 1989).

43. Principles, *supra* note 37, at preambular ¶ 11.

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- Prior operational planning to avoid use of armed force (principle 7);
- Reiteration of necessity and proportionality criteria (principle 8); and
- Minimum criteria for investigating allegations of misuse (principle 9).

Part B of the Principles elaborates the States' responsibilities to prevent the misuse of firearms by private actors, including civilians. Principle 10 encapsulates the basic steps States must take to comply with their due diligence obligation to reduce arms-related violence committed by private actors:

In order to ensure the protection of human rights by preventing small arms violence by private actors, Governments shall incorporate into their national laws licensing requirements to prevent possession of arms by persons who are at risk of misusing them. Possession of small arms shall be authorized for specific purposes only; small arms shall be used strictly for the purpose for which they are authorized. Before issuing a licence Governments shall require training in proper use of small arms, and shall take into consideration, at a minimum, the following factors: age, mental fitness, requested purpose, prior criminal record, and prior acts of domestic violence. Governments shall require periodic renewal of licences.<sup>44</sup>

Principle 10 incorporates several key provisions aimed at reducing civilian gun violence and maximizing human rights protections. First, all civilians must gain and periodically renew licenses to possess firearms. Second, licensing of firearms must be for a specific stated purpose. Licensing provides a transparent and fair procedure for the government, on behalf of its citizens, to ensure that individuals who seek firearms have a stated reason for doing so. Third, to gain a license to possess a firearm, an

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44. *Id.* (Principle 10).

applicant should meet the minimum social requirements to ensure that they will not use the weapon to violate the rights of others.

The framing of Principle 10 was based on the State responses to the Sub-Commission's Questionnaire,<sup>45</sup> and on standards suggested in several previous U.N. resolutions and reports to promote the safety and well-being of persons and to ensure freedom from fear of crime. The U.N. Economic and Social Council adopted resolution 1997/28 on firearm regulation for purposes of crime prevention and public health and safety. That resolution encouraged States to consider regulatory approaches to the civilian use of firearms including, "[a] licensing system, including the licensing of firearm businesses, to ensure that firearms are not distributed to persons convicted of serious crimes or other persons who are prohibited under the laws of the respective Member States from owning or possessing firearms."<sup>46</sup> In 1995, the report of the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders included the concern, "that the high incidence of crimes, accidents and suicides involving the use of firearms is closely related to the abundance of firearms in society without appropriate regulation of the possession and storage or training in their use and, inter alia, to the fact that the persons who are most likely to use them for criminal activities have easy access to them."<sup>47</sup> Similarly, a 1998 report of the U.N. Secretary-General on measures to regulate firearms summarized the findings of four regional workshops on issues involved in national legislation on firearm regulation and elaborated the elements for a declaration of principles, including the requirement that States take appropriate measures to regulate the civilian possession and use of firearms.<sup>48</sup> Conditions discussed by participants at the workshops included age, necessity, training, criminal history, history of drug/alcohol abuse, mental fitness, physical fitness and spousal approval.<sup>49</sup> The Secretary-General's recommendations were tempered with

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45. See discussion *supra* Part II.

46. Economic and Social Council Res. 1997/28, ¶ 5 (July 21, 1997).

47. Ninth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Report Prepared by the Secretariat*, U.N. Doc. A/CONF.169/16/Rev.1at 29 (May 8, 1995).

48. U.N. Commission on Crime Prevention and Criminal Justice, *Criminal Justice Reform and Strengthening of Legal Institutions: Measures to Regulate Firearms*, U.N. Doc. E/CN/15/1998/4 at 9 (Mar. 11, 1998).

