

December 2012

**HUMAN RIGHTS COMMITTEE COUNTRY REPORT**

**United States of America**

**Independent information for the 109th session**

**of the Human Rights Committee (HRC)**

**HUMAN RIGHTS LITIGATION AND INTERNATIONAL ADVOCACY CLINIC  
AND HUMAN RIGHTS PROGRAM  
UNIVERSITY OF MINNESOTA**

**CRITICAL ISSUES**

**Right to Life (Article 6)**

Due diligence to prevent killings and injuries with small arms by private actors

Excessive use of force with firearms by law enforcement and security forces

Transfer of small arms where they are likely to be used to violate the right to life

**PROPOSED QUESTIONS FOR THE GOVERNMENT OF UNITED STATES**

1. The United States Fourth Periodic Report discusses the important actions that the United States has taken to improve access to justice and support for victims of crime,<sup>1</sup> and in its 1995 Concluding Observations this Committee has urged the United States to address easy availability of firearms to the public and the fact that federal and state legislation is not stringent enough.”<sup>2</sup> Current statistics indicate that gun violence continues to kill over 30,000 people per year in the United States, an average of 3.5 people per hour. Please explain what measures, if any, have been taken to implement and restore federal measures designed to prevent Small Arms and Light Weapons (SALW) abuse including universal background checks and licensing requirements, elimination of loopholes for weapons and ammunition purchased online and at gun shows, and the restoration and strengthening of a federal assault weapons ban.

---

<sup>1</sup> Fourth Periodic Report of the United States of America (CCPR/C/USA/4) at ¶¶160–165, U.N. Doc. CCPR/C/USA/4 (2012), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/429/66/PDF/G1242966.pdf?OpenElement>.

<sup>2</sup> U.N. Human Rights Committee, Concluding Observations on the Initial Periodic Report of the United States of America, ¶ 282, U.N. Doc. CCPR/C/79/Add.50, A/50/40 (1995).

2. State laws around gun regulation vary widely. Please provide more information about measures the United States federal government has undertaken to collaborate with individual states to implement mandatory background checks, and provide federal incentives for NICS reporting.
3. The United States has taken commendable action to end domestic violence through actions such as those taken to implement the Violence Against Women Act. Please explain what measures are being undertaken to prevent the use of SALW in domestic violence, including consistent enforcement of court orders to remove firearms from domestic violence offenders, mandatory follow-up by law enforcement on possession of SALW by those under protective orders, and other measures necessary to give effect to the Domestic Violence Offender Gun Ban of 1996.
4. Following up on this Committee's Concluding Observations in 2006,<sup>3</sup> please explain what measures the State party has taken to address police brutality and excessive use of force, including the misuse of SALW, in order to "bring its policies into line with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials."<sup>4</sup>
5. Please explain what measures are being taken to stop and prevent future illicit transfers of SALW across U.S. borders, in particular SALW trafficking to Mexico, and to prevent SALW exports to human rights violators.

---

<sup>3</sup> U.N. Human Rights Committee, Concluding Observations on the Second and Third Periodic Reports of the United States of America, ¶ 30, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (2006) [hereinafter HRC, Concluding Observations 2006], *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/459/61/PDF/G0645961.pdf?OpenElement>.

<sup>4</sup> *Id.*

## EXECUTIVE SUMMARY

The right to life is violated repeatedly by the U.S. government's refusal to address the misuse of firearms by private actors. In December 2012, the killing of 20 young children – all aged six or seven – and six members of the staff of an elementary school in Connecticut focused national and international attention on gun violence in the United States. The killer used semi-automatic weapons to carry out the attack and had hundreds of rounds of ammunition in his possession.

Between 1976 and 2010 there were 645 “mass shootings” – killings of four or more people – in the United States. In 2012 alone, there were 38 reported mass shootings. A number of these have involved high capacity magazines and assault weapons.

The high numbers of killings go beyond “mass shootings.” Roughly 30,000 Americans are killed by firearms each year, and children, victims of domestic violence, and racial minorities are particularly vulnerable to violence with firearms. In 2010, the most recent year statistics were available, 2711 children and teens were killed. Other studies show that women victims of domestic violence are five times more likely to be killed if their abuser owns a handgun. African Americans represented 55% of homicide victims, although they are only 14% of the U.S. population.

There are many actions available to reduce gun violence in the U.S., just as it has been reduced in countries around the world. One recommendation to decrease gun violence is for universal background checks. Currently federal law only requires background checks for purchases of weapons from licensed dealers, and many people who would be otherwise prohibited from purchasing a weapon for reasons such as a criminal record, simply acquire guns through gun shows or online. Another recommendation is to strengthen the effective enforcement of laws prohibiting those who have perpetrated domestic violence from owning firearms. A third recommendation is to enact a ban on assault weapons and high-capacity magazines. Given the variation among the laws of the 50 states, federal coordination is needed for a consistent standard to keep guns out of the hands of prohibited persons. Of particular concern are the lax and inconsistent standards for carrying concealed weapons and the “stand-your-ground” laws that violate the international human rights principles on the use of force (in particular necessity and proportionality).

The negative impacts of illegal arms trafficking go beyond the United States borders – in particular to Mexico. Illicit trafficking of weapons through black market sales, illegal diversion and illegal sales to criminal organizations has resulted in an estimated 2,000 weapons per day illegally trafficked across the U.S.-Mexican border. An estimated 60,000 people were killed in gun violence in Mexico from 2006-2012. Assault weapons transferred across the U.S. border have been especially prevalent in Mexico.

Also in violation of the right to life protected by ICCPR Article 6 are police shootings. Since January 2010, 18 people have been victims of excessive use of force and SALW misuse by the U.S. Customs and Border Police, including six victims under the age of 21.

The high level of small arms exports has also resulted in increasing the availability of arms to countries where they are likely to be used to carry out human rights violations. One example is the Philippines. At the last session of the Human Rights Committee, the members urged the Philippine government to disarm private armies and vigilante groups and to reduce the number of illegal firearms. In 2011, the U.S. government authorized over USD 21 million worth of SALW through direct commercial sales to the Philippines, including 410,291 firearms and 92,996,663 rounds of ammunition.

Simultaneously with the March 2013 session of the Human Rights Committee, the U.S. will be negotiating the Arms Trade Treaty at a diplomatic conference in New York. This meeting will occur after the unsuccessful July 2012 diplomatic conference at which the United States and a small number of other states attempted to exclude the regulation of ammunition and munitions from the treaty.

The United Nations has given important attention to the issues of gun violence in the past and we urge the Committee to inquire at this upcoming session about the steps the United States government has taken and will take to deter future human rights violations with small arms and light weapons.

## I. INTRODUCTION

Roughly 30,000 Americans are killed by firearms each year.<sup>5</sup> In 2010, the most recent year for which statistics are available, 31,672 people were killed by guns in the United States.<sup>6</sup> This averages to 3.5 people in the United States killed with a firearm every hour.<sup>7</sup> Among the top twenty-three populous, high-income countries, 80% of all firearm deaths occurred in the United States.<sup>8</sup>

Gun violence has a disproportionate impact on children. The tragic killing of twenty children, all six or seven years old, by a gunman in their classroom in Newtown, Connecticut on December 14, 2012, was unfortunately just one example of the gun-related violence affecting children in the U.S. In 2010, 2,711 children and teens were killed with guns and over 15,000 were injured.<sup>9</sup> Of those killed, 1,773 (65%) were victims of homicide, 749 (28%) were suicides, and 172 (6%) were accidental deaths or of unknown intent.<sup>10</sup> The gun homicide rate for teens and young adults in the U.S. was 42.7 times higher than the combined gun homicide rate for the same age group of twenty-three other high-income states.<sup>11</sup> The number of preschoolers killed by guns in 2010 (eighty-six) exceeded the number of law enforcement officers feloniously killed in the line of duty (fifty-five).<sup>12</sup>

---

<sup>5</sup> See *Web-based Injury Statistics Query and Reporting System Fatal Injury Reports, 1999–2010 for National, Regional, and States*, NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, [www.cdc.gov/ncipc/wisqars/](http://www.cdc.gov/ncipc/wisqars/) (last visited Dec. 5, 2012) [hereinafter *WISQARS Fatal Injury Reports*].; *There Are Too Many Victims of Gun Violence*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, [http://www.bradycampaign.org/xshare/Facts/Gun\\_Death\\_and\\_Injury\\_Stat\\_Sheet\\_2008\\_\\_2009\\_FINAL.pdf](http://www.bradycampaign.org/xshare/Facts/Gun_Death_and_Injury_Stat_Sheet_2008__2009_FINAL.pdf) (last visited Nov. 2, 2012) (calculating statistics based on 2008–09 available data from the Center for Injury Prevention and Control).

<sup>6</sup> *WISQARS Fatal Injury Reports*, *supra* note 5. In 2010, guns were used in: 11,078 homicides, 19,392 suicides, 606 unintentional deaths, 344 deaths through legal intervention and 252 whose cause is unknown. *Id.*

<sup>7</sup> *Uniform Crime Reports: Table 20 Murder*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-20> (last visited Nov. 2, 2012). Handguns are used in seventy-two percent of murders committed with firearms. *Id.* ABC News reports that American gun deaths account for eighty percent of gun deaths in the twenty-three wealthiest countries and eighty-seven percent of children killed by guns are American. Bill Weir, *Gun Deaths: A Familiar American Experience*, ABC NEWS (July 21, 2012 10:29 AM), <http://abcnews.go.com/blogs/headlines/2012/07/gun-deaths-a-familiar-american-experience/> (citing a study from the *Journal of Trauma and Acute Care Surgery*).

<sup>8</sup> Richardson, Erin G., and David Hemenway, *Homicide, Suicide, and Unintentional Firearm Fatality: Comparing the United States with Other High-Income Countries, 2003*, *J. OF TRAUMA, INJURY, INFECTION, AND CRITICAL CARE* (June 2010).

<sup>9</sup> *Web-based Injury Statistics Query and Reporting System*, NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, [www.cdc.gov/ncipc/wisqars/](http://www.cdc.gov/ncipc/wisqars/) (last visited Dec. 5, 2012).

<sup>10</sup> *Id.*

<sup>11</sup> CHILDREN'S DEF. FUND, PROTECT CHILDREN NOT GUNS 5 (2012), available at <http://www.childrensdefense.org/child-research-data-publications/data/protect-children-not-guns-2012.pdf>

<sup>12</sup> *Law Enforcement Officers Killed and Assaulted: 2010*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/leoka/leoka-2010/fbi-releases-2010-statistics-on-law-enforcement-officers-killed-and-assaulted> (last visited Dec. 5, 2012) (55 of 56 law enforcement officers killed were killed with firearms).

Racial minorities in the United States suffer from gun violence at a dramatically higher rate than the overall population. Crime statistics gathered in 2010 revealed that while African-Americans made up only fourteen percent of the U.S. population, they represented fifty-five percent of all homicide victims.<sup>13</sup> The rate of homicide firearm deaths among children and teens of racial minorities is consistently higher than for white children and teens.<sup>14</sup> The homicide rate for children and teens in 2010 was 8.5 per 100,000 for the African-American population, 2.2 per 100,000 for the Hispanic population, 1.7 per 100,000 Native Americans, and 0.5 per 100,000 whites.<sup>15</sup>

In its Fourth Periodic Report, the United States noted the important commitment it has made to end violence against women through its priority on the implementation of the Violence Against Women Act.<sup>16</sup> These actions are commendable, yet more preventative action is necessary in the area of SALW as women are disproportionately impacted by gun violence. A comparative study of homicide rates in high-income countries showed that the death of women by firearms in the U.S. was twelve times higher than the combined rate of other similarly situated countries.<sup>17</sup> A 2010 study of sixteen states in the U.S. showed that seventy-three percent of murdered women were killed at home.<sup>18</sup> Firearms tend to be more prevalent in homes where abuse has taken place (36.7%) than generally (16.7%),<sup>19</sup> and women are five times more likely to be killed if their abuser owns a firearm.<sup>20</sup> According to the Federal Bureau of Investigation

---

<sup>13</sup> WISQARS *Fatal Injury Reports*, *supra* note 5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* The firearm suicide rate follows the opposite trend, with 1.2 per 100,000 white children and teens committing suicide in 2010 with a firearm as compared to 0.5 per 100,000 African Americans, and 0.4 per 100,000 Hispanics. *Id.*

<sup>16</sup> Fourth Periodic Report of the United States of America (CCPR/C/USA/4) at ¶¶ 53, 135–136 U.N. Doc. CCPR/C/USA/4 (2012), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/429/66/PDF/G1242966.pdf?OpenElement>.

<sup>17</sup> See Erin G. Richardson & David Hemenway, *Homicide, Suicide, and Unintentional Firearm Fatality: Comparing the United States with Other High Income Countries* (2003) J. TRAUMA, INJURY, INFECTION, & CRIT. CARE (2010).

<sup>18</sup> D. Karch, Linda Dahlberg, & Nimesh Patel, *Surveillance for Violent Deaths – National Violent Death Reporting System, 16 states, 2007* (2010). The Violence Policy Center also found ninety percent of women were killed by someone they knew. See *When Men Murder Women: An Analysis of 2008 Homicide Data* (Sept. 2010), available at <http://www.vpc.org/studies/wmmw2010.pdf>.

<sup>19</sup> Susan Sorenson & D.J. Wiebe, *Weapons in the Lives of Battered Women*, 94 AM. J. PUB. HEALTH 1412-17 (2004). These trends are supported by the data over several years. For example, of the 1181 women killed by an intimate partner in 2005, 678 were shot. See D.W. Webster et al., *Women with Protective Orders Report Failure to Remove Firearms from their Abusive Partners: Results from an Exploratory Study*, 19 J. WOMEN'S HEALTH 93 (2010). In 2007, 4,177 women were killed with firearms and in 2008, 7,451 women were treated for gunshot wounds in emergency rooms; sixty-six percent of the injuries they suffered were assault-related. National Center for Injury Prevention and Control, *Web-based Injury Statistics Query and Reporting System* (2007 (deaths) and 2008 (injuries)), [www.cdc.gov/ncipc/wisqars/](http://www.cdc.gov/ncipc/wisqars/). Calculations by Brady Center to Prevent Gun Violence, 2009.

