IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

in the advisory proceedings concerning the

ACTIVITIES OF PRIVATE ARMS MANUFACTURERS

presented by the United Mexican States on 11 November 2022

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A. INTRODUCTION

1. These submissions are made by Agora International Human Rights Group, Centro de Estudios Legales y Sociales (Argentina), Hungarian Civil Liberties' Union, KontraS (Indonesia), Kenya Human Rights Commission and Legal Resources Centre (South Africa) as *amici curiae*. The interveners are NGOs who are members of the International Network of Civil Liberties' Organizations (INCLO).[1] The details on individual intervening organisations are provided in the appendix.

2. These submissions will deal with questions 2 and 3 under section A and questions 6 and 7 under section B of the request for advisory opinion. Consequently, the submissions will start with setting out obligations of States to prevent violence (question 3, section "B" below) and proceed to the obligation to enforce regulations of the activities of private arms manufacturers based on the concept of "business and human rights" (question 2, section "C" below). They will further discuss the human rights implications of the immunities from suit (question 6, section "D" below) and related remedies (question 7, section "E" below).

B. STATE OBLIGATIONS TO PREVENT VIOLENCE

3. This section will provide an overview of international human rights law relating to the State obligations to prevent violence to individuals that may result in loss

[1] www.inclo.net

of life or bodily harm. While the law accepts that such obligations exist, it does not impose an obligation of result that such harm does not happen, rather it takes into account the difficulties in policing unpredictable human behaviour. This section will explore the interpretation and application of the State duty to protect individuals from violence from outside the American System, specifically, under the International Covenant on Civil and Political Rights ("ICCPR", see "a" below), under the European Convention on Human Rights ("European Convention" or "ECHR", see "b" below) and also in the African system (see "c" below).

a. States' obligations under the ICCPR

4. It is well-established under international human rights law that the States bear not only the obligation not to deprive individuals of their life arbitrarily, but also act to protect life. As the Human Rights Committee concluded in General Comment no. 36 on Article 6 of the International Covenant on Civil and Political Rights (Right to life), States must also ensure the right to life and exercise due diligence to protect the lives of individuals against deprivations caused by persons or entities whose conduct is not attributable to the State (CCPR/C/GC/36, 3 September 2019, para. 7). This obligation extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life.

5. With particular regard to the threats to life stemming from gun violence, the Committee found that States parties should disband irregular armed groups, such as private armies and vigilante groups, that are responsible for deprivations of life and reduce the proliferation of potentially lethal weapons to unauthorised individuals (ibid., para. 21; see also Concluding observation on the 4th Periodic Report of the USA, CCPR/C/USA/CO/4, 23 April 2014, para. 10).

b. Interpretation of States' obligations under the ECHR

6. The positive obligation under the European Convention requires both the establishment and enforcement of a regulatory framework for firearms ("i") and also taking operational measures to prevent deaths from firearms ("ii").

i. Obligation to establish a regulatory framework

7. As regards the obligation to establish and enforce a regulatory framework, the Court ruled in *Makaratzis v. Greece* that police officers should not be left in a vacuum when performing their duties, whether in the context of a prepared operation or a spontaneous chase of a person perceived to be dangerous: a legal and administrative framework should define the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the

international standards which have been developed in this respect ([GC], no. 50385/99, 20 December 2004, para. 59).

8. The European Court of Human Rights found violations of that obligation where policemen used firearms off duty. In *Gerasimeko and others v. Russia* the gun had been reported as stolen and should have been kept at the investigator's depot, but was used by a policeman who did not undergo proper psychological assessment and obtained cartridges in violation of the existing regulations (nos. 5821/10 and 65523/12, 1 December 2016, paras. 98-101). In *Gorovenky and Bugara v. Ukraine* the Court also found a violation of Article 2 ECHR because the policeman in question had not been provided with requisite storage for his gun, had to carry it on himself at all times and eventually used it to kill (nos. 36146/05 and 42418/05, 12 January 2012, para. 36). There was no violation of the positive obligation in *Enukidze and Girgvliani v. Georgia* because of the use of firearms by policemen off-duty in a private brawl as the impugned acts, for which they were criminally convicted, had been flagrantly abusive and far removed from the perpetrators' official status (no. 25091/07, 26 April 2011, paras. 298-299).