49. *Id.* at 4-5.

language recognizing the sovereign rights of States to enact their own firearms regulations.<sup>50</sup>

The remaining Principles on the prevention of human rights violations committed with small arms –Principles 11 through 14–consist of restatements in the human rights framework of measures established in other security instruments. The Principles call for marking and tracing by manufacturers;<sup>51</sup> investigation and criminal penalties for misuse of small arms;<sup>52</sup> effective disarmament, demobilization and reintegration programs in post-conflict situations, including the effective collection, control, storage, and destruction of small arms;<sup>53</sup> and prohibition on international transfer when firearms are likely to be used to commit serious human rights violations.<sup>54</sup> An additional Principle, proposed by the Jamaican member of the Sub-Commission, Ms. Florizelle O'Connor and endorsed by the Sub-Commission, requires the mutual exchange of information regarding gun ownership for the purposes of judicial proceedings in other States.<sup>55</sup>

## V. LEGAL DEVELOPMENTS IN THE UNITED NATIONS ON THE PREVENTION OF CIVILIAN FIREARM VIOLENCE

### *A. Human Rights Council*

Since the completion of the Sub-Commission's study, the United Nations Human Rights Council has increased its attention on the risks to human rights caused by the misuse of firearms by civilians. The Council's engagement with civilian firearm violence began in 2015, when the governments of Ecuador and Peru proposed a resolution authorizing a study on the best practices regarding regulation of civilian acquisition,

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50. *Id.* at 10. (“Recognizing that States have developed different cultural and historical uses for firearms and that their sovereign rights to enact their own regulations on firearms should be respected, Member States should...take appropriate measures to regulate firearms, including those suggested in Economic and Social Council resolution 1997/28, paragraph 5.”).

51. Principles *supra* note 37 (Principle 11).

52. *Id.* (Principle 12).

53. *Id.* (Principle 13).

54. *Id.* (Principle 14).

55. *Id.* (Principle 15).

possession and use of firearms. Besides Ecuador and Peru, the cosponsors of the resulting draft resolution<sup>56</sup> included Cuba, Nicaragua, Nigeria, Switzerland, and Venezuela, a list that cast a distinctly geopolitical shadow on this initial effort. The lone Western State, Switzerland, had a long history of supporting research on gun violence, including its funding of Small Arms Survey, a research think tank.<sup>57</sup> The United States Ambassador to the Human Rights Council explained the State's abstention on the resolution, "[w]e do not believe that a state's regulation of the purely domestic acquisition, possession, and use of firearms is an appropriate topic for international attention, generally, or the Human Rights Council, specifically. Further, we do not regard the domestic actions suggested by the resolution to be required by international human rights obligations."<sup>58</sup> Despite the U.S. concerns, the Council adopted the resolution that authorized the study by a vote of forty-one to zero, with six abstentions (France, Japan, Republic of Korea, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America).<sup>59</sup>

The resulting study by the Office of the U.N. High Commissioner for Human Rights discussed the impact of the misuse of firearms on the enjoyment of human rights and regulation of civilian access to firearms.<sup>60</sup> The High Commissioner concluded that the information it had received from States and other U.N. stakeholders "point[ed] to a correlation between civilian access to firearms, including lawfully acquired weapons, and levels of violence and insecurity, including in non-conflict settings."<sup>61</sup>

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56. See Human Rights Council Res. 29/10, U.N. Doc A/HRC/29/L.18 (June 29, 2015).

57. See SMALL ARMS SURVEY, ANNUAL REPORT 2017 18 (2018), available at <http://www.smallarmssurvey.org/fileadmin/docs/M-files/SAS-Annual-Report-2017.pdf>; SMALL ARMS SURVEY, ANNUAL REPORT 2016 19 (2017), available at <http://www.smallarmssurvey.org/fileadmin/docs/M-files/SAS-Annual-Report-2016.pdf>.

58. A/HRC/29/L.18 Vote Item: 3 - 43rd Meeting, 29th Regular Session Human Rights Council, UNITED NATIONS, (July 2, 2015), <http://webtv.un.org/assets/rss/video3804186128001/watch/ahrc29l18-vote-item3-43rd-meeting-29th-regular-session-human-rights-council/4334049853001/?term=&lan=french#player>.

59. Mothusi Bruch Rabasha (Vice-President and Rapporteur), *Report of the Human Rights Council on its Twenty-ninth Session*, ¶ 233, U.N. Doc. A/HRC/29/2 (Nov. 25, 2015).