<sup>20</sup> Jacquelyn C. Campbell, *Risk Factors for Femicide in Abusive Relationships: Results from Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003). See also, Garen Wintemute, *Increased Risk of Intimate Partner Homicide Among California Women Who Purchased Handguns*, 41 ANNALS OF EMERGENCY MED. 282 (2003) (noting that “purchasing a handgun provides no protection against homicide among women and is

(FBI), handguns are the most often used weapon when men kill women, and the “number of females shot and killed by their husband or intimate acquaintance<sup>21</sup> (574 victims) was nearly six times higher than the total number murdered by male strangers using all weapons combined (ninety-eight victims) in single victim/single offender incidents in 2010.”<sup>22</sup> The numbers for black females are fifteen times higher.<sup>23</sup> Overall, because FBI data do not include a category for ex-boyfriends, the numbers may be inaccurately low.<sup>24</sup>

Between 1976 and 2010, there were 645 events of mass shootings in the U.S.<sup>25</sup> While the majority of gun crimes are committed with handguns, large capacity magazines and assault weapons have been used in some of the most high profile and high fatality shootings since the expiration of the Assault Weapons Ban in 2004.<sup>26</sup> Despite the existence of federal prohibitions for certain individuals, even those prohibited from possessing firearms are able to purchase SALW through the same legal avenues as non-prohibited persons, including private sales of both weapons and ammunition at gun shows, online, or other venues, without undergoing a background check or providing identification.<sup>27</sup> In 2012 alone, there have been thirty-eight

---

associated with an increase in their risk of intimate partner homicide”); Douglas Wiebe, *Homicide and Suicide Risks Associated with Firearms in the Home: A National Case-Control Study*, 41 ANNALS OF EMERGENCY MED. 775 (2003) (noting that “females living with a gun in the home were nearly three times more likely to be murdered than females with no gun in the home”); K.M. Grassel, *Association between Handgun Purchase and Mortality from Firearm Injury*, 9 INJURY PREVENTION 50 (2003) (noting that “women who were murdered were more likely, not less likely, to have purchased a handgun in the three years prior to their deaths, again invalidating the idea that a handgun has a protective effect against homicide”); Linda Salzman, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043–47 (1992) (noting that guns have a tendency to “escalate non-fatal spousal abuse to homicide”).

<sup>21</sup> An intimate partner or intimate acquaintance is defined as a spouse, common-law spouse, ex-spouse, or girlfriend/boyfriend. Violence Policy Center, *When Men Murder Women: An Analysis of 2010 Homicide Data Females Murdered by Males in Single Victim/Single Offender Incidents* 1 n. 1 (September 2012).

<sup>22</sup> Violence Policy Center, *When Men Murder Women: An Analysis of 2010 Homicide Data* (Sept. 2012) available at <http://www.vpc.org/studies/wmmw2012.pdf>. The Center also found that of the 1,800 females murdered by males in 2010, of the 1,622 cases in which the weapon used could be determined fifty-two percent were committed by firearms, with seventy percent of those being handguns.

<sup>23</sup> *Id.* at 9. The Violence Policy Center reports that “Compared to a black male, a black female is far more likely to be killed by her spouse, an intimate acquaintance, or a family member than by a stranger. Where the relationship could be determined, 94 percent of black females killed by males in single victim/single offender incidents knew their killers (414 out of 442). Nearly 15 times as many black females were murdered by a male they knew (414 victims) than were killed by male strangers (28 victims) in single victim/single offender incidents in 2010. Of black victims who knew their offenders, 64 percent (267 out of 414) were wives, common-law wives, ex-wives, or girlfriends of the offenders. Ninety-three percent (463 out of 499) of the homicides of black females were intra-racial.” *Id.*

<sup>24</sup> Webster et al., *supra* note 19, at 93.

<sup>25</sup> Mass shootings are defined as those resulting in four or more deaths. *Id.*

<sup>26</sup> See *infra* notes 94–108 and accompanying text.

<sup>27</sup> With the exception of some states which have enacted universal background checks for all sales, the Federal Brady Handgun Violence Prevention Act, enacted to limit the sale of firearms to prohibited persons, imposes a duty to conduct a background check on federally-licensed dealers only. Gun Control Act, 18 U.S.C. § 922(g)(9). On July 30, 2012, Senator Frank Lautenberg introduced the Stop Online Ammunition Sales Act (S.3548), a bill that would require ammunition dealers to be federally licensed and would generally prohibit the sale of ammunition by unlicensed persons. The bill would require unlicensed purchasers to buy ammunition in person and to present a state-issued identification document at the point of purchase. The bill would also

reported mass shootings in the United States.<sup>28</sup> A few examples illustrate the scope of the problem. On December 14, 2012, a 20-year old gunman killed twenty-six people and himself, including twenty children at Sandy Hook Elementary School in Newtown, Connecticut. The shooter was armed with two semi-automatic pistols, a 9mm Sig Sauer and a 10mm Glock, and a semi-automatic .223 caliber Bushmaster rifle and hundreds of rounds of ammunition.<sup>29</sup> A few days prior, on December 11, 2012, a 22-year old gunman killed three people, including himself, and injured another when he shot into a crowd at a shopping mall in Portland, Oregon. He used an AR-15 semiautomatic rifle.<sup>30</sup> On August 5, 2012, a gunman killed seven and injured three when he opened fire at a Sikh temple in Oak Creek, Wisconsin. The weapon he used was a Springfield Armory XDM semi-automatic handgun with three nineteen-round ammunition magazines.<sup>31</sup>

There were roughly 310 million firearms owned or available for sale in the United States as of 2009.<sup>32</sup> According to figures from the Bureau of Alcohol, Tobacco and Firearms (ATF), this represents a twenty-eight percent increase in the amount of guns in the United States in since 1996. Gun ownership in the United States has risen dramatically over the past two decades, and private gun transfers have also increased. Forty percent of all guns are sold through unlicensed private sellers, or those who are not “in the business” of firearm sales and are exempt from performing background checks.<sup>33</sup> Since these sales are anonymous and untraceable, private sales have fueled a large black market for guns in the U.S.<sup>34</sup> Additionally, online private sales have facilitated the ease at which prohibited persons are able to purchase firearms.

The manufacture, transfer, and possession of SALW is regulated at both the federal and state level. However, enforcement is primarily a state function and applies state laws, which may

---

require federally licensed gun dealers to maintain records on ammunition transfers and to report to the Attorney General and to the area chief law enforcement officer whenever an unlicensed person purchases more than 1,000 rounds of ammunition within five consecutive business days. See William J. Krouse, *Congressional Research Service: Gun Control Legislation* 37 (Aug. 3, 2012).

<sup>28</sup> *Mass Shootings in the United States Since 2005*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (Dec. 14, 2012).

<sup>29</sup> Scott Neuman, *School Shooter Armed With ‘Hundreds’ of Rounds of Ammunition, Police Say*, NAT’L PUB. RADIO (Dec. 16, 2012), available at <http://www.npr.org/blogs/thetwo-way/2012/12/16/167379387/obama-to-visit-conn-town-reeling-from-school-shooting>.

<sup>30</sup> Abram Brown, *Type of Rifle in Oregon Mall Shooting Drives Gun Profits and Youth Interest*, FORBES (Dec. 13, 2012), available at <http://www.forbes.com/sites/abrambrown/2012/12/13/type-of-rifle-in-oregon-mall-shooting-drives-gun-profits-and-youth-interest/>.

<sup>31</sup> John Eligon, *Investigators Seek Clues on Gunman’s Last Weeks Before Temple Murder*, THE BOSTON GLOBE (Aug. 9, 2012), available at <http://www.bostonglobe.com/news/nation/2012/08/08/fbi-temple-gunman-shot-himself-still-motive/4H0hJCX6i64xEfCG6SYwyH/story.html>.

<sup>32</sup> C.R.S. REPORT FOR CONGRESS NO. 7-5700, at 7 (Aug. 3, 2012), citing to, U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Firearms Commerce in the United States 2011* at 11 (August 2011).

<sup>33</sup> CITY OF NEW YORK, MAYOR MICHAEL R. BLOOMBERG, POINT, CLICK, FIRE: AN INVESTIGATION OF ILLEGAL ONLINE GUN SALES (2011), available at [http://www.nyc.gov/html/cjc/downloads/pdf/nyc\\_pointclickfire.pdf](http://www.nyc.gov/html/cjc/downloads/pdf/nyc_pointclickfire.pdf) [hereinafter POINT, CLICK, FIRE].

<sup>34</sup> *Id.*



be more or less restrictive than federal law.<sup>35</sup> Under the U.S. Supreme Court decision in *Printz v. United States*, Congress cannot compel state and local law enforcement to execute federal law.<sup>36</sup> The federal government can, however, enforce federal law or promote state compliance through funding incentives.<sup>37</sup> Reduction in gun-related deaths will require action at the federal level, and the federal government should collaborate with the state governments to further respect the rights of individuals under the ICCPR.

## **II. STATE OBLIGATIONS WITH REGARD TO SMALL ARMS AND LIGHT WEAPONS**

*In order to prevent the violation of human rights committed with small arms, Governments and State agents shall ensure strict enforcement of the rules and regulations they adopt, including a clear chain of command over all officials authorized by law to use force and, in particular, small arms. Governments shall ensure that arbitrary or abusive use of force carried out with small arms, including but not limited to force used by any State agent, is punished as a criminal offence.*<sup>38</sup>

### **A. States' Due Diligence Obligation to Prevent Small Arms and Light Weapons Violations by Private Parties**

*The due diligence standard to protect the right to life from violence by small arms and light weapons includes the responsibility “to take steps to prevent reasonably foreseeable abuses by private actors” (occurring within a state’s own territory).*<sup>39</sup>

#### **1. Federal Regulation of SALW**

##### **a. Legal Framework**

Current U.S. federal laws regulating the manufacture, transfer, and possession of firearms are insufficient to meet the government’s due diligence obligation to prevent SALW violations by private actors. The 1934 National Firearms Act (NFA) regulates certain firearms historically associated with crime (e.g., machine guns, short-barreled shotguns, short-barreled rifles,

---

<sup>35</sup> See *infra* A.2.

<sup>36</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>37</sup> Under the National Minimum Drinking Age Act of 1984, the federal government successfully set a national minimum drinking age of 21 by reducing federal highway funds to states that failed to comply with the law. 23 U.S.C. § 158.

<sup>38</sup> Prevention of Human Rights Violations Committed with Small Arms and Light Weapons, endorsed by Sub-Comm. on the Promotion and Protection of Human Rights res. 2006/22, U.N. Doc A/HRC/Sub.1/58/L.11/Add.1 at 3 (24 Aug. 2006) [hereinafter SALW Principles].

<sup>39</sup> *Id.*

silencers, and destructive devices);<sup>40</sup> however, registered NFA firearms represent roughly one percent<sup>41</sup> of the 300 million SALW estimated to be in civilian possession.<sup>42</sup>

The majority of gun crimes in the U.S. are committed with handguns.<sup>43</sup> Federal laws do not mandate licensing for possession or registration of handguns for civilian use. However, the Federal Gun Control Act of 1968 does prohibit the sale or transfer of all firearms to certain categories of individuals, including persons indicted for or convicted of certain crimes, persons unlawfully using or addicted to controlled substances, persons adjudicated as a mental defective or who have been committed to a mental institution, or persons who have been convicted of domestic violence, among other categories.<sup>44</sup>

Federal law also imposes certain duties on federally-licensed gun dealers, including maintaining records of sale, reporting inventory loss or theft, and reporting multiple sales of handguns to the same purchaser.<sup>45</sup> In 1993, Congress enacted the Brady Handgun Violence Prevention Act (Brady Law), creating a national background check for firearm purchasers in the U.S. and the National Instant Criminal Background Check System (NICS).<sup>46</sup> The Brady Law imposes an additional duty on federally-licensed dealers to perform background checks on all purchasers. Like other federal dealer regulations, however, the Brady Law does not apply to unlicensed private sellers “not engaged in the business” of dealing firearms. While this exception

---

<sup>40</sup> 48 Stat. 1236–1240 (1934).

<sup>41</sup> BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES ANNUAL STATISTICAL UPDATE 14 (2012) [hereinafter FIREARMS COMMERCE 2012], available at <http://www.atf.gov/publications/firearms/050412-firearms-commerce-in-the-us-annual-statistical-update-2012.pdf>.

<sup>42</sup> GRAD. INST. OF INT’L STUDIES, SMALL ARMS SURVEY 2007: GUNS AND THE CITY 47 (2007), available at [www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2007/en/full/Small-Arms-Survey-2007-Chapter-02-EN.pdf](http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2007/en/full/Small-Arms-Survey-2007-Chapter-02-EN.pdf). This equates to roughly eighty-eight firearms per 100 people. *Id.*

<sup>43</sup> See *Homicide Trends in the U.S.*, BUREAU OF JUSTICE AND STATISTICS, <http://bjs.ojp.usdoj.gov/content/homicide/weapons.cfm> (last visited Dec. 10, 2012) (showing homicide by weapon type over a thirty-year period).

<sup>44</sup> 18 U.S.C. § 922(g). The law does not prohibit purchase of small arms by individuals recognized as having severe mental illness by a licensed psychologist or medical professional treating them, nor does it prohibit purchase by individuals who have been voluntarily committed to a mental institution. *See id.*

<sup>45</sup> 18 U.S.C. §§ 922(t), 923(g). In 2011, the ATF initiated a multiple sales reporting requirement for states bordering Mexico for certain rifles, including semiautomatic firearms and those that accept detachable magazines. ATF, MULTIPLE SALES REPORTING FACT SHEET (2012), available at <http://www.atf.gov/publications/factsheets/factsheet-multiple-sales-reporting.html>.

<sup>46</sup> Gun Control Act, 18 U.S.C. § 922(g)(9); see also *National Instant Criminal Background Check System*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/nics> (last visited Oct. 3, 2012). A NICS background check includes the search of three databases: the Interstate Identification Index (III), the National Crime Information Center (NCIC), and the NICS Index. III maintains a list of individuals with criminal history records; NCIC maintains a list of individuals who are subjects of protection orders or active criminal warrants and immigration violators. FED. BUREAU OF INVESTIGATION, NATIONAL INSTANT BACKGROUND CHECK SYSTEM (NICS) (2009), available at <http://www.fbi.gov/about-us/cjis/nics/reports/2009-operations-report>.

is commonly referred to as the “gun show loophole,” it applies to all private sales wherever they occur, providing a mechanism for prohibited persons to purchase firearms with no questions asked.