9. Generally, the European Court has consistently indicated that the States are expected to set high professional standards within their law-enforcement systems and ensure that the persons serving in these systems meet the requisite criteria and, in particular, when equipping police forces with firearms, not only must the necessary technical training be given but the selection of agents allowed to carry such firearms must also be subject to particular scrutiny (*Enukidze and Girgvliani*, cited above, para. 299; *Gorovenky and Bugara*, cited above, para. 38; *Gerasimenko and others*, cited above, para. 102)

ii. Obligation to take operational measures

10. Under the European Convention the obligation to take measures to protect the right to life was first established in the case-law of the European Court of Human Rights in the case of *Osman v. the United Kingdom*. The ECtHR affirmed that Article 2 of the Convention protecting the right to life "enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction" (judgment of 28 October 1998, Reports 1998-VIII, para. 115).

11. What was later named "*Osman* test" was formulated in the following terms:

> where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take

measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (*ibid.*, para. 116).

12. Later the ECtHR accepted that the positive obligation under *Osman* may apply not only to situations concerning the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act, but also in cases raising the obligation to afford general protection to society (as in *Maiorano et autres c. Italie*, n° 28634/05, 15 décembre 2009 ; *Choreftakis et Choreftaki c. Grèce*, n° 46846/08, 17 janvier 2012).

13. The *Osman* test is accordingly as follows:

- whether the authorities knew of the risk to life;
- whether the risk to life was real and immediate;
- whether the authorities were able to take preventive measures;
- whether the measures taken might have reasonably avoided the risk.

14. There was a violation of the obligation to take operative measures to protect life from the risk posed by private actors in *Tagayeva and others v. Russia* (nos. 26562/07 *et al.*, 13 April 2017, ECHR 2017-…). The case concerned hostage-taking at a school in Beslan, North Ossetia (Alania), Russia. The documents disclosed during domestic and international proceedings contained information on the date, location and type of the terrorist attack and clearly demonstrated that the Russian Ministry of Interior had had prior knowledge of the preparation of the attack, its targets and methods. Virtually no preventive measures were taken, so the terrorist attack proceeded having met only a couple of unarmed policemen's resistance.

c. Interpretation of the State obligations in the African system

15. Article 4 of the African Charter on Human and Peoples' Rights guarantees the right to life. On 12 December 2015 the African Commission on Human and Peoples' Rights adopted an interpretative General Comment no. 3 on that provision. In particular, the African Commission concluded that the States have "an obligation to protect individuals from violations or threats at the hands of other private individuals or entities, including corporations" (para. 38). This responsibility of States may also have, according to the African Commission, extraterritorial application (paras. 9 and 14).

16. Developing the obligation on prevention of violence the African Commission pointed out that the States have a "responsibility for those deaths where authorities knew or ought to have known of an immediate threat and failed to take measures that might have been expected to avoid those deaths". This responsibility also applies for killings by private individuals "which are not adequately prevented, investigated or prosecuted by the authorities. These responsibilities are heightened when an observable pattern has been overlooked

or ignored, such as is often the case with respect to mob-justice, gender-based violence, femicide, or harmful practices" (para. 39).

C. STATE ENFORCEMENT OF "BUSINESS AND HUMAN RIGHTS" OBLIGATIONS OF PRIVATE ARMS MANUFACTURERS

17. This section will set out the principles relating to the concept of business and human rights, including the expectation and scope of human rights due diligence from both States and private actors (see "a" below). It will also outline the OECD guidelines regarding responsible business conduct, and standards relating to the States' obligation to fight corruption and its implications for the fight against organised crime (see "b" below).

a. Framework of the United Nations

18. The UN Guiding Principles on Business and Human Rights (UNGPs) endorsed by the Human Rights Council in 2011 is the framework with broadest state support that establishes standards for responsible business conduct. Its main guiding principles are grounded in the interlocking but differentiated responsibilities for states and private businesses:
    a. State duty to **protect,** defend and promote human rights and fundamental freedoms;
    b. Business responsibility to **respect** human rights and the recognition of their role as specialised organs of society. This includes not only avoiding infringement in human rights but addressing adverse human rights impacts with which they might be involved through their activities or business relationships;[2]
    c. And the crucial need for the rights and responsibility to be reflected in appropriate and effective **access to remedy** for victims (see also section "E" below).