60. U.N. High Commissioner for Human Rights, *Human Rights and the Regulation of Civilian Acquisition, Possession and Use of Firearms*, U.N. Doc A/HRC/32/21 (Apr. 15, 2016) [hereinafter *Regulation of Firearms*].

61. *Id.* ¶ 51.

To address this problem, the report identified various measures to prevent firearms-related human rights violations, including laws and regulations to license, register, monitor and train persons or companies with access to firearms. The report recommended a licensing system to prevent persons with a prior criminal record, relevant restraining orders, or mental health conditions from gaining access to firearms.<sup>62</sup>

The Human Rights Council's most recent resolution on firearm violence, 38/10 of July 5, 2018,<sup>63</sup> was adopted in the absence of the United States, which withdrew as a member of the body on June 19, 2018.<sup>64</sup> Perhaps because the United States was not present to lobby its allies, a much broader group of States sponsored the 2018 draft resolution<sup>65</sup> and the Council adopted it on a voice vote. The Council's resolution 38/10 was the most robust recognition to date of the human rights responsibilities of States to protect persons from firearms violations committed by non-state actors, calling upon all States to "do their utmost" to take appropriate legislative, administrative and other measures to regulate civilian acquisition, possession and use.<sup>66</sup> The Human Rights Council recognized that civilian firearms-related violence and insecurity posed direct risks not just to life, but also to the entire spectrum of human rights, including "the rights to health, to education, to an adequate standard of living and social security and to the right to participate in public, political and cultural life."<sup>67</sup> The resolution called for a further study by the High Commissioner on civilian misuse of firearms "with a view to...the strengthening or developing of effective national regulation and to other possible measures taken by States."<sup>68</sup>

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62. *Id.* ¶ 54(b).

63. Human Rights Council Res. 38/10, U.N. Doc A/HRC/38/L.14 (July 5, 2018).

64. *Remarks on the UN Human Rights Council*, U.S. DEP'T OF STATE (June 19, 2018), <https://www.state.gov/secretary/remarks/2018/06/283341.htm>.

65. Australia, Azerbaijan, Bolivia, Chile, Cyprus, Cuba, Ecuador, Greece, Honduras, Liechtenstein, Peru, Paraguay, Philippines, Switzerland and Uruguay.

66. *Regulation of Firearms*, *supra* note 60, ¶ 3.

67. *Id.* ¶ 2.

68. Human Rights Council Res. 38/10, ¶ 7, U.N. Doc A/HRC/38/L.14 (July 5, 2018).

*B. Human Rights Committee*

The Human Rights Committee is the body of independent experts that enforces the implementation of the International Covenant on Civil and Political Rights. The Committee examines the periodic reports of States Parties, issuing Concluding Observations about each reporting State's laws, policies and practices in relation to its treaty obligations.<sup>69</sup> In the course of these examinations, the Committee has addressed civilian acquisition, possession and misuse with regard to several states' reports;<sup>70</sup> its most detailed concerns have been directed to the United States.<sup>71</sup>

In its reviews of two of the United States' reports, the Committee expressed its concerns about the problems of civilian gun violence. With regard to the United States' initial report, in 1995, the Committee expressed its regret about "the easy availability of firearms to the public and the fact that federal and State legislation is not stringent enough in that connection to secure the protection and enjoyment of the right to life and security of the individual guaranteed under the Covenant."<sup>72</sup>

In 2014, Committee again expressed its concern about the level of gun violence in the United States and the disparate impacts of that type of violence on women, children and racial minorities. The Committee made

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69. U.N. High Comm'r for Human Rights, *Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15 (Rev. 1)*, pp. 15-24 (May 2005), <https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>.