In 1994, unlicensed and unregulated dealers accounted for an estimated forty percent of firearms sales.<sup>47</sup> While the current volume of private sales is unknown because there is no record of transaction, it is suspected that a significant share of illegal SALW trafficking has moved online where purchasers can maintain anonymity. According to a recent investigation by the city of New York, over 25,000 guns were for sale on ten websites alone.<sup>48</sup> Investigators found that sixty-two percent of online sellers agreed to sell guns to undercover agents who claimed that they would fail a background check, and eighty-two percent of sellers on Craigslist agreed to sell guns to individuals they believed to be prohibited purchasers.<sup>49</sup>

### **b. The Need for Universal Background Checks**

Federal data indicates that background checks have succeeded in keeping SALW out of the hands of persons in prohibited categories. Between November 30, 1998 and September 30, 2012, the FBI processed approximately 153 million NICS background checks.<sup>50</sup> While a small percentage, nearly one million of these permit applications and gun sales were denied to individuals prohibited by law from possessing a firearm.<sup>51</sup> Additional applications were denied by state and local authorities.<sup>52</sup> Approximately sixty percent of individuals denied were identified as having been convicted of a crime punishable by more than one year imprisonment or a misdemeanor punishable by more than two years imprisonment (compared with one percent having been adjudicated as a mental defective).<sup>53</sup>

---

<sup>47</sup> PHILIP J. COOK & JENS LUDWIG, *GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS*, U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE RESEARCH IN BRIEF 6–7 (1997), available at <http://www.ncjrs.gov/pdffiles/165476.pdf> (showing a survey of firearm ownership in 1994 found that forty percent of firearms were acquired from unlicensed dealers).

<sup>48</sup> POINT, CLICK, FIRE, *supra* note 33, at 4. It is a federal offense to sell a firearm to a person known to be or believed to be prohibited from possession. 18 USC § 922(d).

<sup>49</sup> POINT, CLICK, FIRE, *supra* note 33, at 3.

<sup>50</sup> Total NICS Firearm Background Checks, FEDERAL BUREAU OF INVESTIGATION (2012), available at [http://www.fbi.gov/about-us/cjis/nics/reports/1998\\_2012\\_State\\_Program\\_to\\_date\\_Purpose\\_IDs%201.pdf](http://www.fbi.gov/about-us/cjis/nics/reports/1998_2012_State_Program_to_date_Purpose_IDs%201.pdf); FEDERAL DENIALS: REASONS WHY THE NICS SECTION DENIES, FED. BUREAU OF INVESTIGATION (2012) [hereinafter FEDERAL DENIALS], available at <http://www.fbi.gov/about-us/cjis/nics/reports/denials-1.pdf>. See also DEP’T OF JUSTICE, BACKGROUND CHECKS FOR FIREARMS TRANSFERS, 2009—STATISTICAL TABLES, Table 1 (2010) [hereinafter DoJ BACKGROUND CHECKS 2009], available at <http://bjs.ojp.usdoj.gov/content/pub/html/bcft/2009/bcft09st.pdf> (finding out of ninety-five million applications, 1.6 million were denied by FBI and State authority during the period of 1998 to 2009).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> FEDERAL DENIALS, *supra* note 50.

As of September 2012, there were over eight million active records in the NICS index identifying persons prohibited from possessing firearms.<sup>54</sup> The majority (sixty-two percent) are identified as illegal unlawful aliens.<sup>55</sup> Roughly 1.8 million have an adjudicated mental illness, while less than 20,000 have been identified as being unlawful drug users or addicted to a controlled substance.<sup>56</sup>

This highlights a primary limitation of NICS: an unknown number of prohibited individuals are not in the database. This is due, in part, to NICS's reliance on voluntary local, state, and tribal agency reporting.<sup>57</sup> The gap in reporting was highlighted following the shooting of thirty-two people on the campus of Virginia Polytechnic Institute and State University (Virginia Tech) in 2007, where the shooter had successfully passed a background check despite having been adjudicated mentally ill; Virginia did not require that such records be reported to NICS.<sup>58</sup> In fact, at that time, only four states had laws requiring agencies to share relevant mental health records with NICS.<sup>59</sup>

In response, Congress enacted the NICS Improvement Amendments Act (NIAA) to improve reporting by both federal and state agencies.<sup>60</sup> The NIAA requires federal agencies to share records and includes grant awards to states and Indian tribal governments to establish or upgrade information for firearms eligibility determinations.<sup>61</sup> According to the FBI, the number of records in NICS grew by forty-two percent between NIAA enactment and 2011, and the

---

<sup>54</sup> ACTIVE RECORDS IN THE NICS INDEX, FED. BUREAU OF INVESTIGATION, *available at* <http://www.fbi.gov/about-us/cjis/nics/reports/denials-1.pdf>.

<sup>55</sup> *Id.* Illegal aliens account for approximately one percent of federal denials. FEDERAL DENIALS, *supra* note 50.

<sup>56</sup> ACTIVE RECORDS IN THE NICS INDEX, *supra* note 54.

<sup>57</sup> See MAYORS AGAINST ILLEGAL GUNS, FATAL GAPS: HOW MISSING RECORDS IN THE FEDERAL BACKGROUND CHECK SYSTEM PUT GUNS IN THE HANDS OF KILLERS (2011) [hereinafter FATAL GAPS], *available at* [http://mayorsagainstillegalguns.org/downloads/pdf/maig\\_mimeo\\_revb.pdf](http://mayorsagainstillegalguns.org/downloads/pdf/maig_mimeo_revb.pdf) (finding that records about serious mental health and drug abuse problems that disqualify people from purchasing a gun are not well captured in the National Instant Criminal Background Check System (NICS)). Under the U.S. Supreme Court decision in *Printz v. United States*, Congress cannot compel state and local law enforcement to execute federal law. *Printz v. United States*, 521 U.S. 898 (1997).

<sup>58</sup> *The Fix Gun Checks Act: Better State and Federal Compliance, Smarter Enforcement: Hearing Before the Subcomm. on Crime and Terrorism of the S. Judiciary Comm.*, 112th Cong. (2011) (statement of David Cuthbertson, Asst. Dir., Criminal Just. Info. Serv. Div., FBI, *available at* <http://www.fbi.gov/news/testimony/the-fix-gun-checks-act-better-state-and-federal-compliance-smarter-enforcement>).

<sup>59</sup> *Id.* at 14. In the aftermath of Virginia Tech, seventeen states enacted laws requiring reporting to NICS and four states amended their laws to permit the sharing of mental health records. *Id.* at 14.

<sup>60</sup> NICS Improvement Amendments Act of 2007, Pub. L. No. 100–180 (codified at 18 U.S.C. § 922 note). *The NICS Improvement Amendments Act of 2007*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=49> (last visited Oct. 2, 2012).

<sup>61</sup> *State Profiles*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=491#summaries> (listing awards by state).

number of mental health records increased by 153 percent.<sup>62</sup> Additionally, over 766,000 criminal dispositions were obtained.<sup>63</sup> Despite this success, as of October 2011, twenty-three states had submitted fewer than 100 records; seventeen had submitted less than ten; and four had not submitted any.<sup>64</sup> Additionally, underreporting of substance abuse remained an issue, with forty-four states submitting fewer than ten records and thirty-three submitting none.<sup>65</sup> The FBI reports continuing challenges, at both the federal level and state level, including limited personnel, outdated information technology, and state privacy laws that bar reporting.<sup>66</sup>

The Fix Gun Checks Act of 2011 is currently pending before both chambers of Congress. This law would require a background check for every firearm sale, including transfers by unlicensed dealers, penalize states that do not make data electronically available to NICS, and require federal agencies to certify that they have submitted all records to NICS.<sup>67</sup> This draft legislation has widespread public support; seventy-four percent of members of the National Rifle Association (NRA) who are also gun owners support requiring a criminal background check for firearm purchase; eighty-seven percent of non-NRA gun owners support these background checks.<sup>68</sup>

In 2011, in the wake of the shooting of United States Representative Gabrielle Giffords and her constituents, the Department of Justice created a set of recommendation that the federal government could implement in order to make the background check system more robust. These proposals were intended to reduce the risk of SALW proliferation into the hands of persons with mental illness or criminal records.<sup>69</sup> The measures primarily focused on methods to improve the FBI database, by compelling benefits agencies, such as the Social Security Administration, to issue a report for the database anytime a benefit receiver has been deemed mentally incompetent

---

<sup>62</sup> *The Fix Gun Checks Act: Better State and Federal Compliance, Smarter Enforcement: Hearing Before the Subcomm. on Crime and Terrorism of the S. Judiciary Comm.*, 112th Cong. (2011) (statement of David Cuthbertson, Asst. Dir., Criminal Just. Info. Serv. Div., FBI, available at <http://www.fbi.gov/news/testimony/the-fix-gun-checks-act-better-state-and-federal-compliance-smarter-enforcement>).

<sup>63</sup> *Id.*

<sup>64</sup> FATAL GAPS, *supra* note 57, at 3.

<sup>65</sup> *Id.* According to the FBI, a failed drug test, single drug-related arrest, or admission of drug use within the past year will temporarily disqualify a person from possessing a firearm. *National Instant Criminal Background Check System*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet> (last visited Nov. 2, 2012).

<sup>66</sup> *Id.*

<sup>67</sup> Fix Gun Checks Act of 2011, S. 436.IS, 112th Cong. (2011).

<sup>68</sup> Gun Owners Poll, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE (Jul. 2012), <http://www.bradycampaign.org/studies/view/240>.

<sup>69</sup> Charlie Savage, *Justice Dept. Shelved Ideas to Improve Gun Background Checks*, NEW YORK TIMES (Dec. 16, 2012), available at <http://www.nytimes.com/2012/12/16/us/politics/justice-dept-studied-and-shelved-ideas-to-bolster-gun-database.html>.

or requires a trustee, as well as when federal employees or job applicants fail a drug test.<sup>70</sup> This proposal included an appeal process. The proposal also included a Congressionally established incentive program to increase voluntary submissions of state law enforcement information into the database, and an increase in criminal penalties, including mandatory minimum prison sentences for “straw buyers” who purchase firearms for those who would have failed a background check.<sup>71</sup> Most of these proposals were put on hold in 2011 and have not been pursued as of yet.<sup>72</sup>

### c. Regulations to Limit the Disproportionate Impact on Women and Children

The federal government has enacted various legislative measures<sup>73</sup> designed to deal with the disproportionate impact of firearms on women and children in domestic violence situations.<sup>74</sup> The most significant is the Domestic Violence Offender Gun Ban of 1996,<sup>75</sup> which is commonly referred to as the Lautenberg Amendment.<sup>76</sup> The Amendment makes it illegal for persons who (1) have been convicted of the misdemeanor crime of domestic violence and (2) are subject to a qualifying protection order, to possess, ship, receive, or transport a firearm or ammunition.<sup>77</sup> It also applies to federal, state, and local government employees in both their professional and private capacities.<sup>78</sup> Although assessments of federal and state laws prohibiting the ownership of firearms by individuals subject to court orders have found an associated eight percent decrease in

---

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See, e.g.*, 18 U.S.C. § 922(g)(8) (regulating the possession of a firearm while subject to a protective order; 18 U.S.C. § 922(d)(8) (regulating the transfer of a firearm to person subject to a protective order; 18 U.S.C. § 922(d)(9) (regulating the transfer of a firearm to person convicted of a misdemeanor crime of domestic violence); 18 U.S.C. § 922(g)(1) (regulating the possession of a firearm by convicted felon). *See also*, 18 U.S.C. § 2261 (regulating interstate travel to commit domestic violence; 18 U.S.C. § 2261A (prohibiting interstate stalking); 18 U.S.C. § 2262 (prohibiting interstate travel in violation of a protective order). *See generally*, Violence Against Women Reauthorization Act of 2012, *available at* <http://www.govtrack.us/congress/bills/112/hr4970/text>.

<sup>74</sup> *See supra*, notes 16–24 and accompanying text.

<sup>75</sup> The ban was enacted as a supplement to the 1968 gun law and it applies to federal, state, and local government employees in both their professional and private capacities.

<sup>76</sup> 18 U.S.C. § 922(g)(9) (1996).

<sup>77</sup> 18 U.S.C. § 922(g)(9). It defines a misdemeanor crime of domestic violence as “a criminal offense that: is a federal, state, local or tribal offense that is a misdemeanor under federal or state law; Has as an element the use or attempted use of physical force, or the threatened use of a deadly weapon; and, At the time the misdemeanor was committed, the convicted offender was: a current or former spouse, parent, or guardian of the victim, a person with whom the victim shared a child in common, a person who was cohabiting with or had cohabited with the victim as a spouse, parent, or guardian, or a person who was or had been similarly situated to a spouse, parent, or guardian of the victim.”

<sup>78</sup> Misdemeanor Crimes of Domestic Violence and Federal Firearms Prohibitions, *available at* <http://www.atf.gov/publications/download/i/atf-i-3310-3.pdf>. The language of the statute, however, excludes dating partners. Federal law defines “intimate partner” as the spouse of the person, former spouse of the person, a parent of a child of the person, and/or a person who cohabitates or has cohabited with the person.” 18 U.S.C. §921(32) (2004).

intimate partner homicides,<sup>79</sup> the effectiveness of the Lautenberg Amendment is often compromised by the following problems:

### 1. *Lack of effective enforcement*

A 2006 study found that although California law allowed criminal justice agents to confiscate firearms from offenders, this rarely occurred.<sup>80</sup> A 2010 study of 782 victims of domestic violence in New York and California found that courts were not consistent in their implementation of laws designed to disarm offenders.<sup>81</sup> The confiscation of a firearm may depend on a number of discretionary practices, such as a judge's decision to (1) check the firearm prohibition box on a protective order form, (2) include prohibition language, or (3) verbally confirm that firearms should be confiscated.<sup>82</sup> Law enforcement officers rarely follow-up on a confiscation case on their own initiative,<sup>83</sup> so enforcement will often depend on whether a victim knows the judge has given this order. Furthermore, most victims who obtain a protective order do not ask courts to confiscate their abusers' firearms because (1) they fear retaliation, (2) the abuser may have access to another firearm, (3) the circumstances of the case may not meet the legal requirements for the removal of the firearm, or (4) they may not have known the request was within their rights.<sup>84</sup>

### 2. *Inconsistencies between state and federal laws*

Some state laws exceed the federal requirements set out in the Domestic Offender Gun Ban.<sup>85</sup> On the other hand, other states do not have state laws prohibiting possession of firearms

---

<sup>79</sup> E.R. Vigdor & J.A. Mercy, *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?* 30 EVAL REV. 313–46 (2006).