19. The UNGP, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, as well as tools developed by the OECD[3] all set forth **due diligence** as one of the primary frameworks for States and businesses to comply with their responsibilities to respect human rights. For corporations, due diligence can be defined as: "the process enterprises should carry out to identify, prevent, mitigate and account for how they address these actual and potential adverse impacts in their own operations, their supply chain and other business relationships."[4] Ruggie, author of the UNGPs, recognized that businesses have the capacity to potentially impact all "internationally recognized rights" and

[2] https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf
[3] Such as the OECD's Due Diligence Guidance For Responsible Business Conduct: https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm
[4] OECD Due Diligence Guidance For Responsible Business Conduct, p. 15.

therefore should pay special attention to rights that are particularly relevant to their sector when conducting human rights due diligence (HRDD).[5]

20. Due diligence efforts exercised by States similarly entail taking positive steps to minimise risks and prevent serious harm from happening. States' positive obligations may include "undertaking environmental and social impact assessments prior to granting a concession for a development project to a company, in consultation with affected communities and acting in good faith."[6]

21. State responsibility may include a "duty of care" that considers a more expansive notion of jurisdiction that "does not refer to the place the breach occurred, but to the relationship between the person and the State with respect to the alleged violation."[7] The IACHR's jurisprudence has also given a broad interpretation to the notion of jurisdiction, stating that "international responsibility may be generated by the State's acts or omissions that produce effects or are carried out outside its territory" (*Victor Saldaño v. Argentina*, inadm. report no. 38/99, 11 March 1999, para. 17).

22. A robust HRDD process conducted, including through human rights impact assessments (HRIAs) should address actual adverse impacts as well as potential adverse impacts and risks. It is particularly important for the business operations, products or services that are inherently risky because they are likely to cause, contribute or directly be linked with adverse impacts. In other instances, the business operations might not be inherently risky, but the circumstances in which the product is acquired or used result in significant risks.[8] They should also ensure to: "(a) draw on internal and/or independent external human rights expertise; and (b) involve meaningful consultation with potentially affected groups and other relevant stakeholders."[9]

23. Due diligence responsibilities should be commensurate with risk and be appropriate to the specific corporation's circumstances and context[10] in order to successfully help anticipate, prevent and mitigate negative human rights impacts. They should consider three main factors: "firstly, the country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose. The second is what human rights impacts their own activities may have within that context, for example, in their capacity as producers, service providers, employers, and neighbours. The third is whether

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[5] Ruggie J. "Protect, respect and remedy: A framework for business and human rights", UN Doc. A/HRC/8/5, 7 April 2008, para. 52.
[6] Cantú Rivera H. "Regional Approaches in the Business and Human Rights Field," (2013) *L'Observateur des Nations Unies*, 35, p. 79.
[7] http://www.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_American_Standards.pdf, para. 151.
[8] OECD Due Diligence Guidance For Responsible Business Conduct, p.16
[9] UNGP, p.19
[10] OECD Due Diligence Guidance For Responsible Business Conduct p.21

they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors."[11]

24. As a last resort, HRDDs may help corporations decide whether or not to go ahead with or discontinue operations because the risk of an adverse impact is too high or mitigation efforts have been unsuccessful. When a company finds that it has contributed or may contribute to an adverse human rights impact, it should "take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible."[12] Similarly, the ongoing and regular carrying out of HRDD assessments should give States the information needed to decide if to carry forward with an agreement with a particular company, or in the case of an existing business relationship, the need to cease this relationship, and whether it should support independent investigations and seek accountability on behalf of victims.