70. See Human Rights Comm., Concluding Observations on the Fifth Periodic Rep. of Yemen, ¶ 16, U.N. Doc. CCPR/C/YEM/CO/5 (Apr. 23, 2012) [hereinafter Yemen Observations], (expressing concern about the existence of a large number of weapons in the possession of public and private actors throughout the country.); Human Rights Comm., Concluding Observations on the Fourth Periodic Rep. of the Philippines, 106th Session (Oct. 15 – Nov. 2, 2012), ¶ 14, U.N. Doc. CCPR/C/PHL/CO/4 (Nov. 13, 2012) [hereinafter Philippines Observations], (expressing concern at the proliferation of private armies and vigilante groups and the large number of illegal firearms); U.N. Human Rights Comm., Concluding Observations on the Initial Rep. of Angola, 107th Sess. (Mar. 11-28, 2013), ¶ 12, U.N. Doc. CCPR/C/AGO/CO/1, (Apr. 29, 2013) [hereinafter Angola Observations] (recommending the State consider reinforcing its legislation in order to combat illegal possession and use of small arms) (Apr. 29, 2013).

71. U.N. Secretary-General, *Consideration of reports submitted by States Parties under Article 40 of the Covenant, United States of America*, ¶ 17, U.N. Doc. CCPR/C/79/Add.50 (Apr. 7, 1995) [hereinafter 1995 U.S. Observations], Human Rights Comm., Concluding Observations on the Fourth Periodic Rep. of the United States of America, 110th Sess. (Mar. 10-28, 2014), ¶ 10, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014) [hereinafter 2014 U.S. Observations].

72. 1995 U.S. Observations, *supra* note 71, ¶ 17.

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the following set of recommendations:

The State Party should take all necessary measures to abide by its obligation to effectively protect the right to life. In particular, it should: (a) Continue its efforts to effectively curb gun violence, including through the continued pursuit of legislation requiring background checks for all private firearm transfers, in order to prevent possession of arms by persons recognized as prohibited individuals under federal law, and ensure strict enforcement of the Domestic Violence Offender Gun Ban of 1996 (the Lautenberg Amendment);<sup>73</sup> and (b) Review the Stand Your Ground laws to remove far-reaching immunity and ensure strict adherence to the principles of necessity and proportionality when using deadly force in self-defence.<sup>74</sup>

The Committee's recommendations to other States Parties to the Covenant provided some context for the globalized nature of civilian gun violence and illuminated the treaty body's views of States Parties' human right obligations to prevent that violence. To address the problem of criminal violence of vigilante groups in the Philippines, the Committee recommended that the government establish a mechanism to disband and disarm all private armies, vigilante groups and 'force multipliers,'<sup>75</sup> and also increase efforts to reduce the number of illegal firearms.<sup>76</sup> Similarly, in post-conflict Angola, the Committee highlighted the insecurity caused by small arms remaining in civilian hands.<sup>77</sup> The Committee expressed its regret that Angola "ha[d] not provided statistical data regarding the number of crimes committed involving small arms; investigations undertaken; prosecutions made; sanctions imposed on those responsible and measures taken to protect its population against insecurity caused by small arms."<sup>78</sup> It recommended that the Angolan government "strengthen

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73. [18 U.S.C. § 922(g)(9) (2018)].

74. 2014 U.S. Observations, *supra* note 71, ¶ 10.

75. Force multipliers is the name given to anti-crime volunteers in the Philippines.

76. Philippines Observations, *supra* note 70, ¶ 14.

77. Angola Observations *supra* note 70, ¶ 12.

78. *Id.*

measures to collect small arms held by the population and to reduce insecurity in its territory. It should further consider reinforcing its legislation in order to combat illegal possession and use of small arms.”<sup>79</sup>

In reviewing the 2012 report of Yemen, the Human Rights Committee expressed its concern about “the existence of a large number of weapons in the possession of public and private actors throughout the country, and the lack of proper control over the stockpiling and distribution of such weapons.”<sup>80</sup> The Committee recommended that Yemen “work with the international community to develop and implement an effective disarmament, demobilization and reintegration programme for non-State actors, including the collection, control, storage and destruction of unnecessary weapons.”<sup>81</sup>

In addition to its recommendations in response to State reports, the Human Rights Committee has addressed threats to human rights from private armed violence in its general comments. The Committee’s most recent General Comment, number 36, interpreted Article 6 of the Covenant on the right to life.<sup>82</sup> General comment 36 replaced the Committee’s 1982 comment, number 6,<sup>83</sup> reflecting the many legal developments since the previous statement on the right to life.