<sup>80</sup> P.L. Seave, *Disarming Batterers Through Restraining Orders: The Promise and the Reality*, 30 EVAL REV. 245–65 (2006).

<sup>81</sup> Webster et al., *supra* note 19. In this study researchers surveyed 782 female victims of domestic violence in New York and Los Angeles. Among these women, 542 had obtained a protective order, and of these, eighty-two reported their abuser's ownership of a firearm. Although the laws allowed judges to confiscate weapons, only twenty-one victims reported that they did so. Only ten reported their abusers had, in fact, surrendered their firearms. The study showed that when judges used their authority, victims were likely to report that firearms had been surrendered or confiscated.

<sup>82</sup> Kathryn E. Moracco et al., *Preventing Firearm Violence Among Victims of Intimate Partner Violence: An Evaluation of a New North Carolina Law*, Final report submitted to the National Institute of Justice by Pacific Institute for Research and Evaluation (Sept. 2006). There are also lingering legal issues regarding the seizure of guns at domestic violence sites and the potential for constitutionally illegal search and seizures.

<sup>83</sup> S. Frattaroli & S.P. Teret, *Understanding and Informing Policy Implementation: A Case Study of the Domestic Violence Provisions of the Maryland Gun Violence Act of 1996*, 30 EVAL REV. 347–60 (2006).

<sup>84</sup> Webster et al., *supra* note 19, at 9.

<sup>85</sup> John Wilkinson & Toolsi Gowin Meisner, *Domestic Violence and Firearms: A Deadly Combination*, 3 STRATEGIES 1, 6 n. 12 (2011). States including Delaware, Arizona, Iowa, Minnesota, Montana, New Jersey, Texas and West Virginia have standards that exceed the federal requirement. For example, domestic violence statutes in Minnesota, New Jersey, and Texas include current or former dating partners in the categories of persons excluded from purchasing or possessing a firearm. California prohibits people convicted of stalking from possessing firearms and the state maintains a Prohibited Arms Persons file database. Illinois, Minnesota, New Jersey, Texas, Washington and West Virginia prohibit purchase or possession of firearm by anyone found guilty of domestic violence misdemeanor against any household member, regard less of relationship to victim. Illinois, Minnesota, Texas and Washington apply the prohibition to family members whether or not they reside with misdemeanorant.

by people convicted of domestic violence misdemeanors.<sup>86</sup> States also have different laws with regard to weapon seizures and returns and understandings of which groups are included in the category of “intimate relationships.”<sup>87</sup> Although constitutional challenges to the Lautenberg Amendment have been largely settled,<sup>88</sup> differences between states and between state and federal policies have created complicated statutory interpretation and application problems.<sup>89</sup>

These inconsistencies further complicate enforcement problems because, although the pertinent provisions are of a federal law, the protection order and misdemeanor convictions for domestic violence are likely to be under state law. It is unclear whether state officials become responsible for enforcing the violation of a federal law by ensuring that firearms are confiscated.<sup>90</sup> Such cases are rarely prosecuted in federal courts,<sup>91</sup> due in part to (1) poor communication between federal and state officials regarding such violations, (2) a lack of prioritization of domestic violence crimes by the U.S. Attorney’s office, (3) reluctance among state officials to participate in what is perceived to be federal law enforcement, and (4) insufficient resources.<sup>92</sup> These problems undermine the effective enforcement of the Domestic Violence Offender Gun Ban, and facilitate the continuation of disproportionate impacts of SALW on women and children in circumstances of domestic strife.

#### **d. The Need to Restore and Improve the Federal Assault Weapons Ban SP-11/15/12**

In 1994, the Federal Public Safety and Recreational Firearms Use Protection Act (Assault Weapons Ban) was enacted to prohibit manufacture and possession of semi-automatic firearms

---

<sup>86</sup> *Id.* States that do not prohibit gun possession by those convicted of domestic violence include Alabama, Alaska, Arkansas, Mississippi, and Nevada.

<sup>87</sup> Emily J. Sack, *Confronting the Issue of Gun Seizure in Domestic Violence Cases*, 6 J. CTR. FOR FAMILY, CHILDREN, & THE COURTS 10 (2005). For instance, some states do not have a clear definition for the misdemeanor crime of domestic violence, and have tended to prosecute such crimes under assault and harassment laws. *Id.* at 5.

<sup>88</sup> *See, e.g.*, *United States v. Morrison*; *United States v. Meade*, 175 F.3d 215, 224–25 (1st Cir. 1999) (rejecting a Tenth Amendment challenge); *United States v. Bostic*, 168 F.3d 718, 723–24 (4th Cir. 1999) (rejecting a Tenth Amendment challenge); *United States v. Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001) (holding that the Second and Tenth Amendments did not bar federal firearms regulation); *United States v. Emerson*, 270 F.3d 203, 260–63 (5<sup>th</sup> Cir. 2001) (rejecting a Second Amendment challenge to section 922(g)(8))

<sup>89</sup> Two questions have been particularly challenging: whether the crime fits the federal requirement and if the protection order is a “qualifying protection order” under federal law. States have ruled differently on whether the relationship between the abuser and the victim should be an element of the state criminal statute to meet the federal requirement or if proof of the relationship from the facts is sufficient. *See City of Cleveland v. Carpenter*, No. 82786, 2003 WL22976619, at \*1 (Ohio Ct. App., Dec. 18, 2003); 29. *See also Hesse v. Pennsylvania State Police*, 850 A.2d 829, 832 (Pa. Commonw. Ct. 2004).

<sup>90</sup> Sack, *supra* note 87, at 8.

<sup>91</sup> *See Tom Lininger, A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 530–31 (2003). *See also*, Sack, *supra* note 87, at 8 (noting that between 1995 through 2001, only 187 federal prosecutions were filed under the statute, representing only one percent of the 6,000 federal gun possession charges filed each year. “This level of prosecution does not come close to reaching the number of eligible cases. Judge Richard A. Posner of the Seventh Circuit Court of Appeals has estimated that approximately 40,000 people violate section 922(g)(8) each year by possessing firearms while subject to a protection order. Prosecutions under section 922(g)(9) are only slightly higher. Since that statute took effect in 1996, 379 cases have been filed, representing only two to three percent of total federal gun law prosecutions.”).

<sup>92</sup> Sack, *supra* note 87, at 8.



and large capacity magazines.<sup>93</sup> While four states, including California, Massachusetts, New York, and New Jersey have enacted permanent assault weapons bans, the Federal law expired in 2004. Assault weapons historically accounted for between two and eight percent of gun crimes before the ban and large capacity magazines accounted for another fourteen to twenty-six percent of guns used in crimes.<sup>94</sup>

In the years following the implementation of the ban, (1995–2003), one study reported an overall sixty-six percent drop in the percentage of assault weapons traced to use in crimes.<sup>95</sup> Another study has reported that the share of gun crimes involving assault weapons declined between seventeen and seventy-two percent in a range of U.S. cities.<sup>96</sup> For example, in 2004, the year the ban expired, the state of Virginia reported an all-time low rate of gun crime involving large-capacity magazines.<sup>97</sup> That number has increased each year since the ban’s expiration—from ten percent in 2004 to twenty-two percent in 2011.<sup>98</sup>

The heightened lethality of large capacity magazines (a magazine that contains eleven or more bullets) has been demonstrated by a number of high profile mass shooting incidents across the United States.

- On December 14, 2012, Adam Lanza entered Sandy Hook Elementary School in Newtown, Connecticut armed with two semiautomatic pistols, a 9mm Sig Sauer and a 10mm Glock and a semiautomatic .223 caliber Bushmaster rifle and more than a hundred rounds of ammunition.<sup>99</sup> Lanza killed twenty children aged six or seven, six adults, including the school principal, school psychologist, teachers,

---

<sup>93</sup> The now-expired 1994 Federal Assault Weapons ban defined “large capacity magazines” as detachable components for firearms capable of holding more than ten rounds of ammunition. Krouse, *supra* note 27, at 92. Other state laws provide different definitions. Law Center to Prevent Gun Violence, *Large Capacity Ammunition Magazines Policy Summary* (May 21, 2012), available at [smartgunlaws.org/large-capacity-ammunition-magazines-policy-summary/](http://smartgunlaws.org/large-capacity-ammunition-magazines-policy-summary/).

<sup>94</sup> Christopher S. Koper, *Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994–2003*, REPORT TO THE NAT’L INSTITUTE OF JUSTICE, U.S. DEPT. OF JUST. (June 2004).

<sup>95</sup> Brady Center to Prevent Gun Violence and Crime Gun Solutions LLC, *On Target: The Impact of the 1994 Federal Assault Weapons Act 2* (2004).

<sup>96</sup> Koper, *supra* note 94. The study examined the use of assault weapons and large-capacity magazines in crime Baltimore, Miami, Milwaukee, Boston, St. Louis and Anchorage. *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> David S. Fallis & James V. Grimaldi, *Va. Data Show Drop in Criminal Firepower During Assault Gun Ban*, WASH. POST (Jan. 23, 2011), available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012203452.html>.

<sup>99</sup> Scott Neuman, *School Shooter Armed With ‘Hundreds’ of Rounds of Ammunition, Police Say*, NAT’L PUB. RADIO (Dec. 16, 2012), available at <http://www.npr.org/blogs/thetwo-way/2012/12/16/167379387/obama-to-visit-conn-town-reeling-from-school-shooting>.

and himself. Lanza's mother was found dead the same day at another residence. Lanza shot himself in the head as police arrived at the school.<sup>100</sup>

- In July 2012, James Eagan Holmes entered a movie theatre in Aurora, Colorado wearing body armor and equipped with four guns, including a shotgun, an assault rifle armed with a 100-round magazine, and an extended capacity semi-automatic pistol.<sup>101</sup> Holmes killed twelve people and injured fifty-eight more before he was arrested.<sup>102</sup> The 100-round magazine in Holmes's assault rifle jammed before he unloaded the full clip, which prevented him from inflicting further damage.<sup>103</sup>
- In January 2011, Jared Loughner shot Congressional Representative Gabrielle Giffords, killed twelve people, and injured fourteen others outside a shopping mall in Tucson, Arizona.<sup>104</sup> Loughner's semi-automatic pistol was equipped with an extended capacity magazine capable of holding up to thirty-eight rounds.<sup>105</sup>
- Virginia Tech student, Seung-Hui Cho, fatally shot thirty-two people and himself on April 16, 2007.<sup>106</sup> Cho used a semi-automatic pistol equipped with an extended capacity magazine to shoot at his victims.<sup>107</sup>

While a number of bills have been introduced in prior years, no action was taken by Congress to reinstate the ban on large capacity magazines has been introduced in both the U.S. House and Senate.<sup>108</sup> At the time we submitted this report, Congress was discussing further legislation in the wake of the tragedy in Connecticut.<sup>109</sup>

---

<sup>100</sup> James Barron, *Nation Reels After Gunman Massacres 20 Children at School in Connecticut*, NEW YORK TIMES (Dec. 14, 2012), available at [http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/12/15/nyregion/shooting-reported-at-connecticut-elementary-school.html?pagewanted=all&_r=0).

<sup>101</sup> Pete Williams and Bill Dedman, *Aurora Suspect James Holmes was Buying Guns, Dropping out of Graduate School*, NBCNEWS.COM Oct. 15, 2012, available at [http://usnews.nbcnews.com/\\_news/2012/07/20/12854157-aurora-suspect-james-holmes-was-buying-guns-dropping-out-of-graduate-school?lite](http://usnews.nbcnews.com/_news/2012/07/20/12854157-aurora-suspect-james-holmes-was-buying-guns-dropping-out-of-graduate-school?lite)

<sup>102</sup> *Id.*

<sup>103</sup> Susan Candiotti, *Source: Colorado Shooter's Rifle Jammed During Rampage*, CNN.COM, July 22, 2012, available at <http://www.cnn.com/2012/07/22/us/colorado-shooting-investigation/index.html>.

<sup>104</sup> Susanna Kim, *Glock 19: How Did Jared Loughner Buy Popular, Expensive Pistol?*, ABCNEWS.COM, Jan. 11, 2011, available at <http://abcnews.go.com/Business/questions-remain-jared-loughner-paid-expensive-firearm/story?id=12585290#.UKWFOfXNkYK>.

<sup>105</sup> *Id.*

<sup>106</sup> *The 'Unremarkable Sale' of Gun to Student Killer*, NBCNEWS.COM, April 18, 2007, available at [http://www.msnbc.msn.com/id/18170761/ns/us\\_news-crime\\_and\\_courts/t/unremarkable-sale-gun-student-killer/#.UHw8wcXA9PM](http://www.msnbc.msn.com/id/18170761/ns/us_news-crime_and_courts/t/unremarkable-sale-gun-student-killer/#.UHw8wcXA9PM).

<sup>107</sup> Greg McCune, *Gun Type Used in Sikh Shootings Used in Other Attacks*, REUTERS, Aug. 7, 2012, available at <http://www.reuters.com/article/2012/08/07/us-usa-wisconsin-shooting-weapon-idUSBRE8760T820120807>.

<sup>108</sup> Large Capacity Ammunition Feeding Device Act, H.R. 308, 112th Cong. (2011); Large Capacity Ammunition Feeding Device Act, S. 32, 112th Cong. (2011).

<sup>109</sup> See, e.g., Michael D. Shear, *Obama Vows Fast Action in New Push for Gun Control*, NYTIMES.COM, Dec. 19, 2012, available at <http://www.nytimes.com/2012/12/20/us/politics/obama-to-give-congress-plan-on-gun-control-within-weeks.html?pagewanted=all>.