25. Given the complexity of many companies operating and with business relationships across different countries, extraterritorial application of the responsibility to respect human rights must be considered to ensure that people and communities are not left unprotected, and that the appropriate regulation, prevention and effective remedies for investigation and redress are implemented. This has been most robustly developed in debates around the responsibilities of multinational companies involved in extractive industries. During the 149th Period of Session, the Inter-American Commission on Human Rights held a hearing on the human rights situation of people affected by mining in the Americas where article 36 of the OAS Charter was cited to assert the responsibilities not only of home and host States of transnational corporations for their infringement of human rights dispositions and of their duty to protect human rights, but of the very enterprises themselves.[13]

b. Framework of the OECD

26. Many OAS Member States are also either Members of or candidates for the membership in the Organisation for Economic Cooperation and Development ("OECD"). The OECD Guidelines for Multinational Enterprises on Responsible Business Conduct[14] are recommendations addressed by governments to multinational enterprises on strategies to minimise adverse impacts on matters associated with an enterprise's operations, products and services. They cover key areas of business responsibility, including human rights, labour rights,

[11] Ruggie J. "Clarifying the concepts of "sphere of influence" and "complicity" : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises", UN Doc. A/HRC/8/16, 15 May 2008, p. 7.
[12] OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2023), https://mneguidelines.oecd.org/mneguidelines/, p.19.
[13] Cantú Rivera H., *op. cit.*, p. 77.
[14] *Supra*, n. 12

environment, bribery and corruption, consumer interests, disclosure, science and technology, competition, and taxation. The 2023 edition provides updated recommendations for responsible business conduct across key areas such supply and "downstream value" chain due diligence.

27. The added consideration of the downstream human rights impacts in any HRDD[15] process undertaken by a company is a critical one as it not only considers "their suppliers when assessing their human rights impacts, but also how their products and services can impact the enjoyment of right"[16] once they leave the company. This follows the recommendations in the UNGP that states a business bears responsibility for respecting human rights not only within its own activities but with respect to risks which arise from its business relationships. This includes not only business partners in the upstream supply chain, but "relationships with entities in its full value chain […] defined to include entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services."[17]

28. Within its recommendations for business to implement human rights due diligence, the OECD Guidelines for Multinational Enterprises go further to indicate that: "a State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights" (p. 25).

29. OECD has developed obligations of Member States to ensure businesses' compliance with human rights obligations by the application of a binding treaty, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the OECD Anti-Bribery Convention").

30. Insofar as relevant to the present advisory proceedings, the obligations of States to combat corruption and enforce anti-corruption legislation under the OECD framework are as follows.[18] Corruption in the army not only undermines its legitimacy and efficacy but can create significant security concerns. Widespread corruption has weakened armies' ability to halt criminal groups. Although stringent anti-bribery laws have been passed in most OECD countries and compliance has become part of the lexicon of today's businesses, major corruption scandals continue to occur. Governments and international bodies have a vital role to play in promoting more integrity in this sector.

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[15] https://www.ohchr.org/sites/default/files/documents/issues/business/2022-09-13/mandating-downstream-hrdd.pdf

[16] https://media.business-humanrights.org/media/documents/Due_diligence_in_the_downstream_value_chain.pdf, p. 4.

[17] Ibid., p. 5.

[18] https://www.oecd.org/investment/Terrorism-corruption-criminal-exploitation-natural-resources-2017.pdf

31. In many countries, avoiding investigation or detection or impeding ongoing judicial or investigative processes can be accomplished by exerting influence, particularly at lower to mid levels of law enforcement structures. This can benefit organised crime. In the judicial sphere, judges and prosecutors can be corrupted by organised crime groups to escape pre-trial detention and obstruct justice. Since the entry into force of the OECD Anti-Bribery Convention, countries have strengthened their capacities to investigate, prosecute and sanction transnational corruption. The Convention addresses in particular the need to preserve the law enforcement community as well as the judiciary from undue influences in high profile corruption cases.

32. International instruments designed to fight bribery in international business transactions, with the OECD Anti-Bribery Convention at the forefront, are essential and powerful tools to fight corruption in export and import of firearms and make national export and import control regimes more effective. A global and coordinated approach by governments, business and international standard setters is needed.

D. INDUSTRY IMMUNITIES FROM LAWSUITS IN INTERNATIONAL HUMAN RIGHTS LAW

33. This section will firstly discuss the Court's competence to give an advisory opinion on the question 6 of the request (see "a" below) and then the issue of immunities from lawsuit or execution of judgments in public international law and international human rights law (see "b" below).

a. Competence of the Court to give an advisory opinion

34. The *amici* submit that the well-established public international law, as well as the case-law of this Court, affect the scope of an advisory opinion on the question 6 proposed by Mexico. This is because of the proceedings pending before the courts in the United States of America. The limits, however, do not preclude the Court from giving an advisory opinion.