General comment 36 offered more guidance for States Parties to the Covenant on its obligations to address threats to life caused by civilian firearm violence. The new general comment explained the deepening jurisprudence on the due diligence obligations to ensure the right to life, stating that States Parties must “exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities, whose conduct is not attributable to the State.”<sup>84</sup> The Committee explained, “The duty to protect the right to life by law also includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, including from threats

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79. *Id.*

80. Yemen Observations, *supra* note 70.

81. *Id.*

82. Human Rights Comm., General Comment No. 36 (2018), U.N. Doc. CCPR/C/GC/36, (Oct. 30, 2018).

83. *See supra* note 20 and accompanying text.

84. Human Rights Comm., *supra* note 82, ¶ 7.

emanating from private persons and entities.”<sup>85</sup>

The General Comment applied the due-diligence obligation specifically to armed violence, explaining that States Parties are obligated to “undertake reasonable positive measures, which do not impose on them disproportionate burdens, in response to reasonably foreseeable threats to life originating from private persons and entities, whose conduct is not attributable to the State.”<sup>86</sup> Specifically, the comment provided “States parties should also disband irregular armed groups... and reduce the proliferation of potentially lethal weapons to unauthorized individuals.”<sup>87</sup>

#### CONCLUSION

This article demonstrates that the United Nations’ human rights bodies are engaging in an increasingly robust discussion about the human rights risks of firearm violence. That discussion is likely to lead to the elaboration of minimum international standards to prevent gun-related violations, including those committed by private actors. The Sub-Commission’s Principles provide an excellent baseline for delineating the State’s obligations to prevent rights violations committed with firearms, based on jurisprudence regarding due diligence and reported State practice.

Since the Sub-Commission’s endorsement of the Principles in 2006, the deepening jurisprudence in international human rights bodies has further reinforced the positive responsibilities of States to exercise due diligence to protect the lives of persons against deprivations caused by private persons or entities. The Human Rights Committee’s General Comment 36 and its Concluding Observations clarify the obligation of States to avoid reasonably foreseeable threats and life-threatening situations that can result in loss of life. Unregulated civilian possession of firearms constitutes such a reasonably foreseeable threat and the Committee has thus called for effective licensing of civilians seeking to

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85. *Id.* ¶ 18.

86. *Id.* ¶ 21.

87. *Id.* ¶ 21. (first citing Angola Observations, *supra* note 70; then citing 2014 U.S. Observations, *supra* note 71).

acquire firearms in its human rights reviews.

The Human Rights Council has also spoken clearly on this issue, calling for States to regulate civilian acquisition, possession and use of firearms, based on the recognition that civilian firearms-related violence and insecurity pose direct risks, not only to the right to life, security of person and physical integrity, but to the entire spectrum of human rights. There is an emerging global consensus and common practice regarding the minimum regulations needed to prevent civilian firearms-related violence. The Sub-Commission's study demonstrated more than a decade ago that all States—including the United States—had at least some regulations in place to keep firearms out of the hands of those likely to misuse them. The challenge now is to articulate those minimum standards clearly as universal human rights obligations, and not just to leave them to other international sectors, such as security or crime prevention, to address.

As a matter of human rights law, then, the Human Rights Council must speak to the basic minimum standards for licensing civilian possession of firearms. The standards should establish common licensing criteria based on established State practice, limiting acquisition based, at a minimum, age, criminal record, mental fitness, requested purpose, and prior acts of domestic violence. A clear statement of principles by the international human rights community for preventing civilian gun violence would represent a collective commitment to end the devastating impacts of firearm violence and would assert the primacy of human rights in the global politics that surround this issue.