It is important, however, that any new legislation remove loopholes of the original ban which allowed manufacturers to re-release semiautomatic weapons with very minor cosmetic changes to comply with the Federal ban, and allowed the continued unregulated possession and transfer of semiautomatic weapons and large capacity magazines manufactured before the ban.<sup>110</sup> Programs that have been used effectively include one in Australia to ban the use of semi-automatic weapons and to buy back weapons already in circulation.<sup>111</sup> Reinstatement of an assault weapons ban would limit access to extremely lethal weapons and large capacity magazines. Although it may not reduce the frequency of mass shootings, the ban would help reduce the amount of harm a mass murderer can inflict through the limitation placed on magazine capacity and reduction in military style firearms.

## 2. State Regulation of SALW

While the federal government has enacted instrumental legislation regulating firearms, gun control in the U.S. is almost entirely governed by state law and subject to state enforcement. State laws may be stronger or weaker than federal law, but do not preempt federal law. The federal government should also collaborate with state and local entities within the federal system, in order to comply with its Article 6 obligations. The most important way in which the federal government can cooperate with the states is by ensuring there is a working mechanism in place to keep guns out of the hands of prohibited persons.

State laws on transfer and possession vary widely across the country—some more and some less restrictive than federal regulation. But, because there is no practical way to stop illegal gun trafficking at state borders, weak laws in some states undermine efforts to strengthen laws in other states.

According to the Brady Campaign to Prevent Gun Violence, California leads the nation in strongest gun laws, while Arizona ranks last.<sup>112</sup> California bans the sale of assault weapons and possession of unregistered and inherited assault weapons, requires firearm dealers to be licensed, requires background checks for all private firearm sales and a ten-day waiting period for purchases, requires a license for a handgun purchase, requires firearm removal at the scene of

---

<sup>110</sup> Fallis & Grimaldi, *supra* note 98. The statute banning semi-automatic weapons classified a rifle as a semiautomatic assault weapon if it was able to accept a detachable magazine and included two or more of the following five characteristics: (1) a folding or telescoping stock, (2) a pistol grip, (3) a bayonet mount, (4) a muzzle flash suppressor or threaded barrel capable of accepting such a suppressor, or (5) a grenade launcher. Krouse, *supra* note 27, at 37–40.

<sup>111</sup> Andrew Leigh & Christine Neill, *Do Gun Buybacks Save Lives? Evidence from Panel Data*, 12 AM. L. & ECON. REV. 509 (2010).

<sup>112</sup> *State Gun Laws*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/stategunlaws/> (last visited Oct. 31, 2012) (giving California a score of 88 out of 100 total possible points and Arizona, 2 out of 100).

domestic violence, requires handgun microstamping for tracing purposes, and allows significant local law enforcement discretion in permitting, among other regulations.<sup>113</sup>

Arizona, in contrast, allows firearms to be openly carried or concealed without a permit, does not require licensing, allows transfer and possession of assault weapons and large capacity magazines, does not limit the number of firearms that can be purchased at one time,<sup>114</sup> does not require background checks for private sales, and does not impose a waiting period on firearms sales.<sup>115</sup> In 2009, Arizona had the fifteenth highest rate of gun related deaths per capita, and the thirteenth highest rate of crime gun exports.<sup>116</sup> As discussed further below, one destination for these weapons is Mexico, which has a staggering number of illegal SALW.

#### **a. State background checks and carrying concealed weapons laws**

Several states have taken action to limit sale of firearms to prohibited persons through private sales. Six states have enacted universal background check laws for all firearm sales at gun shows, one state allows counties to regulate gun show sales, and three require background checks on all handgun sales at gun shows.<sup>117</sup> Seven states require permits for handgun possession and require permit applicants to pass a background check.<sup>118</sup> But the majority—thirty-three states—have taken no action to close the gun show loophole.<sup>119</sup>

The issues that accompany the sale of firearms to prohibited persons are compounded by permissive laws to allow the carrying of concealed carry weapons (CCW). A study conducted after Texas overturned its 125-year ban on concealed carry in 1995 showed that in the five years immediately following the repeal, concealed handgun license holders were arrested for 5,314 crimes—a rate eighty-one percent higher than that of the state’s general population over the age of twenty-one.<sup>120</sup> And an investigation of Florida’s CCW laws found that in the first half of

---

<sup>113</sup> CALIFORNIA DEP’T OF JUSTICE, CALIFORNIA FIREARMS LAWS (2007), *available at* <http://oag.ca.gov/sites/all/files/pdfs/firearms/forms/Cfl2007.pdf>.

<sup>114</sup> According to a 2010 study published in the *Journal of Urban Health*, handguns purchased by individuals who purchased multiple guns of a similar type were 58 percent more likely to be used in crime than handguns purchased by individuals who purchased only a single handgun. MONA A. WRIGHT, ET AL., FACTORS AFFECTING A RECENTLY PURCHASED HANDGUN’S RISK FOR USE IN CRIME (2010), *available at* <http://www.springerlink.com/content/p61j7v136802v627/fulltext.pdf>.

<sup>115</sup> *Arizona State Law Summary*, LAW CENTER TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/arizona-state-law-summary/> (last visited Oct. 31, 2012).

<sup>116</sup> *Id.*

<sup>117</sup> *Gun Show Loophole*, COALITION TO STOP GUN VIOLENCE, <http://www.csgv.org/issues-and-campaigns/gun-show-loophole/> (last visited Oct. 10, 2012).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> L. CENTER TO PREVENT GUN VIOLENCE, REGULATING GUNS IN AMERICA—AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE AND SELECTED LOCAL GUN LAWS 203 (2008), *available at* <http://smartgunlaws.org/wp-content/uploads/2008/01/RegGuns.entire.report.pdf>.

2006, permits had been granted to more than 1,400 felons, 216 individuals with outstanding warrants, 128 individuals with active domestic violence injunctions against them, and six registered sex offenders.<sup>121</sup> Under federal law, no background check is required for firearm purchasers who hold a state-issued CCW permit if the approval process included a NICS check.<sup>122</sup> If an individual falls into one of the prohibited categories after the permit has been issued, this exception allows them to acquire a firearm.

All fifty states currently allow citizens to carry certain concealed firearms in public.<sup>123</sup> Thirty-seven states have “shall-issue” policies, meaning the state must issue permits to all applicants who meet minimal statutory requirements.<sup>124</sup> No discretion is granted to the issuing official. Four states allow carrying of concealed weapons without a permit.<sup>125</sup>

### **b. Stand your ground laws**

The “stand your ground” law or “shoot first” law has provided a controversial expansion of what is commonly known as the Castle doctrine,<sup>126</sup> and was brought into the center of national debate in 2012 after the killing of seventeen-year-old Trayvon Martin in the state of Florida by George Zimmerman, who followed him after being instructed by police not to do so. He claimed to be threatened and invoked Florida’s “stand your ground” law as his defense to shooting and killing Trayvon Martin.<sup>127</sup>

---

<sup>121</sup> *Id.*

<sup>122</sup> 27 C.F.R. § 478.102(d).

<sup>123</sup> *Concealed Weapons Permitting Policy Summary*, LAW CENTER TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/concealed-weapons-permitting-policy-summary/> (last visited Dec. 27, 2012). Illinois was the last state in the nation to enforce a ban on concealed carrying of weapons. This law was overturned on Dec. 11, 2012 by the Seventh Circuit Court of Appeals. *Moore v. Madigan*, Nos. 12-1788, 12-1269, 2012 WL 6156062 (7th Cir. Dec. 11, 2012).

<sup>124</sup> CONGRESSIONAL RESEARCH SERVICE, REPORT FOR CONGRESS NO. 7-5700, at 7 (Aug. 3, 2012) [hereinafter C.R.S. REPORT NO. 7-5700], *citing to*, Wisconsin’s concealed carry permit went into effect on November 1, 2011. “Shall issue” states include Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>125</sup> *Id.* at 7. Senator Barbara Boxer recently introduced the Common Sense Concealed Firearms Permit Act of 2011. Common Sense Concealed Firearms Permit Act, S. 176, 112th Cong. (2011); The bill would establish minimum federal eligibility requirements for conceal and carry, but it would be more restrictive than current “shall issue” state law. *Id.* See also, C.R.S. REPORT NO. 5-5700, *supra* note 124. It would require the applicant to demonstrate: 1) good cause for requesting the permit; and 2) that he/she is worthy of the public trust to carry a concealed firearm in public. S. 176, 112th Cong., § 2(b) (2011).

<sup>126</sup> The Castle Doctrine is a legal concept common to many jurisdictions in the U.S. Generally, claims of self defense in circumstances of deadly force include a duty to retreat. Under the Castle Doctrine, a person has no duty to retreat in their own home. STEVE JANSEN & M. ELAINE NUGENT-BORAKOVE, EXPANSIONS TO THE CASTLE DOCTRINE 3 (2007), available at <http://www.ndaa.org/pdf/Castle%20Doctrine.pdf>.

<sup>127</sup> Dan Berry, *Race, Tragedy and Outrage Collide After a Shot in Florida*, N.Y. TIMES, April 1, 2012, available at [http://www.nytimes.com/2012/04/02/us/trayvon-martin-shooting-prompts-a-review-of-ideals.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/04/02/us/trayvon-martin-shooting-prompts-a-review-of-ideals.html?pagewanted=all&_r=0).

Under the international human rights principles of necessity and proportionality, there is a general duty to avoid the use of force where non-violent means of self-protection are reasonably available.<sup>128</sup> U.S. laws and standards were in compliance with that principle until, in 2005, Florida enacted the first and most extensive no-retreat self-defense law in the country.<sup>129</sup> Florida's version of the law<sup>130</sup> explicitly states that a person has "no duty to retreat" and can "meet force with force, including deadly force" when he or she "reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony."<sup>131</sup> The Florida law may be interpreted to allow use of deadly force even when the danger has ceased by including language that states that a person need only have reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or "had occurred."<sup>132</sup> In addition, Florida's law provides blanket immunity, both criminal and civil, for a person using force as defined and permitted by law.<sup>133</sup> As the National District Attorneys Association (NDAA) has pointed out, the "blanket immunity" that the Florida law gives to members of the public who fire their guns is actually broader than the leeway the law gives to police.<sup>134</sup>

## **B. State Obligation Not to Violate the Right to Life with Small Arms and Light Weapons**

*A State's first duty under the SALW Principles is negative; not to violate the right to life in its officials' acts or omissions regarding the use of small arms and light weapons.*<sup>135</sup>

### **1. Police Use of Force**

Law enforcement in the United States is primarily a local matter, with cities and counties providing the majority of service, each within their respective jurisdiction.<sup>136</sup> State agencies additionally have jurisdiction over some statewide matters including enforcement of traffic laws on state or interstate highways and protection of certain state entities (e.g., state capitol, state

---

<sup>128</sup> Barbara Frey, Prevention of human rights violations committed with small arms and light weapons, United Nations Sub-Commission on the Promotion and Protection of Human Rights, U.N. Doc. A/HRC/Sub.1/58/27 (2006), at 12.

<sup>129</sup> JANSEN & NUGENT-BORAKOVE, *supra* note 126, at 5.

<sup>130</sup> FLA. STAT. § 776.012 (2005).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*; See JANSEN & NUGENT-BORAKOVE, *supra* note 126, at 7.

<sup>133</sup> *Id.*

<sup>134</sup> JANSEN & NUGENT-BORAKOVE, *supra* note 1266, at 8.

<sup>135</sup> *Id.* at 8.

<sup>136</sup> See FBI Uniform Crime Reports, Crime in the United States; Police Employee Data <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/police-employee-data> (last visited Dec. 10, 2012).

hospital, etc.)<sup>137</sup> As of October 2011, there were well over 14,000 city and county law enforcement agencies in the U.S., and an aggregate number of over 1 million law enforcement officers<sup>138</sup> nationwide.<sup>139</sup> Due to the decentralization of police authority, the collection of data regarding police use of force in the U.S. is complicated by the wide variety of definitions, requirements, policies, reporting and investigation procedures applied by the various agencies.

The Committee previously encouraged the United States to bring its excessive force policies into compliance with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Further, the Committee recommended that the United States increase its efforts to eliminate police brutality and excessive use of force by law enforcement officials, and to limit use of electro-muscular disruption devices (tasers) to circumstances of necessity, where greater or lethal force would otherwise be justified.<sup>140</sup> However, excessive use of force by police officials with SALW including the excessive and sometimes lethal use of tasers and other SALW, continues to be a cause for concern.

In its Fourth Periodic Report, the U.S. notes that since 2005, the DoJ “has convicted or obtained pleas from, over 165 officers and public officials for criminal misconduct related to police brutality or excessive force.”<sup>141</sup> Yet, in 2010 alone, the most recent year for which statistics were available, there were a reported 1,575 officers involved in excessive force reports, including 232 officers involved in firearm-related excessive force complaints,<sup>142</sup> and 166 officers involved in taser-related cases throughout the United States.<sup>143</sup> There were 127 fatalities associated with substantiated excessive force allegations in 2010.<sup>144</sup> Of these excessive force fatalities, ninety-one were caused by firearms, and eleven by tasers.<sup>145</sup> The ACLU has noted a disproportionate rate of excessive force incidents against members of racial or ethnic minority groups and the U.S. periodic report notes that “many” convictions for excessive use of force involved minority victims.<sup>146</sup> According to the most recent FBI statistics, there were 385

---

<sup>137</sup> See FBI Uniform Crime Reports, Crime in the United States; State, Tribal and Other Agencies. Table 81. <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/police-employee/state-tribal-and-other-agencies> (last visited Dec. 10, 2012).

<sup>138</sup> Law enforcement officers are “individuals who ordinarily carry a firearm and a badge, have full arrest powers, and are paid from governmental funds set aside specifically for sworn law enforcement representatives.” FBI Uniform Crime Reports, Police Employment Data, Definition. (2011). <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/police-employee-data>.

<sup>139</sup> FBI Uniform Crime Reports, Crime in the United States, Full-Time Law Enforcement Employees. Table 74. [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table\\_74\\_full-time\\_law\\_enforcement\\_employees\\_by\\_population\\_group\\_percent\\_male\\_and\\_female\\_2011.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table_74_full-time_law_enforcement_employees_by_population_group_percent_male_and_female_2011.xls)

<sup>140</sup> HRC, Concluding Observations 2006, *supra* note 3.