35. A century ago the Permanent Court of International Justice had to decide "whether questions for an advisory opinion, if they relate to matters which form the subject of a pending dispute…, should be put to the Court without the consent of the parties" (PCIJ, *Status of Eastern Carelia*, Advisory Opinion, 23 July 1923, Series B no. 5, p. 27). The PCIJ replied in the negative for "to answer it would involve the duty of ascertaining what evidence might throw light upon the contentions which have been put forward…, and of securing the attendance of such witnesses as might be necessary"; the request thus concerned "a question of fact which could not be elucidated without hearing the parties" (*ibid.*, p. 28). The

Eastern Carelia opinion was later cited with approval by the International Court of Justice (e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, p. 161, para. 56).

36. This Court has adopted criteria to decide on whether to give an advisory opinion consistent with those of the PCIJ and the ICJ. The Court's case law prevents it from exercising its advisory function where the questions relate to pending or potential contentious proceedings before it or seek, even if indirectly, to affect an internal dispute (*Solicitud de Opinión Consultiva presentada por la Comisión Interamericana de Derechos Humanos*. Resolución de 29 de mayo de 2018, cons. 6).

37. The United Mexican States instituted proceedings against seven private arms manufacturers before the US District Court for the District of Massachusetts. On 30 September 2022 a judge of that court dismissed the action relying, in particular, on the Protection of Lawful Commerce in Arms Act ("PLCAA") which granted immunity to arms manufacturers from tort claims (*Estados unidos mexicanos v. Smith & Wesson and others*, Case 1:21-cv-11269-FDS, Document 163). Mexico appealed and the case is currently pending before the US Court of Appeals for the First Circuit (case no. 22-1823, argued on 24 July 2023).

38. It follows, accordingly, that question 6 which concerns immunities of private arms manufacturers from lawsuit has a direct link with pending proceedings in the United States of America where Mexico's claims were precluded by the application of immunity under PLCAA. The fact that the United States of America is not a party to the American Convention does not affect the application of the international law defining the competence of the Court to give advisory opinion (see the above-cited cases of the PCIJ and the ICJ). The link between question 6, even if formulated in generic terms, and pending contentious proceedings is thus direct.

39. Yet a direct link to and even inseparability from a pending dispute does not preclude a court from giving an advisory opinion, as long as the opinion is not dealing with the merits of the dispute. This has been the constant jurisprudence of the ICJ which critically scrutinised and dismissed references of States to the existing disputes (most recently, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports 2019, p. 118, paras. 88-89 (submissions of the United Kingdom); but also: *Wall Opinion*, cited above, pp. 157-159, paras. 46-50 (submissions of Israel); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports 1971, pp. 22-24, paras. 23-26 and 34 (submissions of South Africa)).

40. In this respect it is recalled that the role of this Court's advisory jurisdiction is intended to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the Inter-American system to carry out the functions assigned to them in this field (*"Other treaties" subject to the consultative jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82 of 24 September 1982, Series A no. 1, para. 25). It extends to the interpretation of the treaties adopted within the framework, or under the auspices, of the Inter-American system and other treaties concerning the protection of human rights in the American States. None of those treaties is applicable in the proceedings before the US courts.

41. Consequently, this Court can give advisory opinion on question 6 of the request provided it does not comment on the PLCAA proceedings in the US or the PLCAA's compliance with international law.

b. Immunities from lawsuit in public international law and international human rights law

42. Within the Court's competence to give advisory opinion, the *amici* submit that public international law does provide for immunities from lawsuit. Yet, such immunities are in almost all circumstances reserved for States, not for private entities. In any event, international human rights law sets out the criteria against which immunity provisions can be assessed.

43. It is generally accepted in public international law that States are immune from action before the courts of other States. Where immunity was denied to the State because it prevented compensation to the victims of war crimes and crimes against humanity, that is, *jus cogens* prohibitions in international law, the International Court of Justice upheld the immunity for the reason that it was a rule of customary international law. It pointed out that no conflict existed between a rule of customary international law (State immunity) and rules of customary international law having attained the status of *jus cogens* (crimes against humanity). The former, ICJ ruled, were "procedural in character" and "confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State", not the legality of conduct of the State claiming immunity (ICJ, *Jurisdictional Immunities (Germany v. Italy)*, Judgment, 3 February 2012, ICJ Reports 2012, p. 140, para. 93).