<sup>141</sup> Fourth Periodic Report, *supra* note 1, at ¶ 662.

<sup>142</sup> CATO Institute’s National Police Misconduct Reporting Project, Police Misconduct Statistical Report (2010). <http://www.policemisconduct.net/2010-npmsrp-police-misconduct-statistical-report/>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* See also, HRC, Concluding Observations 2006, *supra* note 3, at ¶30 (use of tasers).

<sup>146</sup> AMERICAN CIVIL LIBERTIES UNION, RACE & ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE 119–126 (2008); Fourth Periodic Report of the United States of America (CCPR/C/USA/4) at ¶ 662, U.N. Doc.

“justifiable homicides”<sup>147</sup> by means of a firearm committed by law enforcement officers in 2010.<sup>148</sup> However, internal affairs records and citizen complaints against law enforcement officers are exempt from disclosure in seventeen states, rendering these numbers likely underestimations.<sup>149</sup>

The U.S. remarks in its Fourth Periodic Report that “U.S. law provides various avenues through which victims of police brutality may seek legal remedies. . . [including] criminal punishment of the perpetrator. . . .” However, as previously noted, only a small fraction of excessive force complaints result in a conviction. In fact, they may result in no disciplinary action at all. One example of this is the 2011 shooting of U.S. Marine veteran Jose Guerena who was killed in his home by officers of the Pima County, Arizona SWAT team who had raided the house on suspicions of drug trafficking.<sup>150</sup> While Guerena held his gun in defense with the safety still on, the five-person SWAT team fired more than seventy rounds. Officers claims Guerena had fired first, but an investigation showed that Guerena’s gun had not been fired. While an autopsy determined Guerena had died quickly, emergency care was denied for more than an hour at the scene. Following questions by the media, the Pima County Sheriff’s Department sealed the records, including the search warrants, and criticized the media for trying to make information available to the public.<sup>151</sup> The Pima County Attorney’s Office determined that use of deadly force was “reasonable and justified under the law.”

Across many police departments in the U.S., like Pima County, a lack of transparency as to how excessive use of force allegations are investigated compromises public access to information regarding the process and significantly diminishes public oversight. The U.S. government’s own lack of complete and accurate statistics on use of excessive and deadly force by police further undermines effective investigations.<sup>152</sup>

Currently, the U.S. government maintains two national systems—the Uniform Crime Reporting Program of the FBI and the National Vital Statistics System (NVSS) of the National

---

CCPR/C/USA/4 (2012), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/429/66/PDF/G1242966.pdf?OpenElement>.

<sup>147</sup> The FBI defines a justifiable homicide as “the killing of a felon by a peace officer in the line of duty and determined through law enforcement investigation as justifiable.” FBI Uniform Crime Reporting Program, Crime in the United States (2010).

<sup>148</sup> FBI Uniform Crime Reporting Program, Crime in the United States, Expanded Homicide Data Table 14 (2010).

<sup>149</sup> Jenny Rachel Macht, *Should Police Misconduct Files be Public Record? Why Internal Affairs Investigations and Citizen Complaints Should be Open to Public Scrutiny*, 45 No. 6 Crim. Law Bulletin ART 5 (2000).

<sup>150</sup> Ellen Tumposky, *Drug SWAT Team That Gunned Down Ex-Marine Found No Drugs*, ABC NEWS (May 27, 2011), [http://abcnews.go.com/US/swat-team-gunned-marine-find-drugs/story?id=13702756#.UL\\_wn6N5iyU](http://abcnews.go.com/US/swat-team-gunned-marine-find-drugs/story?id=13702756#.UL_wn6N5iyU)

<sup>151</sup> Media Release, Officer Involved in Shooting – Update, PIMA COUNTY SHERIFF’S DEP’T (May 18, 2011), available at [http://pimasheriff.org/files/9213/0574/4466/Officer\\_Involved\\_Shooting\\_Update.pdf](http://pimasheriff.org/files/9213/0574/4466/Officer_Involved_Shooting_Update.pdf)

<sup>152</sup> *SWAT Shooting of Guerena Ruled ‘Reasonable and Justified,’* TUCSON NEWS KOLD/KMSB (June 13, 2011 11:47 pm), <http://www.tucsonnewsnow.com/story/14901148/swat-shooting-of-guerena-ruled-reasonable-and-justified> (last visited Dec. 5, 2012).



Center for Health Statistics—that collect information on homicides.<sup>153</sup> According to a 2003 study of their data, it was concluded that both systems underreport.<sup>154</sup> The NVSS misclassified cases as homicides, because certifiers failed to mention police involvement. Underreporting in the FBI system was determined to be the result of failure of law enforcement agencies to file reports or, when reports were filed, by omitting homicides committed by police officers in the line of duty.<sup>155</sup>

The U.S. government has requested specific information on police excessive use of force and arrest-related deaths from individual states, but many have failed to cooperate. In 1994, the U.S. Congress enacted the Violent Crime Control and Law Enforcement Act, which, among other things, required the U.S. Attorney General to gather data on police use of excessive force and publish annual reports based on that data.<sup>156</sup> However, this provision did not mandate state compliance and was not funded. In turn, many police departments have been reluctant to provide the Department of Justice (DoJ) with this information.<sup>157</sup> Although the DoJ Bureau of Justice Statistics has attempted to comply with the Violent Crime Control and Law Enforcement Act, it has never published the required annual summary.<sup>158</sup> In 2000, Congress amended the aforementioned act by passing the Death in Custody Report Act, which created a national system for counting all arrest-related deaths, known as the Arrest-Related Deaths Program (ARD).<sup>159</sup> The 2011 report from the ARD concluded that between 2003 and 2009, 2,931 (including seventy-eight juveniles) of a total of 4,813 arrest-related deaths were the result of homicide by law enforcement personnel.<sup>160</sup> The report further noted that arrest-related deaths are likely underreported due to inconsistent state participation, except in California and Texas where law enforcement agencies are mandated by law to report arrest-related deaths.<sup>161</sup>

Additionally, determinations as to whether a homicide committed by a law enforcement officer qualifies as “justifiable” have been controversial. A recent lawsuit by the ACLU of Arizona against the Scottsdale Police Department demonstrates the problematic nature of law

---

<sup>153</sup> *Summary of the Uniform Crime Reporting*, U.S. DEP’T OF JUSTICE, <http://www2.fbi.gov/ucr/killed/2009/aboutucr.html> (last visited Dec. 5, 2012); *National Vital Statistics System*, CTR. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/nvss.htm> (last visited Dec. 5, 2012).

<sup>154</sup> Underreporting of Justifiable Homicides Committed by Police Officers in the United States, 1976–1998. *Am J. Public Health*. 2003 July; 93(7): 1117–1121.

<sup>155</sup> *Id.* See also, AMERICAN CIVIL LIBERTIES UNION, RACE & ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE 120 (2008).

<sup>156</sup> Violent Crime Control and Law Enforcement Act, 42 U.S.C. §14142 (1994).

<sup>157</sup> Matthew Hickman, BJS Special Report: Citizen Complaints About Police Use of Force 1–3 (2006), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/ccpuf.pdf>.

<sup>158</sup> Michael R. Smith, Toward a National Use-of-Force Data Collection System: One Small (and Focused) Step Is Better than a Giant Leap, 7 *Criminology & Pub. Pol’y* 619, 621 n.1 (2008).

<sup>159</sup> Pub. L. No. 106-297, 114 Stat. 1045 (2000).

<sup>160</sup> *Arrest-Related Deaths, 2003–2009*, DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2228> (last visited Dec. 5, 2012).

<sup>161</sup> *Id.* at 14.

enforcement agencies making such determinations internally.<sup>162</sup> On February 14, 2012, Officer James Peters shot and killed John Loxas, an unarmed man holding his infant grandson in his arms. Within the last ten years, the same officer has been involved with six homicides that were internally determined by the head of the Scottsdale Police Department to be “justified.”<sup>163</sup> The ACLU of Arizona claims that a lack of accountability and meaningful review of police shootings has contributed to ongoing deadly and excessive force in the state, and argues that the city’s internal review process is inadequate.<sup>164</sup>

Beyond data recovery from local law enforcement agencies, experts have suggested that the federal government create a national system to receive and document complaints against law enforcement officers.<sup>165</sup> Currently, the United States Department of Justice’s Civil Rights Division has the authority under the Violent Crimes Control and Law Enforcement Act to investigate police departments regarding allegations of excessive force, corruption or discrimination against minority populations,<sup>166</sup> and under the Civil Rights of Institutionalized Persons Act (CRIPA), to pursue civil lawsuits against state institutions that are believed to have violated the civil rights of their residents, including through excessive use of force.<sup>167</sup> However, lack of data at the state and local level, and insufficient incentives for states to report excessive force and address police abuse has stunted the effectiveness of such federal initiatives. Another potential mechanism for investigation of excessive force or police abuse cases is internal review, but this practice varies widely between law enforcement agencies and may undermine thorough investigations due to lack of oversight.<sup>168</sup>

Due to a lack of data, transparency and internal accountability, public and political pressure on police management is inadequate to provide local governments with incentives to address excessive force and police abuse. However, the U.S. government has also failed to properly enforce the reporting provisions of the Violent Crime Control and Law Enforcement Act<sup>169</sup> and has not used adequate incentives<sup>170</sup> to encourage states to comply with data gathering efforts.

---

<sup>162</sup> Complaint, *Loxas v. City of Scottsdale*.

<http://www.acluaz.org/sites/default/files/documents/Loxas%20Complaint.pdf>.

<sup>163</sup> *Id.* at 2.

<sup>164</sup> Press Release, ACLU-Arizona, Relatives of Man Killed While Holding His Infant Grandson File Wrongful Death Lawsuit Against the City of Scottsdale (September 24, 2012) at <http://www.acluaz.org/issues/criminal-justice/2012-09/2745>.

<sup>165</sup> John Dugan and Daniel Breda, Complaints about police officers: A comparison among types and agencies, 19 J.C. J. 2, 165–171 (1991).

<sup>166</sup> Violent Crime Control and Law Enforcement Act, 42 U.S.C. § 14141 (1994).

<sup>167</sup> Fourth Periodic Report of the United States of America (CCPR/C/USA/4) at ¶ 184, U.N. Doc. CCPR/C/USA/4 (2012), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/429/66/PDF/G1242966.pdf?OpenElement>.

<sup>168</sup> Hickman, *supra* note 157, at 5.

<sup>169</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat 1796 (1994).

<sup>170</sup> *Id.*

## 2. Deaths on the U.S.-Mexican Border

Agents from the U.S. Customs and Border Patrol (CBP), have systematically employed excessive and lethal force with impunity along the U.S. – Mexico border.<sup>171</sup> Since January 2010, eighteen people have been the victims of excessive use of force and SALW misuse by the CBP,<sup>172</sup> at least fifteen of whom were fatally shot.<sup>173</sup> Six of the victims were under the age of twenty-one and five were U.S. citizens.<sup>174</sup> For instance, on October 10, 2012, Jose Antonio Elena Rodriguez, a sixteen year-old Mexican boy, was fatally shot seven times in the back by a CBP agent for allegedly throwing rocks across the border.<sup>175</sup> A nineteen year-old U.S. citizen named Carlos La Madrid was shot in the back four times by CBP on March 21, 2011 while fleeing into Mexico.<sup>176</sup> Fifteen year-old Sergio Adrián Hernández Guereca was shot and killed by a CBP agent also after allegedly throwing rocks near El Paso, Texas on June 7, 2010.<sup>177</sup>

The case of Hernández Guereca was the first and only publicly-concluded federal investigation of lethal force by a CBP official. On April 27, 2012, the DoJ announced that it had found the CBP officer not guilty of any wrong doing, and marked the DoJ's apparent acquiescence to the CBP practice of meeting rock-throwing with lethal force.<sup>178</sup> As of October 2012, the DHS had not published its policy on the use of force.<sup>179</sup>

---

<sup>171</sup> American Civil Liberties Union, Statement on Human Rights Violations on the United States-Mexico Border Submitted to Office of the United Nations High Commissioner for Human Rights 4 (October 25, 2012), [http://www.aclu.org/files/assets/121024\\_aclu\\_written\\_statement\\_ochcr\\_side\\_event\\_10\\_25\\_12\\_final\\_0.pdf](http://www.aclu.org/files/assets/121024_aclu_written_statement_ochcr_side_event_10_25_12_final_0.pdf) [hereinafter, ACLU OHCHR Statement].

<sup>172</sup> ACLU OHCHR Statement, at 1. The ACLU reports the following persons were shot and killed by the CBP: Juan Pablo Pérez Santillán (near Brownsville, Texas on July 7, 2012); Jorge A. Solis, age twenty-eight (Douglas, AZ on Jan. 4, 2010); Victor Santillan de la Cruz, thirty-six (Laredo, TX on Mar. 31, 2010); Sergio Adrián Hernández Guereca, fifteen (in Ciudad Juarez, Mexico on June 7, 2010); Juan Mendez, eighteen (Eagle Pass, TX on Oct. 5, 2010); Ramses Barron Torres, seventeen (Nogales, Mexico on Jan. 5, 2011); Carlos La Madrid, nineteen (Douglas, AZ on March 21, 2011); Jose Alfredo Yañez Reyes, forty (Tijuana, Mexico on June 21, 2011); Gerardo Rico Lozano, twenty (Corpus Christi, TX on Nov. 3, 2011); Byron Sosa Orellana, twenty-eight (Sells, AZ on Dec. 6, 2011); Juan Pablo Perez Santillán, thirty (Matamoros, Mexico on July 7, 2012); Guillermo Arévalo Pedroza, thirty-six (Nuevo Laredo, Mexico on Sept. 3, 2012); Valeria Tachiquin-Alvarado, thirty-two (Chula Vista, CA on Sept. 28, 2012); Jose Antonio Elena Rodriguez, sixteen (Nogales, Mexico on Oct. 10, 2012). *Id.*

<sup>173</sup> KPBS, *Deadly Patrols* (2012), available at <http://www.kpbs.org/news/investigations-desk/deadly-patrols/app/>.

<sup>174</sup> ACLU, *ACLU Regional Center for Border Rights Urges Full Investigation of Texas State Trooper Killing of Two Unarmed Migrants* (October 26, 2012), available at <http://www.aclu.org/immigrants-rights/aclu-regional-center-border-rights-urges-full-investigation-texas-state-trooper>.

<sup>175</sup> ACLU OHCHR Statement, at 4.

<sup>176</sup> ACLU OHCHR Statement, at 4.

<sup>177</sup> ACLU OHCHR Statement, at 5.

<sup>178</sup> ACLU OHCHR Statement, at 5.

<sup>179</sup> Chris Rickerd, ACLU, *Border Patrol Must Stop Hiding the Truth About Its Uses of Force* (October 4, 2012), available at <http://www.aclu.org/blog/immigrants-rights-racial-justice-criminal-law-reform/border-patrol-must-stop-hiding-truth-about>.

In May 2012, sixteen members of Congress submitted a letter to Department of Homeland Security (DHS) Secretary Janet Napolitano, DHS Acting Inspector General Charles K. Edwards, and Attorney General Eric Holder demanding an investigation into the abuses occurring along the border.<sup>180</sup> Though the DHS has included an investigation of the border killings in its current annual summary, the frequency and regularity of Customs and Border Patrol (CBP)'s use of lethal force has prompted a number of human rights bodies such as the Inter-American Commission on Human Rights, to call for a comprehensive, independent investigation of CBP policies and practices.<sup>181</sup> Navi Pillay, the U.N. High Commissioner for Human Rights, has urged the U.S. and Mexico to "redouble their efforts to investigate promptly and transparently these incidents."<sup>182</sup> The ACLU has recommended actions to prevent or deter excessive use of force by CBP agents including, a publicly transparent system of accountability that would investigate and punish abusive agents, reforming use-of-force training and policies, and an oversight commission.<sup>183</sup>

The CBP employs over 40,000 personnel,<sup>184</sup> which make up a substantial share of the Department of Homeland Security employee roster, and a significant percentage of total federal law enforcement personnel.<sup>185</sup> The number of CBP personnel is rapidly increasing.<sup>186</sup> As of 2011, the U.S. Border Patrol (BP) alone, a division of CBP tasked with physical border security, employed 21,444 personnel.<sup>187</sup> This totals approximately 9.4 agents per linear mile tasked with patrolling the U.S. – Mexico border.<sup>188</sup> This figure does not include agents from the Drug Enforcement Agency (DEA), the FBI, or the ATF.<sup>189</sup> The rapid expansion of the CBP and numerous reports of SALW misuse indicate a need for proper training, oversight, and accountability for officers in order to prevent violations and SALW abuse. Further, the U.S. is encouraged to establish accountability mechanisms for CBP officials and thoroughly investigate allegations of excessive force and SALW abuse along the border.

---

<sup>180</sup> Congressional Sign-on Letter to Janet Napolitano, Sec'y, Dep't of Homeland Security May 10, 2012), *available at* <http://serrano.house.gov/sites/serrano.house.gov/files/DHSletter.pdf>; Congressional Sign-on Letter to Charles K. Edwards, Acting Inspector Gen., Dep't of Homeland Sec. (May 10, 2012), *available at* <http://serrano.house.gov/sites/serrano.house.gov/files/DHSletter.pdf>; Congressional Sign-on Letter to Eric Holder, Att'y Gen., Dep't of Justice (May 10, 2012), *available at* <http://serrano.house.gov/sites/serrano.house.gov/files/DoJLetter.pdf>.

<sup>181</sup> Inter-American Commission on Human Rights, Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/II, Doc. 78/10 (December 30, 2010), <http://cidh.org/countryrep/USImmigration/TOC.htm>; <http://serrano.house.gov/sites/serrano.house.gov/files/DHSletter.pdf>.

<sup>182</sup> Stephanie Nebehay, *U.S. Uses Excessive Force Along Mexican Border: U.N.*, REUTERS (Oct. 18, 2012, 12:46 pm), <http://www.reuters.com/article/2012/10/18/us-mexico-us-un-rights-idUSBRE89H13F20121018>.

<sup>183</sup> ACLU OHCHR Statement, at 7–8.

<sup>184</sup> ACLU OHCHR Statement, at 2.

<sup>185</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Federal Law Enforcement Officers, 2008* (June 2012), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/fleo08.pdf>.

<sup>186</sup> ACLU OHCHR Statement, at 2.

<sup>187</sup> ACLU OHCHR Statement, at 2. There were reportedly 9,212 BP agents employed in 2000, and 4,028 in 1993.

<sup>188</sup> ACLU OHCHR Statement, at 2.

<sup>189</sup> ACLU OHCHR Statement, at 2.

### C. State Extraterritorial Obligation Regarding Transfers of Small Arms and Light Weapons

*The human rights rule of transfer requires both prevention of illicit transfers and due diligence regarding the small arms end use in human rights violations. It considers “1) the seriousness of the violation that results from the transfer; 2) the degree of knowledge of the transferring state regarding likely violations; and 3) the capacity of the transferring state to prevent the violations.”*<sup>190</sup>

Several human rights challenges relate to U.S. policies and practices regarding extra-territorial transfers of small arms and light weapons. Every day, thousands of guns illegally cross the U.S.-Mexico border into the hands of criminals in Mexico where they are used to carry out killings and other violent offenses. The U.S. still has not ratified the 1997 Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms (CIFTA) signed by former President William J. Clinton over a decade ago. Additionally, the legal framework for arms exports is both complicated and at times ineffective in preventing exports of arms to human rights abusers. Finally, the U.S. has stalled the completion of the Arms Trade Treaty.

#### 1. Illicit Transborder Transfer

According to the U.S. government, illicit trafficking in small arms and light weapons poses the greatest threat to regional security in the developing world.<sup>191</sup> Illicit trafficking can include black market sales, illegal diversion and illegal sales to insurgent groups and criminal organizations.<sup>192</sup> In 2006, the U.S. government announced a four-prong approach to combat the illicit trafficking of small arms and light weapons: (1) curbing transfers and black market sales; (2) attempting to raise other countries’ arms exports standards; (3) streamlining and strengthening U.S. export procedures to improve accountability; and (4) supporting the destruction of excess stockpiles of small arms.<sup>193</sup>

Despite these announced policy goals, the U.S. is the source of the vast majority of the arms used to fuel the narco-violence in Mexico. Guns flow into Mexico at an estimated rate of 2,000 per day, a staggering statistic given that Mexico has only a single gun store and

---

<sup>190</sup> Barbara Frey, *Obligations to Protect the Right to Life: Constructing a Rule of Transfer Regarding Small Arms and Light Weapons*, 51–53 in *UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS* (Mark Gibney and Sigrun Skodly, eds.): Univ. of Penn. Press (2010); see SALW Principles 13–15, *supra* note 38.

<sup>191</sup> Richard F. Grimmer, *International Small Arms and Light Weapons Transfers: U.S. Policy*, CONGRESSIONAL RESEARCH SERVICE, (October 2, 2006).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

approximately 6,000 legally registered guns.<sup>194</sup> An estimated 60,000 persons died from gun violence in Mexico from 2006 to 2012.<sup>195</sup>

According to the U.S. government, seventy percent of the 99,000 firearms recovered from Mexican criminal activity between 2007 and 2011 originated from sales in the United States<sup>196</sup> Further, according to the ATF, between the years 2006 and 2011, over 1.2 million rounds of ammunition believed to be destined for Mexico were seized during the course of ATF-instigated investigations and joint investigations originating in California, Arizona, Texas, and New Mexico.<sup>197</sup>

Mexico's most violent drug cartels are exploiting U.S. guns laws to acquire massive quantities of assault rifles and other firearms through the use of “straw purchasers,” or an agent who acquires a firearm for someone who is unable to purchase the good or service directly.<sup>198</sup> Several U.S. Attorneys have stated that current penalties for illegal straw purchases are inadequate to deter illegal purchases before they occur.<sup>199</sup> According to Peter Forcelli, a senior ATF agent, testifying at a congressional hearing, the typical punishment for “straw purchasers” is probation or less than a year in prison.<sup>200</sup> U.S. Senator Kristen Gillibrand introduced a trafficking prevention bill in 2011, which would amend the federal criminal code to impose a fine and/or twenty-year prison term for individuals involved in firearm trafficking.<sup>201</sup> Like other federal firearm legislation currently pending, this bill was referred to committee where no action has been taken.<sup>202</sup>

Assault weapons have been especially prevalent in criminal activity in Mexico. An estimated sixty percent of the over 100,000 firearms seized in Mexico between 2007 and 2011 were assault weapons, including AR-15s and AK-47s.<sup>203</sup> Former Mexican President Felipe Calderon linked this directly to the expiration of the U.S. federal assault weapons ban, saying,

---

<sup>194</sup> Press Release, Bureau of Alcohol, Tobacco, and Firearms, *Government of Mexico Firearms Trace Data* (April 26, 2012). <http://www.atf.gov/statistics/download/trace-data/international/2007-2011-Mexico-trace-data.pdf>

<sup>195</sup> Ed Vulliamy, *Mexico's drug cartels target journalists in brutal killing spree*, THE OBSERVER (October 13, 2012).

<sup>196</sup> *Id.* Of those firearms, more than 68,000 were U.S. sourced. The data is based on firearms that were traced by the U.S. government. *Id.*

<sup>197</sup> S.J. Res. 10, Ch. 75, 2011–2012 Leg., (Ca. 2012).

<sup>198</sup> Bureau of Alcohol, Tobacco, Firearms and Explosives, Office of Enforcement Programs and Services, Firearms Programs Division, *FEDERAL FIREARMS REGULATIONS AND REFERENCE GUIDE* (2005).

<sup>199</sup> Letter from 5 US Attorneys to Chief Judge William K. Sessions of the United States Sentencing Commission (Dec. 12, 2010). Stating: “straw purchasing and illegal arms exporting go hand in hand, and both must be addressed together.”

<sup>200</sup> U.S. Congress, Committee on Oversight and Government Reform, *Outgunned: Law Enforcement Agents Warn Congress They Lack Adequate Tools to Counter Illegal Firearms Trafficking* (June 2011).

<sup>201</sup> Gun Trafficking Prevention Act of 2012, S. 1973, 112th Cong. (2011).

<sup>202</sup> *See S. 1973: Gun Trafficking Prevention Act of 2012*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s1973> (last visited Dec. 5, 2012).

<sup>203</sup> Brendan Walsh, Bloomberg, “Calderon Blames Violence on End of U.S. Gun Ban” (May 10, 2011), *available at* <http://www.bloomberg.com/news/2011-05-10/calderon-blames-violence-on-end-of-u-s-gun-ban.html>.

“the violence in Mexico started when the assault weapons ban expired.”<sup>204</sup> And according to Grupo Multisistema de Seguridad Industrial, a private security firm in Mexico, the flow of arms from the U.S. has contributed to a 1,000% increase in illegal possession of assault weapons in Mexico in the last decade.<sup>205</sup>

Although the U.S. recognizes that a major issue exists in the illicit transfer of small arms and light weapons, it has not taken effective steps to prove its commitment to eradicating the problem. In fact, the U.S. has yet to ratify the 1997 Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms (CIFTA), a multilateral treaty designed to prevent, combat, and eradicate illegal transnational trafficking, signed by former President William J. Clinton over a decade ago.<sup>206</sup> Nor has it used domestic legislation to stem the underlying problems leading to the transfers across the border, including unregulated private sales of firearms such as assault weapons which are now legally sold in the U.S., a lack of regulations to block straw purchases and legislation to punish the individuals making them, and a lack of federal legislation specifically targeting illicit transfers of arms.

## 2. U.S. Export

The global market of small arms and light weapons is approximately worth \$7.1 billion, and the United States is the world’s largest exporter of small arms and light weapons.<sup>207</sup> In the U.S., arms exports are governed by three laws and two sets of regulations: the Arms Export Control Act of 1976 (AECA),<sup>208</sup> the Foreign Assistance Act of 1961,<sup>209</sup> the Export Administration Act of 1979,<sup>210</sup> the International Traffic in Arms Regulation (ITAR),<sup>211</sup> and the Export Administration Regulations.<sup>212</sup> This legal framework allows for, at least, four methods through which small arms and light weapons are exported from the U.S. to foreign purchasers. They include: 1) foreign military sales (FMS), 2) direct commercial sales (DCS), 3) transfers of excess defense articles (EDA) and, 4) emergency drawdowns of weaponry.<sup>213</sup>

---

<sup>204</sup> *Id.*

<sup>205</sup> International Action Network on Small Arms, *Increase in illegal possession of firearms in Mexico* (March 12, 2012), available at <http://www.iansa.org/news/2012/03/increase-in-illegal-possession-of-firearms-in-mexico>.

<sup>206</sup> Organization of American States, Parties and Signatories to the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, available at <http://www.oas.org/juridico/english/sigs/a-63.html>.

<sup>207</sup> Matt Schroeder, Patrick Herron and Nic Marsh, Larger but Less Known: Authorized Light Weapons Transfers, Small Arms Survey 2011: States of Security (July 2011), available at <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2011/en/Small-Arms-Survey-2011-Chapter-01-EN.pdf>.

<sup>208</sup> Arms Export Control Act of 1976, 22 U.S.C. ch. 39 (2006).

<sup>209</sup> Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq.

<sup>210</sup> Export Administration Act of 1975, 50 U.S.C. App. 2401 et seq.

<sup>211</sup> International Traffic in Arms Regulation, 22 C.F.R. pt. 121 (2012).

<sup>212</sup> Export Administration Regulation 15 C.F.R. pt. 734 (2012).

<sup>213</sup> LORA LUMPE & JEFF DONARSKI, THE ARMS TRADE REVEALED: A GUIDE FOR INVESTIGATORS AND ACTIVISTS, Chapter 1: Ways and Means (Federation of American Scientists 1998), available at <http://www.fas.org/asmp/library/handbook/cover.html>.

Foreign military sales are based on government-to-government agreements negotiated by the Department of Defense (DoD).<sup>214</sup> Requests for foreign military sales are initiated at the U.S. embassy within the purchasing country. The request is then sent to the relevant U.S. government agencies, and congressional notification of the proposed sale is required if the sale is valued at \$14 million or more.<sup>215</sup>

Direct commercial sales (DCS) are negotiated directly between private U.S. companies and foreign buyers. However, DCS must still be approved by the State Department's Office of Defense Trade Controls, through the provision of an export license, and they are subject to the same congressional notification procedure as FMS.<sup>216</sup>

The United States government also transfers arms to other countries by distributing weapons classified as excess defense articles (EDA) or emergency “drawdowns” from U.S. military stocks at no charge or at greatly reduced prices.<sup>217</sup>

A primary concern with the AECA is fragmentation as a result of several different licensing and enforcement agencies to implement its goals, leading to overlapping jurisdiction and divergent results.<sup>218</sup> Under the law, exports of dual-use goods and technologies are licensed by the Department of Commerce, munitions are licensed by the Department of State, and restrictions on exports based on U.S. sanctions are administered by the U.S. Treasury.<sup>219</sup> Enforcement of export controls is conducted by these agencies as well as by units of the Department of Homeland Security and the Department of Justice.<sup>220</sup> Moreover, according to the Government Accountability Office, Congress has an incomplete picture of defense exports due to “the differing purposes of the agencies’ data systems and different reporting methodologies.”<sup>221</sup>

Another central criticism of U.S. arms export policy is that it hinders Congress from conducting its oversight function. Within the current legal framework, Congress has the right to review and the ability to block arms sales pursued by the executive branch of government. Sections 36(b) & (c) of the AECA require the President to notify Congress when a proposed

---

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Government Accountability Office, *Defense Exports: Reporting on Exported Articles and Services Needs to Be Improved*, GAO-10-952 (2010) [hereinafter GAO, *Defense Exports*], available at <http://www.gao.gov/assets/310/309800.pdf>.

<sup>219</sup> *Id.* at 24.

<sup>220</sup> Congressional Research Service, *The U.S. Export Control System and the President’s Reform Initiative* (2012).

<sup>221</sup> GAO, *Defense Exports*, *supra* note 218.



weapons sale or lease is valued at \$14 million or more.<sup>222</sup> In most cases, Congress has only thirty days to take action before a contract is offered or an export license is granted. For certain close allies, Congress has only a fifteen day review period. And in order to block or amend a proposed arms transfer, members of both the House of Representatives and the Senate must introduce a Joint Resolution of Disapproval, which would then be referred to the House and Senate foreign affairs committees. After committee approval, the full House and Senate must pass the resolution by a two-thirds majority to prevent a presidential veto. The time limit is a high hurdle and Congress has never blocked an arms sale in this manner.<sup>223</sup> Taken with the fact that sales of small arms routinely fall below the \$14 million threshold for congressional notification, it is fairly easy for small arms transfers to go unnoticed and unreviewed.

Since 1973, U.S. law has formally required the restriction or denial of foreign aid to countries that have consistently violated the human rights of their citizens.<sup>224</sup> Section 502B of the Foreign Assistance Act<sup>225</sup> states that no “security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights” unless the president certifies in writing that extraordinary circumstances exist warranting provision of such assistance.”<sup>226</sup> Congress did not define the term extraordinary circumstances, which gives the Executive great discretion in decision making around foreign aid.<sup>227</sup> Further, terminating aid, under Section 502B, requires that a link be established between the government and the specific human rights violations.<sup>228</sup>

One situation in which the continuing shipment of SALW from the United States may be linked to the commission of violations of the ICCPR’s Article 6 is the Philippines. In 2011, the U.S. authorized over \$21 million worth of small arms and lights weapons through direct commercial sales to the Philippines, including 410,291 firearms and 92,996,663 rounds of ammunition.<sup>229</sup> Meanwhile, the U.S. State Department’s Country Report for Human Rights Practices for 2011 on the Philippines noted that “killings of activists by security or paramilitary forces as well as killings of judicial officials and local government leaders by antigovernment insurgents continued to be serious problems.”<sup>230</sup> The issue of extrajudicial killings has been well documented by human rights organizations and brought before the U.N. Human Rights Committee.

---

<sup>222</sup> Peter K. Tompa, *The Arms Export Control Act and Congressional Codetermination Over Arms Sales*, 1 AM. U. J. INT’L L. & POL’Y 291 (1986), at n.s 95–98.

<sup>223</sup> Richard F. Grimmett, *Arms Sales: Congressional Review Process*, Congressional Research Service Report 7-5700, at 4 (Feb. 1, 2012).

<sup>225</sup> Foreign Assistance Act (P.L. 87–195) 22 U.S.C. § 2151 et seq.

<sup>226</sup> *Id.* at Sec. 502B(2).

<sup>227</sup> CLAIR APODACA, UNDERSTANDING U.S. HUMAN RIGHTS POLICY: A PARADOXICAL LEGACY 36 (2006).

<sup>228</sup> *Id.* at 37.

<sup>229</sup> U.S. State Department, *2011 Section 655 Annual Military Assistance Report* (2012).

<sup>230</sup> U.S. State Department, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2011: Philippines* (2012).

At the 106th session, the Human Rights Committee made the following recommendations regarding the abuse of firearms by governmental and nongovernmental forces in the Philippines:<sup>231</sup>

*The State party should take necessary measures to prevent extrajudicial killings and enforced disappearances and ensure that alleged perpetrators of these crimes are effectively investigated, prosecuted and, if convicted, punished with appropriate sanctions, and that the victims' families are adequately compensated. The State party should establish a mechanism to disband and disarm all private armies, vigilante groups and "force multipliers", and also increase efforts to reduce the number of illegal firearms. The Committee urges the State party to revoke Executive Order No. 546, and to take advantage of the framework agreement for peace signed with the Moro Islamic Liberation Front to address the issues of extrajudicial killings and enforced disappearances.*

These abuses include extrajudicial killings by police forces,<sup>232</sup> auxiliary forces,<sup>233</sup> state sponsored militias and military groups,<sup>234</sup> as well as by private armies acting at the behest of state officials.<sup>235</sup> According to Karapatan Alliance for the Advancement of Peoples' Rights in the Philippines, there have been documented cases of 114 victims of extrajudicial killings in the past two years alone.<sup>236</sup> Although President Benigno Aquino promised to dismantle paramilitary groups and militias, many of which have perpetrated egregious killings, the government of the Philippines has yet to act to disband or disarm them.<sup>237</sup> Despite these ongoing violations, the U.S. continues to sell small arms and light weapons to the Philippines.

### 3. Arms Trade Treaty

In July 2012, the Arms Trade Treaty (ATT) diplomatic conference convened in New York. The ATT negotiation process ended without a final resolution after a number of governments, including the United States, demanded additional time to review and agree upon a

---

<sup>231</sup> Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the Philippines*. U.N. HCR 106th Sess. U.N. Doc. CCPR/C/PHL/CO/4 (2012).

<sup>232</sup> Amnesty International Annual Report 2011, available at <http://www.amnesty.org/en/region/philippines/report-2011>

<sup>233</sup> Herman Joseph S. Kraft, *The Foibles of an Armed Citizenry: Armed Auxiliaries of the State and Private Armed Groups in the Philippines (Overview)* 187, in PRIMED AND PURPOSEFUL: ARMED GROUPS AND HUMAN SECURITY EFFORTS IN THE PHILIPPINES (Diana Rodriguez ed., 2010).

<sup>234</sup> The Philippine Commission on Human Rights, *On the Revival of Civilian Armed Forces Geographical Units (CAFGUs)*, available at [http://www.chr.gov.ph/MAIN%20PAGES/about%20hr/advisories/pdf\\_files/abthr009.pdf](http://www.chr.gov.ph/MAIN%20PAGES/about%20hr/advisories/pdf_files/abthr009.pdf).

<sup>235</sup> Human Rights Watch, *"The Own the People": The Amputuans, State-backed Militias, and Killings in the Southern Philippines* (Nov. 16, 2010), available at <http://www.hrw.org/en/reports/2010/11/16/they-own-people-0>.

<sup>236</sup> KARAPATAN, *Aquino Perpetuates Impunity* (November 23, 2012), <http://www.karapatan.org/Aquino+perpetuates+impunity>.

<sup>237</sup> Human Rights Watch, *Philippines: No Progress Disarming, Demobilizing Militias* (November 21, 2012), available at <http://www.hrw.org/news/2012/11/21/philippines-no-progress-disarming-demobilizing-militias>.

draft text for the treaty.<sup>238</sup> One of the primary areas of concern highlighted by conference chair, Ambassador Moritán, on the penultimate day of the diplomatic conference was the inclusion of ammunition and munitions under the scope of the ATT.<sup>239</sup> The U.S. and a small number of other states sought to exclude ammunition and munitions, due in part to a concern that ammunition represented a “fundamentally different commodity,” which posed “significant burdens associated with licensing, authorizations, and recordkeeping...”<sup>240</sup> This U.S. resistance had a great impact on the ATT negotiation process: despite the majority of member states’ support for the inclusion of ammunition and munitions in the ATT, the most recent draft text failed to include ammunition and munitions under the scope of the ATT, and only briefly referred to ammunition in the export section of draft article 6.4.<sup>241</sup>

On November 7, 2012, the First Committee of the U.N. General Assembly voted in favor of a resolution to conclude negotiations at a diplomatic conference in March, 2013.<sup>242</sup> The United States has expressed its commitment to the successful drafting of a strong ATT and the full implementation of the U.N. Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (POA).<sup>243</sup>

The State party is encouraged to maintain its support for a robust ATT, and to revisit its opposition to the regulation of ammunition under the ATT. Ammunition is a necessary component of arms abuse, and must be included in an ATT that can effectively respond to and prevent human rights abuses.<sup>244</sup> Though the U.S. occupies the greatest global market share in

---

<sup>238</sup> Press Release, Control Arms, U.N. Diplomats Agree to Conclude Arms Trade Treaty Negotiations in 2013 (Nov. 7, 2012), available at <http://speakout.controlarms.org/wordpress/wp-content/uploads/2012/11/UN-Diplomats-agree-to-conclude-Arms-Trade-Treaty-negotiations-in-2013-1.pdf>.

<sup>239</sup> Control Arms Daily Summary – ATT Diplomatic Conference 2012, Evening Plenary, July 26, 2012, available at [http://fredslaget.no/attachments/article/3064/DipCon\\_Daily%20Summary\\_26%20July\\_Evening%20Session.pdf](http://fredslaget.no/attachments/article/3064/DipCon_Daily%20Summary_26%20July_Evening%20Session.pdf).

<sup>240</sup> Thomas Countryman, State Dep’t Assistant Secretary of the Bureau of Int’l Security and Nonproliferation, Statement before the U.N. Conference on the Arms Trade Treaty (July 10, 2012). See also, Ray Acheson, *Editorial: Demanding More From an Arms Trade Treaty*, 5(18) ARMS TRADE TREATY MONITOR 1 (July 27, 2012), available at <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/monitor/ATTMonitor5.18.pdf>.

<sup>241</sup> *Id.*

<sup>242</sup> G.A. Draft Res. A/C.1/67/L.11, U.N. Doc. A/C.1/67/L.11 (Oct. 18, 2012); Press Release, Control Arms *supra* note 238.

<sup>243</sup> Walter S. Reid, U.S. Deputy Permanent Representative to the Conference on Disarmament Delegation of the United States of America, Statement before the Conventional Weapons Segment of Thematic Debate in the First Committee of the Sixty-seventh Session of the United Nations General Assembly 1–2 (Oct. 24, 2012), available at [http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com12/statements/24Oct\\_US.pdf](http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com12/statements/24Oct_US.pdf).

<sup>244</sup> Hilde Wallacher & Alexander Harang, *Small, But Lethal: Small Arms Ammunition and the Arms Trade Treaty* 6, 10, PRIO (2011), available at [http://controlarms.org/wordpress/wp-content/uploads/2011/03/Small-but-Lethal-Small-Arms-Ammunition-and-the-Arms-Trade-Treaty.PRIO\\_.pdf](http://controlarms.org/wordpress/wp-content/uploads/2011/03/Small-but-Lethal-Small-Arms-Ammunition-and-the-Arms-Trade-Treaty.PRIO_.pdf).

export of small arms ammunitions,<sup>245</sup> its obligations to protect the right to life under the ICCPR caution against promoting an ATT that does not substantively prevent the unregulated transnational transfer of ammunition. Finally, the State party is encouraged to work with other States in the ATT negotiation process to close loopholes in the most recent draft text, remove blanket veto powers, and support strong SALW and ammunitions export regulations, particularly with regard to transfers to violators of human rights and international humanitarian law.<sup>246</sup>

### III. CONCLUSION

The prevalence of SALW continues to compromise the achievement of human rights in the United States, in particular the large number of deaths caused by gun violence. We thank the Committee for its interest and hope that attention to SALW issues can assist in deterring future violations.

***Submitted by:***

Jennifer M. Green, J.D.  
Laura Matson, MSc  
Thea Reilkoff, Dina Al-Shorafa,  
Savir Punia, Rachel Blackhurst  
Human Rights Clinic  
University of Minnesota Law School  
229 19<sup>th</sup> Avenue South  
Minneapolis, MN 55455  
Tel: +1-612-625-7247  
jmgreen@umn.edu

Barbara A. Frey, J.D.  
Director, Human Rights Program,  
Institute for Global Studies  
University of Minnesota  
14 Social Sciences Building  
267 19th Avenue South  
Minneapolis, MN 55455  
Tel: +1-612-626-1879  
freyx001@umn.edu

---

<sup>245</sup> Norwegian Initiative on Small Arms Transfers, Trade Database, *available at* <http://www.prio.no/NISAT/Small-Arms-Trade-Database/>; Norwegian Initiative on Small Arms Transfers, NISAT Arms Trade Mapper, *available at* <http://www.prio.no/NISAT/NISAT-Arms-Trade-Mapper/>.

<sup>246</sup> Ray Acheson, *Editorial: A Pause for Reflection*, 5(19) ARMS TRADE TREATY MONITOR 2 (July 30, 2012), *available at* <http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/monitor/ATTMonitor5.19.pdf> (arguing that the “ATT process demonstrated that there is already an overwhelming norm against transferring arms when there is a risk of violation of human rights and international humanitarian law, including acts of gender-based violence.”). *See also* Press Release, Oxfam Int’l, Arms Trade Treaty Negotiations Threatened by Diplomatic Damocles’ Sword (Oct. 14, 2012, *available at* <http://www.oxfam.org/en/pressroom/pressrelease/2012-10-15/arms-trade-treaty-negotiations-threatened-diplomatic-damocles-sword>).