44. In international human rights law the immunities are also largely concerned with the suits brought against foreign States, their diplomatic or consular representations or the forum State's own officials. The immunities are regarded as a limitation of the right of access to court, so they are not absolute.

45. Applying Articles 2 and 14 of the ICCPR, the Human Rights Committee upheld the foreign State immunity from enforcement of compensation awarded by the

courts of the forum State, as "the very essence" of the right to an effective judicial protection was not impaired (*Sechremelis and others v. Greece*, comm. no. 1507/2006, 30 November 2010, para. 10.5). But in *Dassum v. Ecuador* the Committee found that a legislative decree prohibiting to sue or seek judicial review of the actions of the State agency that took over the administration of a bank was a violation of Article 14 ICCPR (comm. no. 2244/13, 22 June 2016, paras. 7.2-7.4).

46. Under Article 6 of the European Convention of Human Rights a highly divided Grand Chamber of the European Court distinguished, by 9 votes to 8, between "immunity from liability", in principle, a substantive limitation rendering Article 6 inapplicable, from an "immunity from suit" suggestive of a procedural limitation (*Roche v. United Kingdom* [GC], no. 32555/96, 19 October 2005, ECHR 2005-X, para. 121). The Court has developed a test which assesses whether a limitation on access to court, including the immunity from suit, pursues a legitimate aim and is proportionate to the aim pursued (*Lupeni Greek Catholic Parish and others v. Romania* [GC], no. 76943/11, 29 November 2016, ECHR 2016-…, para. 89). The *jus cogens* nature of the right of access to court was nevertheless denied by reference to the works of the International Law Commission (*Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016, ECHR 2016-…, paras. 57 and 136).

47. Applying these criteria the Court has held that, for example, immunity of foreign States, their diplomatic representations and international organisation pursues a legitimate aim of complying with international law to promote comity and good relations between States (*Al-Adsani v. the United Kingdom* [GC], no. 35763/97, 21 November 2001, ECHR 2001-XI; *Stichting Mothers of Srebrenica and others v. the Netherlands* (dec.), no. 65542/12, 11 June 2013, ECHR 2013-III). Private gains are not regarded as legitimate aims in the Convention jurisprudence (see, *mutatis mutandis*, *Volchkova and Mironov v. Russia* (merits), nos. 45668/05 and 2292/06, 28 March 2017, para. 117).

48. The immunities of embassies and consulates from lawsuits arising out of employment or commercial disputes were held to be disproportionate (*Cudak v. Lithuania* [GC], no. 15869/02, 23 March 2010, ECHR 2010-…). Immunity of foreign States from compensation claims for torture was, however, maintained as proportionate (*Naït-Liman v. Switzerland* [GC], no. 51357/07, 15 March 2018, ECHR 2018-…).

49. This overview of the case-law from the ICJ, HRC and ECHR developed under public international law and international human rights law shows that the immunity as a bar on access to court is normally concerned with States, their diplomatic and consular representations and international organisation. Conversely, no international court or a human rights organ has upheld immunity

of private persons, even less whole industries, from lawsuit. Should such immunity be enacted and be assessed by a court, public international law and international human rights law provide the criteria for assessment of whether the right of access to court is complied with.

50. The criteria of assessment would thus include:

- whether there is a rule of customary international law upholding the immunity from lawsuit;
- whether the immunity does not impair the very essence of the right of access to court; in particular,
- whether the immunity pursues a legitimate aim; and
- whether the immunity is proportionate to achieve the said legitimate aim.

51. Finally, the *amici* observe that independently of the outcome of a court case on the merits there is value in the trial itself which should not be underestimated in discussing limits on access to justice. Indeed, disclosure, discovery, witness testimony and cross-examination of witnesses, adversarial discussion of evidence and legal arguments in open court have a value of their own. They allow the public at large to have access to the information that would likely not be available otherwise, but that may be important for wider political or social debate.

E. REMEDIES FOR THE LACK OF ACCESS TO JUSTICE

52. Lack of access to justice can happen not only by the operation of immunity, but also by other means: time-limits, statutory limitations, fees and duties (ECtHR, *FC Mretebi v. Georgia*, no. 38736/04, 31 July 2007), absence of legal aid (ECtHR, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, and *Timofeyev et Postupkin c. Russie*, n^{os} 45431/14 et 22769/15, 19 janvier 2021), evidentiary burdens (ECtHR, *Roman Zakharov v. Russia* [GC], no. 47143/06, 4 December 2015, ECHR 2015-…, para. 295, and HRC, *Pezoldova v. Czech Republic*, comm. no. 757/1997, 25 October 2002), costs awards (HRC, *Äärelä and Näkkäläjärui v. Finland,* comm. no. 779/1997, 24 October 2001), denial of enforcement (ECtHR, *Stratis Andreadis and Stran Greek Refineries v. Greece*, judgment of 9 December 1994, Series A no. 301-B, ordered even by an arbitral tribunal, as in *Chevron Corp. and Texaco Petroleum Corp. v. Ecuador*, PCA Case no. 2009-23, First Interim Award on Interim Measures, 25 January 2012). Yet, there is an emerging trend in international human rights law to provide victims with remedies where they lack access to court, in particular by establishing trust funds.

53. As the UNGP put it, when judicial remedy is not available, non-judicial remedies should be "legitimate, accessible, predictable, equitable, transparent,

rights-compatible, a source of continuous learning, based on engagement and dialogue" (principle 31).

54. It is accordingly for the States to step in and create a way to compensate those deprived of access to justice, if, for example, the respondents are unable to pay or the immunities prevent the adjudication of claims. Trust funds are known to be established to act as remedy under both national law (*Fonds de garantie des victimes des actes terroristes et d'autres infractions* in France[19]) and international law (Trust Fund for Victims which implements the reparations awarded by the International Criminal Court[20]).

55. Precisely, where the claims of Italian victims of the Nazi Germany were precluded by the operation of State immunity, so that they could not obtain the enforcement of their claims against Germany in Italy, the latter eventually created a trust fund to compensate them. When the constitutionality of the trust fund was put into question the Italian Constitutional Court upheld the regulations establishing the trust fund for the reason that it compensated for the lack of access to justice created by the operation of State immunity under international law (sentenza n. 159 del 2023 del 21 luglio 2023, ECLI:IT:COST:2023:159, para. 11). A similar proposal to establish a trust fund was made in the context of Russia's denial of payment of just satisfaction to successful applicants before the European Court of Human Rights after Russia's expulsion from the Council of Europe.[21]

F. CONCLUSION

56. For these reasons the *amici* submit that the questions in the request for advisory opinion should be answered as follows:

- Question 2: States are under the obligation to protect and promote human rights and ensure businesses' respect of human rights, in particular, by promoting human rights due diligence across corporations' full supply and value chains that minimise risks and address human rights impacts, fighting corruption in public and private sector alike, and enforcing import and export controls of firearms;

- Question 3: international human rights law requires States to take positive measures to prevent risk to life, this measures include enacting and enforcing accessible and foreseeable regulations on the use of firearms and, where the risk is known and imminent, taking operative measures to prevent it;

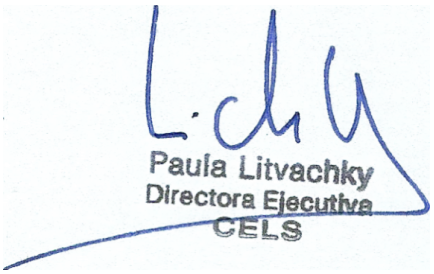
[19] https://www.fondsdegarantie.fr/en/home-2/
[20] https://www.trustfundforvictims.org/
[21] https://verfassungsblog.de/moving-on-in-strasbourg/

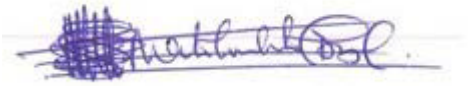
- Question 6: international human rights law does not provide for any immunities from suit for private persons or whole industries, where such immunities are enacted, they should not impair the right of access to court, in particular, by pursuing a legitimate aim and being proportionate to that aim;
- Question 7: where no access to justice is possible States should introduce effective non-judicial remedies, which are legitimate, accessible, predictable, equitable, transparent, and rights-compatible, including establishment of trust funds for victims.

Respectfully submitted,

For Agora International Human Rights Group
Pavel Chikov, Chairperson

For Centro de Estudios Legales y Sociales
Paula Litvachky, Executive Director





For KontraS
Indria Fernida, Chairperson

For Legal Resources Centre
Nersan Govender, Director

INFORMATION ON THE INTERVENING ORGANISATIONS

Agora International Human Rights Group
Agora is a network of more than 100 lawyers and other legal professionals working on landmark human rights cases domestically and internationally. A response unit that handles incidents involving human rights violations operates across several European countries. Agora is currently representing applicants in several hundred applications brought before the European Court of Human Rights (ECHR). They also provide support to political immigrants, persons who have been forced to leave Russia due to persecution by the authorities and asylum seekers. Agora is also active across post-Soviet States where the negative impact of Russian authorities on the human rights situation is strongly felt.

Centro de Estudios Legales y Sociales (CELS)
CELS is an Argentine organisation that works to protect and expand the effective exercise of human rights, justice and social inclusion at a national and international level. It was founded in 1979 as an urgent response to the enforced disappearances and other atrocities being committed during the country's last dictatorship. After the return to civilian rule in 1983, while preserving its flagship work on transitional justice, CELS transitioned to an expanded agenda addressing violations under democracy and the structural causes of inequality and human rights violations on matters of citizen security, economic, social and cultural rights (ESCR), judicial reform, prisons and criminal justice, mental health, migrants' rights, freedom of expression, civilian control of the Armed Forces and, more recently, decent habitat and labour outsourcing.

Hungarian Civil Liberties Union (HCLU)
The HCLU is a law reform and watchdog public interest NGO in Hungary, working independently of political parties, the state or any of its institutions. Since its foundation in 1994, the HCLU has been working towards everybody being informed about their fundamental human rights and being empowered to enforce them against undue interference by those in positions of public power. In the areas of political freedoms (including the freedom of speech and he press, the right of assembly, etc.), privacy rights and equality, HCLU monitors legislation, pursues strategic litigation (200 cases annually), provides free legal aid (in more than 4500 cases per year), provides training and launches awareness raising media campaigns in order to mobilise the public. HCLU initiates the implementation and amendment of legislation, and seeks to change enforcement practice in law. HCLU also cooperates with many domestic and foreign human rights organisations and institutions, and do effective advocacy and outreach.

Kenya Human Rights Commission (KHRC)
The KHRC is a premier and flagship non-governmental human rights and governance institution in Africa that was founded in 1992 with a mission to foster human rights, democratic values, human dignity and social justice. They deal with human rights and

social justice issues and situations at all levels in the society. The KHRC's interventions are executed under four interdependent strategic objectives and thematic programs: Civil and Political Rights; Economic and Social Rights; Equality and Non-Discrimination and Institutional Development and Sustainability. The KHRC is recognized for its long history, tenacity, consistency, expertise, and passion in providing technical and political leadership around the pertinent human rights and governance programs at all levels.

KontraS

KontraS (the Commission for the Disappearances and the Victims of Violence), which was born on 20 March 1998, is a task force formed by a number of civil society organisations and community leaders of Indonesia. This task force was originally named KIP-HAM, which was formed in 1996. As a commission that works to monitor human rights issues, KIP-HAM received many complaints and input from the public, both victims and communities who dared to express their aspirations about the human rights problems that occurred in their area.

Legal Resources Centre (LRC)

The Legal Resources Centre is an independent, client-based, non-profit public interest law clinic which uses law as an instrument of justice. It was established in 1979 and is South Africa's largest public interest, human rights law clinic. In addition to its national office , LRC has four regional offices, in Cape Town, Durban, Grahamstown and Johannesburg. In its earlier years, the LRC challenged the legal mechanisms used by the apartheid government to oppress millions of South Africans. Since 1994, the LRC has focused on making the South African Constitution a living document and ensuring that the rights and responsibilities enshrined therein are respected, promoted, protected and fulfilled using a range of strategies including impact litigation, law reform and networking. The LRC provides legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances.