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## SECTION I

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# INTERGOVERNMENTAL MECHANISMS



# Rana Plaza

BANGLADESH, Dhaka: National Garments Worker Federation organized grand rally with Rana Plaza & Tazreen Fashion survivors in front of press club demanded their compensation under "loss of earning" system.  
©Photo by Zakir Hossain Chowdhury/NurPhoto

## SECTION I

# INTERGOVERNMENTAL MECHANISMS

## PART I

### The United Nations System for the Promotion and Protection of Human Rights

**Every year thousands of complaints of alleged human rights violations are processed by** the United Nations system for the promotion and protection of human rights.

The system is mainly based on two types of mechanism:

- Mechanisms linked to bodies created under the **United Nations human rights treaties** (Treaty-based bodies and mechanisms);
- Mechanisms linked to **United Nations charter-based bodies**.

So far these mechanisms have been under-utilised for invoking the responsibility of states when business enterprises operating on their territory commit human rights violations. These mechanisms are unable to issue enforceable sanctions on either states or companies; they can only show up states in a shameful light. However, NGOs have a crucial role to play in ensuring that such procedures are as effective as possible.

# CHAPTER I

## United Nations Treaty-Based Mechanisms

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### Main United Nations human rights instruments and obligations of States Parties

The United Nations system for the promotion and protection of human rights is based on the Universal Declaration of Human Rights and the core international treaties that have given it legal form. The rights established by these instruments are **universal, indivisible, interdependent and interrelated** and they belong to each individual person.<sup>1</sup>

The **nine core United Nations human rights treaties** are the following:

- International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December, 1966, entered into force on 23 March 1976.
- International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted on 16 December 1966, entered into force on 3 January 1976.
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted on 21 December 1965, entered into force on 4 January 1969.
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted on 18 December 1979, entered into force on 3 September 1981.
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, entered into force on 26 June 1987.
- Convention on the Rights of the Child, adopted on 20 November 1989, entered into force on 2 September 1990.
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted on 18 December 1990, entered into force on 1 July 2003.
- Convention on the Rights of Persons with Disabilities, adopted on 12 December 2006, entered into force on 3 May 2008.
- International Convention for the Protection of All Persons from Enforced Disappearance, open to signature on 6 February 2007, not yet entered into force.

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<sup>1</sup> UN, *Vienna Declaration and Programme of Action*, adopted and signed on 9 October 1993, § 5.

**Protocols** were added to some of these instruments. These protocols are designed either to develop the protection of certain specific rights (such as a system for prisons' visit in the case of the Optional Protocol to CAT) or to create mechanisms enabling individuals to submit complaints. Accession to the protocols remains optional for the States Parties to the corresponding conventions.

- Optional Protocol to ICCPR of 16 December 1966.
- Second Optional Protocol to ICCPR of 15 December 1989, aiming at the abolition of the death penalty.
- Optional Protocol to the Convention on the Elimination of Discrimination Against Women of 10 December 1999.
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 25 May 2000.
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 25 May 2000.
- Optional Protocol to the Convention against Torture of 18 December 2002.
- Optional Protocol to the Convention on the Rights of Persons with Disabilities of 13 December 2006.
- Optional Protocol to the ICESCR of 10 December 2008.

### Obligations of states

Each Member State Party to an instrument assumes the general obligation to respect, protect and fulfil the rights and freedoms concerned:

- Obligation to **respect**: the state must refrain from interfering with or hindering or curtailing the exercise of such rights by individuals.
- Obligation to **protect**: the state must protect individuals and groups against violations of their rights by others, including by private actors.
- Obligation to **fulfil** or implement: the state must facilitate the exercise of such rights by all.

In deciding to subscribe to international human rights conventions, states commit to take appropriate measures of a legislative, judiciary, administrative or other nature to guarantee the exercise of the rights specified for all individuals falling within their jurisdiction. The **Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights** were adopted in 2011 by a group of legal experts. The United Nations Charter<sup>2</sup> already specifies the obligation for a state not to undermine human rights in another country, obliges states to provide international assistance and cooperation to help others realise these human rights. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights<sup>3</sup> (ICESCR) contain similar

<sup>2</sup> See in particular: *UN, United Nations Charter*, signed on 26 June 1945, art. 55.

<sup>3</sup> Five ICESCR articles deal with the obligation to lend international assistance and co-operation. See in particular UN, ICESCR, adopted on 16 December 1966, entered into force on 23 March 1976, art. 2.

obligations. ICESCR also specifies that states must refrain from any activity liable to hinder the realisation of economic, social and cultural rights in another country.

## **Responsibility of states regarding acts committed by private actors**

Although international instruments are only binding on the States Parties to discharge their international obligations, states must protect individuals not only against violations by their agents, but also against acts committed by private persons or entities – including therefore multinational corporations. If the state defaults on its obligation to protect, the acts concerned can be imputed to it, regardless of whether the private person can be prosecuted for the acts perpetrated.

At the moment, human rights instruments only deal with businesses indirectly as “organs of society”; there is currently no international convention directly dealing with the responsibility of non-state actors. However, an international consensus has emerged recognizing the responsibility of business enterprises to respect human rights.

The UN Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, elaborated in 2003 by the Sub-Commission on the Promotion and Protection of Human Rights, aimed at codifying the respective responsibilities of states and business enterprises. However, despite raising these important issues, the Norms were never adopted. In 2005, a new special procedure, the UN Secretary General Special Representative on the issue of Human Rights and Business was established to clarify the concepts and responsibilities of states and business enterprises. Mr John Ruggie, Special Representative, was charged with this question between 2005 and 2011.

In his 2008 report entitled “Protect, Respect and Remedy: a framework for Business and Human Rights”, John Ruggie proposed a Framework based on three pillars: The obligation of the state to protect, the corporate responsibility to respect and access to remedies for victims of human rights violations.

In June 2011, at the end of the mandate of the Special Representative, the UN Human Rights Council unanimously adopted the Guiding Principles on Business and Human Rights for implementing the UN “Protect, Respect and Remedy” framework<sup>4</sup>. This text, which is not legally binding, aims at operationalizing the three pillars of the Framework. At the same time, the Human Rights Council decided to establish a Working Group on the issue of human rights and transnational cor-

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4 HRC, Resolution 17/4, *Human rights and transnational corporations and other business enterprises*, <http://daccess-dds-ny.un.org> For a critical approach of the Guiding Principles: *Joint Civil Society Statement on the Draft Guiding Principles*, 31 January 2011, [www.fidh.org](http://www.fidh.org).

porations and other business enterprises, consisting of five independent experts, of balanced geographical representation, for a period of three years<sup>5</sup>. In June 2014, the Human Rights Council decided to extend the Working Group's mandate for a period of three years<sup>6</sup>. The Human Rights Council also decided to create a multi-stakeholder Forum on Business and Human Rights, to be held annually under the guidance of the Working Group.

## THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS<sup>7</sup>

### Pillar I: State duty to protect

In the first pillar of the framework John Ruggie confirms the basic principle of international law that states have an obligation to protect human rights against actions of non-state actors, including corporations. States have to take measures to fulfil this obligation, including the enactment of legislation. States are also expected to hold non-state actors accountable if they commit human rights violations. States should take additional steps to make sure businesses that they control or with whom they contract respect human rights. States should ensure greater policy coherence of their trade and investment policies with their human rights obligations including when acting as members of multilateral institutions. **The main point of debate relates to states' extraterritorial obligations.** In other words, the obligation of states where parent companies of multinational corporations are incorporated in their jurisdiction to regulate the activities of these corporations outside their territories and to eventually sanction them if found to be involved in human rights violations abroad.

### Pillar II: Corporate responsibility to respect

Although the idea that international legal obligations can be directly imposed on companies is still controversial, the Guiding Principles clearly establish that business enterprises should, at all times, respect all human rights. According to John Ruggie, this derives not only from legal obligations but also from the necessity for corporations to obtain a social licence to operate. This means businesses should avoid infringing on the human rights of others and should address adverse human rights impacts in which they are involved. In order to do so, companies should conduct due diligence<sup>8</sup> to identify, prevent, mitigate and account for how they address adverse impacts on human rights.

<sup>5</sup> See the UN Working Group's mandate on <http://www.ohchr.org/>

<sup>6</sup> HRC, Resolution 26/22, *Human rights and transnational corporations and other business enterprises* <http://daccess-dds-ny.un.org>

<sup>7</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, [www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

<sup>8</sup> For an explanation of the due diligence concept, see Section II on judicial mechanisms.

## Pillar III: Access to remedy

The Guiding Principles recognise that states must ensure that those affected have access to effective remedy. The Special Representative has been criticized by NGOs for his weak and ambiguous interpretation of the right to an effective remedy, and for focusing too much on non-judicial remedies, falling short of providing strong recommendations to bring justice and reparation to victims.

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## TOWARDS AN INTERNATIONAL BINDING INSTRUMENT

On 26<sup>th</sup> June 2014, the Human Rights Council adopted a resolution<sup>9</sup> establishing an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. The adoption of this resolution, tabled by Ecuador and South Africa, echoed a global call from over 600 civil society organisations and social movements in over 90 countries,<sup>10</sup> most of which continue to actively advocate for a binding treaty through the Treaty Alliance. 20 States voted in favour<sup>11</sup>, 14 States voted against<sup>12</sup> and 13 States abstained<sup>13</sup>. FIDH welcomed this initiative for the development of an international legal framework on business and human rights as a promising step towards corporate accountability, and actively participated in the first session of the intergovernmental open-ended working group in July 2015<sup>14</sup>. FIDH hopes this intergovernmental process can contribute to further clarifying and codifying existing obligations and ensure redress for corporate-related abuses<sup>15</sup>.

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9 HRC, Resolution 26/9, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, [www.ihrb.org/pdf/G1408252.pdf](http://www.ihrb.org/pdf/G1408252.pdf).

10 Bangkok Joint Statement, 2013, available at [www.treatymovement.com](http://www.treatymovement.com).

11 Algeria, Morocco, Ethiopia, Kenya, Burkina Faso, Ivory Coast, Congo, Benin, Namibia, South Africa, Pakistan, India, Indonesia, the Philippines, Kazakhstan, Vietnam, China, Russia, Venezuela and Cuba.

12 Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America.

13 Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates.

14 See FIDH's written submission and oral statements at [www.fidh.org/article18033](http://www.fidh.org/article18033).

15 *Business and Human Rights: Enhancing Standards and Ensuring Redress*, FIDH, March 2014, [www.fidh.org](http://www.fidh.org).



# Monitoring activities of the treaty bodies

For each of the main United Nations human rights treaties a committee is created to monitor Member States' adherence to the convention and its implementation. The Committees are composed of independent experts who are elected, normally for a period of four years, by the Member States. The Committees have several instruments and procedures for examining Member States' adherence to their international commitments:

1. General comments
2. State reports
3. Inter-state complaints
4. Individual complaints
5. Inquiries or visits
6. Referral to the United Nations General Assembly<sup>16</sup>

## 1. General comments

General comments are the main instrument by which Committees publish **their interpretation of certain provisions** of international human rights conventions and the corresponding obligations assumed by states.

General comments are predominantly issued to elaborate on the meaning of specific rights or certain aspects of the monitoring procedures. They can prove very useful for plaintiffs lodging individual complaints.

## The Committees in action regarding states' obligations towards business enterprises

### Human Rights Committee (CCPR), General Comment No. 31

"The Covenant (on Civil and Political Rights) itself envisages in some articles certain areas where there are **positive obligations on States Parties to address the activities of private persons or entities**. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26."<sup>17</sup>

### Committee on Economic, Social and Cultural Rights (CESCR) –The Right to Health, General Comment No. 14

"While only states are parties to the Covenant and thus ultimately accountable for compliance with it, **all members of society** – individuals, including health professionals, families,

<sup>16</sup> Applies to the Committee on Enforced Disappearances if it receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State Party. See UN Convention on Enforced Disappearances, signed on 20 december 2006, art. 34.

<sup>17</sup> CCPR, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, *op.cit.*

local communities, intergovernmental and non-governmental organisations, civil society organisations, **as well as the private business sector – have responsibilities regarding the realization of the right to health.** State Parties should therefore provide an environment which facilitates the discharge of these responsibilities. [...] **States Parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to health in pursuing their activities.**"<sup>18</sup>

#### **CESCR – The right to adequate housing: forced evictions, General Comment No. 7**

"The practice of forced evictions is widespread and affects persons in both developed and developing countries. [...] Forced evictions might be carried out in connection with conflict over land rights, development and infrastructure projects, such as the construction of dams or other large-scale energy projects. [...] It is clear that legislation against forced evictions is an essential basis upon which to build a system of effective protection. [...] **The legislation must also apply in relation to all agents acting under the authority of the state or who are accountable to it.**"<sup>19</sup>

#### **CRC – State obligations regarding the impact of the business sector on children's rights, General Comment No. 16**

"Host States have the primary responsibility to respect, protect and fulfil children's rights in their jurisdiction. **They must ensure that all business enterprises, including transnational corporations operating within their borders, are adequately regulated within a legal and institutional framework that ensures that they do not adversely impact on the rights of the child and/or aid and abet violations in foreign jurisdictions.**

Home States also have obligations, arising under the Convention and the Optional Protocols thereto, to respect, protect and fulfil children's rights in the context of businesses' extra-territorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned. A reasonable link exists when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned. When adopting measures to meet this obligation, States must not violate the Charter of the United Nations and general international law nor diminish the obligations of the host State under the Convention.

**Both home and host States should establish institutional and legal frameworks that enable businesses to respect children's rights across their global operations.** Home States should ensure that there are effective mechanisms in place so **that the government agencies and institutions with responsibility for the implementation of the Convention and the Optional Protocols thereto coordinate effectively with those responsible for trade and investment abroad.** They should also **build capacity so that development assistance agencies and overseas missions that are responsible for promoting trade can integrate business issues**

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<sup>18</sup> CESCR, *The right to the highest attainable standard of health*, General Comment No. 14, 11 August 2000, E/C.12/2000/4 (2000), §§ 42 and 55.

<sup>19</sup> CESCR, *Forced evictions, and the right to adequate housing*. General Comment No. 7, 20 May 1997, E/1998/22, annex IV at 113 (1998), §§ 4, 7, 9, 13 and 14.

into bilateral human rights dialogues, including children's rights, with foreign governments. States that adhere to the OECD Guidelines for Multinational Enterprises should support their national contact points in providing mediation and conciliation for matters that arise extra-territorially by ensuring that they are adequately resourced, independent and mandated to work to ensure respect for children's rights in the context of business issues.<sup>20</sup> Recommendations issued by bodies such as the OECD national contact points should be given adequate effect."<sup>21</sup>

## 2. State reports

It is the task of each United Nations Committee to receive and examine the reports submitted regularly to them by the States Parties. These reports detail the progress a Member States has made on implementing the instrument that they have undertaken to comply with.

The process for monitoring the reports – the main mission of the treaty bodies – is designed to be a **constructive dialogue between the Committee and the state** delegation concerned<sup>22</sup>.

The state first submits an initial report, then (approximately every 4 years) submits periodic reports on progress achieved and legislative, judiciary, administrative or other measures taken or modified to give effect to the rights concerned. These reports also detail any obstacles or difficulties Member States have encountered over the previous reporting period.

### ② Process and outcome

#### *Process*<sup>23</sup>

- On the basis of the report submitted, the Committee begins by drawing up a **preliminary list of issues and questions** that is sent to the state concerned. If necessary the state may then send back further information and prepare itself for further discussions with the experts.
- The state is then invited to send a delegation to the Committee's session during which the report will be examined, so that government representatives can answer

<sup>20</sup> For more information on the OECD Guidelines for Multinational Enterprises and the National Contact Points, see Part I in Section III of the guide.

<sup>21</sup> CRC, *State obligations regarding the impact of the business sector on children's rights*, General Comment No. 16, 17 April 2013, CRC/C/CG/16, Part C on "Children's rights and global operations of business"

<sup>22</sup> CCPR, *Consolidated guidelines for State reports*, 26 February 2001, CCPR/C/66/GUI/Rev.2, § G.1.

<sup>23</sup> The following passages are largely based on OHCHR, *The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies*, Fact Sheet No. 30, p. 23 and following.

directly to the questions put by the Committee, and provide additional information. If a state refuses to send a delegation, some Committees decide to examine the report in the absence of any official representation, while others postpone the examination.

- Other information on the human rights situation in the country concerned may be provided to assist the Committees in their examination of state reports. The Committee on Migrant Workers (CMW), for instance, regularly bases its examination on data gathered by the International Labour Organisation.
- The examination of the state report culminates in the Committee’s adoption of its **concluding observations, or comments**. These acknowledge the positive steps taken and identify areas where more needs to be done by the Member State to protect the rights concerned. The aim of the experts’ conclusions is to give the state practical advice and concrete recommendations for improved implementation or adherence to the particular Convention. States are invited to **publicize** the observations.

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## THE ROLE OF NGOS IN THE MONITORING PROCESS FOR STATE REPORTS

NGOs have a central role to play in the process for drawing up the state reports.

Some states arrange a direct consultation with NGOs when preparing their report, before it is submitted to the Committee. The remarks of the civil society organisations can thus be included in the final document. Once the official report is drawn up, it can also be presented and discussed in meetings with NGOs, organised on the initiative of the state’s authorities or civil society.

NGOs can draw up a **parallel report** (or ‘shadow report’) to the government’s report which describes how NGOs see the realisation of the protected rights at the national level.

Parallel reports can be sent directly to the Committees up to one month before the Committee’s examination. NGOs can present information to the experts at informal “briefing” sessions, and may be present during the examination of the governmental report.

All Committees can be contacted via the Office of the United Nations High Commissioner for Human Rights in Geneva:

[Name of Committee]

Office of the United Nations High Commissioner for Human Rights

Palais des Nations

8-14, avenue de la Paix

CH-1211 Geneva 10 – Switzerland

Fax: +41 (0)22 917 90 29

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## Follow up

The state is obliged to report on progress made in the implementation of the Convention in its next periodic report.

However, in some cases a specific follow-up procedure is applied.<sup>24</sup> Some Committees' final observations require the State Party to **implement** certain specific recommendations on matters of particular concern by a given deadline.

## Outcome

The procedure for monitoring state reports by United Nations Committees of experts has proved itself to be of **significant effectiveness**, owing to:

- The impact that Committees' criticism can have on states which attach importance to their human rights reputation.
- The use that can be made of such criticism by civil society organisations in support of their advocacy activities.
- Useful clarification that concluding observations provide vis-a-vis the content of states' obligations under the various conventions.

However, in practice the effectiveness of the procedure is undermined by a number of difficulties, linked in particular to:

- The **delay** with which states submit their reports (ranging from a few months to several years<sup>25</sup>).
- The **delay** with which the Committees examine them (15 to 22 months on average).
- The **overlapping** obligations states' have to report on (i.e. states often have several reports to submit to different Committees).
- The **lack of adequate resources** of both states and Committees.
- The **poor quality or inaccuracy of some of the state reports**, particularly in the absence of NGO reports.
- The lack of pertinence of the experts' examination, or the absence of any effective follow-up.<sup>26</sup>

<sup>24</sup> OHCHR, *The United Nations. Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies*, op.cit., p. 24.

<sup>25</sup> CCPR, *Reporting obligations of States parties under article 40 of the Covenant*, General Comment No.30, 18 September 2002, CCPR/C/21/Rev.2/Add.12.

<sup>26</sup> CHR, *Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights*, 27 April 2000, E/CN.4/RES/2000/75.

## The Committees in action in relation to corporate-related human rights abuses

### Committee on the Rights of the Child (CRC) – Free Trade agreements and the Rights of the Child – the case of Ecuador

“The Committee finally recommends the State Party to ensure that free trade agreements do not negatively affect the rights of children, *inter alia*, in terms of access to affordable medicines, including generic ones. In this regard, the Committee reiterates the recommendations made by the Committee on Economic, Social and Cultural Rights (E/C.12/1/Add.100)”<sup>27</sup> which strongly urged Ecuador “to **conduct an assessment of the effect of international trade rules on the right to health for all** and to make extensive use of the flexibility clauses permitted in the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement) in order to ensure access to generic medicine and more broadly the enjoyment of the right to health for everyone in Ecuador.”<sup>28</sup>

### Committee on Economic Social and Cultural Rights (CESCR) – Concluding observations on the report submitted by the Russian Federation

“24. The Committee expresses its serious concern that the rate of contamination of both domestically produced and imported foodstuffs is high by international standards, and appears to be caused – for domestic production – by the improper use of pesticides and environmental pollution through the improper disposal of heavy metals and oil spills, and – for imported food – by the **illegal practices of some food importers. The Committee notes that it is the responsibility of the Government to ensure that such food does not reach the market.**

### Committee on the Elimination of Racial Discrimination (CERD) – Concluding observations on the report submitted by Canada

“17. [...] the Committee encourages the State Party to take appropriate legislative or administrative measures to **prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada.** In particular, the Committee recommends that the State Party explore ways to hold transnational corporations registered in Canada accountable. The Committee requests the State Party to include in its next periodic report information on the effects of activities of transnational corporations registered in Canada on indigenous peoples abroad and on any measures taken in this regard.”<sup>29</sup>

### Human Rights Committee - Concluding observations on the report submitted by Germany

“16. While welcoming measures taken by the State party to provide remedies against German companies acting abroad allegedly in contravention of relevant human rights standards, the Committee is concerned that such remedies may not be sufficient in all cases (art. 2, para. 2).

<sup>27</sup> CESCR, *Concluding observations: Ecuador*, 7 June 2004, E/C.12/1/Add.100, § 55.

<sup>28</sup> CRC, *Concluding observations: Ecuador*, 13 September 2005, CRC/C/15/Add.262, § 21.

<sup>29</sup> CERD, *Concluding observations: Canada*, 25 May 2007, U.N. Doc. CERD/C/CAN/18.

The State party is encouraged to **set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations.** It is also encouraged to **take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.**<sup>30</sup>

### **Human Rights Committee – Concluding observations on the report submitted by Canada**

6. While appreciating information provided, the Committee is concerned about allegations of human rights abuses by Canadian companies operating abroad, in particular mining corporations and about the inaccessibility to remedies by victims of such violations. The Committee regrets the absence of an effective independent mechanism with powers to investigate complaints alleging abuses by such corporations that adversely affect the enjoyment of the human rights of victims, and of a legal framework that would facilitate such complaints (art. 2).

The State party should: a) enhance the **effectiveness of existing mechanisms to ensure that all Canadian corporations, in particular mining corporations, under its jurisdiction respect human rights standards when operating abroad;** b) consider establishing an **independent mechanism with powers to investigate human rights abuses by such corporations abroad;** c) and **develop a legal framework that affords legal remedies to people who have been victims of activities of such corporations operating abroad.**<sup>31</sup>

### **CESCR - Concluding observations on the report submitted by Austria**

“12. The Committee is concerned at the **lack of oversight over Austrian companies operating abroad** with regard to the negative impact of their activities on the enjoyment of economic, social and cultural rights in host countries (art. 2).

The Committee **urges the State party to ensure that all economic, social and cultural rights are fully respected and rights holders adequately protected in the context of corporate activities,** including by establishing appropriate laws and regulations, together with **monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations,** as underlined in the Committee’s statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights (E/2012/22, annex VI, section A).<sup>32</sup>

### **CESCR - Concluding observations on the report submitted by Belgium**

“22. The Committee is concerned by reports that the State party’s policy for promoting **agrofuels**, in particular its new Agrofuels Act of 17 July 2013, is likely to encourage large-scale cultivation of these products in third countries where Belgian firms operate and could lead to negative consequences for local farmers (art. 11).

<sup>30</sup> CCPR, *Concluding observations: Germany*, 12 November 2012

<sup>31</sup> CCPR, *Concluding observations: Canada*, July 2015

<sup>32</sup> CESCR, *Concluding observations: Austria*, 13 December 2013

The Committee recommends that **the State party systematically conduct human rights impact assessments in order to ensure that projects promoting agrofuels do not have a negative impact on the economic, social and cultural rights of local communities in third countries where Belgian firms working in this field operate.**"<sup>33</sup>

#### **CESCR - Concluding observations on the report submitted by China**

"13. The Committee is concerned about the lack of adequate and effective measures adopted by the State party to **ensure that Chinese companies, both State-owned and private, respect economic, social and cultural rights, including when operating abroad** (art. 2, para. 1).

The Committee recommends that the State party:

- (a) Establish a clear regulatory framework for companies operating in the State party to ensure that their activities promote and do not negatively affect the enjoyment of economic, social and cultural human rights;
- (b) Adopt appropriate legislative and administrative measures to ensure the legal liability of companies and their subsidiaries operating in or managed from the State party's territory regarding violations of economic, social and cultural rights in the context of their projects abroad."<sup>34</sup>

#### **CEDAW - Concluding observations on the report submitted by India**

14. (...) The Committee is further concerned with the **impact on women, including in Nepal, of infrastructure projects such as the Lakshmanpur dam project, including their displacement, loss of livelihood, housing, and food security as a result of the subsequent floods.**

15. The Committee reaffirms that the State party must **ensure that the acts of persons under its effective control do not result in violations of the Convention, including those of national corporations operating extra-territorially, and that its extraterritorial obligations extend to their actions affecting human rights, regardless of whether the affected persons are located on its territory**, as indicated in the Committee's General Recommendations number 28 (2010) and 30 (2013). Accordingly it recommends that the State party:

- (a) Undertake an immediate review of the impact of the India Housing Project in Sri Lanka and adopt a consultative and gender – sensitive approach in implementing the ongoing and future phases of the project and address the needs and concerns of the most disadvantaged and marginalised groups of women;
- (b) Adopt all necessary measures including an **impact assessment on the effects of the Lakshmanpur dam project on women in Nepal, and ensure that adequate measures are adopted, including to prevent or remedy their loss livelihood, housing and food security, and provide adequate compensation whenever their rights have been violated.**"<sup>35</sup>

<sup>33</sup> CESCR, *Concluding Observations, Belgium*, 23 December 2013

<sup>34</sup> CESCR, *Concluding observations: China*, 13 June 2014

<sup>35</sup> CEDAW, *Concluding observations: India*, 18 July 2014



### 3. Inter-state complaints

Although this type of mechanism has in practice **never been used**, several instruments contain provisions to allow States Parties to complain to the relevant Committee about alleged violations or the non-implementation of the treaty concerned by another State Party. Most instruments (see summary table) require that states accept the Committee's jurisdiction regarding inter-state complaints.

For diplomatic reasons it is very unlikely that such a mechanism be used in connection with violations committed by business enterprises.

### 4. Individual complaints

#### ② Who can receive a complaint?

At present, **seven of the nine Committees**<sup>36</sup> allow for complaints from individuals (or groups of individuals) relating to alleged violations by a State Party of the rights guaranteed by the instruments concerned.

#### **Complaint mechanism instituted by the Optional Protocol to the ICESCR**

On 10 December 2008, the General Assembly adopted the Optional Protocol to the ICESCR. This was an **important breakthrough**, in that it instituted a **mechanism for individual complaints** to the CESC, settling the difficult debate on the question of the “justiciability” of economic, social and cultural rights. Uruguay was the 10<sup>th</sup> state to ratify the Optional Protocol to the ICESCR, which triggered its entry into force on 5 May 2013, along with the individual complaint mechanism. As of March 2016, 47 states had signed the Optional Protocol, and 21 states had ratified it.<sup>37</sup>

In the future the Committee will very likely be called upon to examine the human rights implications of the activities of enterprises in states where, or from where, they operate. Of particular interest to the Committee will likely be the rights to health, to housing, to food and to fair and favourable working conditions. However the extraterritorial effectiveness of the new mechanism remains limited (*i.e.* the possibility of lodging a complaint against the country of origin of a transnational enterprise for violations committed in a third country), because article 2 of the Protocol specifies that to be admissible a complaint must come from persons who “fall within the jurisdiction of a State Party, who assert that they are subjected to a violation by that State Party.”<sup>38</sup>

36 CCPR, CESC, CERD, CEDAW, CAT, CRPD, and CED This will also apply to the Committee on Migrant Workers, and the Committee on the Rights of the Child when in force. See table at the end of this part.

37 UN, *UN Treaty Collection*, <https://treaties.un.org>

38 For a further analysis, see M. Sepúlveda and C. Courtis, *Are Extra-Territorial Obligations Reviewable Under the Optional Protocol to the ICESCR?*, Nordisk Tidsskrift for Menneskerettigheter, Universitetsforlaget, 2009, Vol 27, Nr.1, 54-63.

## ② Who can file a complaint?

As a general rule **any individual** can submit a complaint to one of the Committees against a state that meets the prior conditions, i.e.:

- The state that is alleged to have violated the rights in question has, depending on the treaty, either ratified the instrument, accepted it or approved it.<sup>39</sup>
- The state that is alleged to have violated the rights in question has accepted the competence of the Committee to accept individual complaints.<sup>40</sup>

The assistance of a lawyer is not required, even though professional help can improve the quality of the communication by making sure that all the relevant factors likely to be of interest to the Committee have been included.

In principle, the **direct victim** of the alleged violations, or in certain cases, a group of victims, must lodge the complaint. The treaty bodies do not allow for *actio popularis* (or action in defence of a collective interest).

When the direct victim is not in a position to lodge the complaint in person, it can be lodged **on his or her behalf**. Such is the case, for instance, if the victim is incapable of acting, or if the possible violation is sufficiently certain and imminent.<sup>41</sup> However, except in special cases, when a complaint is brought on behalf of a third party, **written consent** must be obtained beforehand.<sup>42</sup>

## ② Under what conditions?

With some variations, all the Committees operate in accordance with the following principles:<sup>43</sup>

- The communication must not be **anonymous**. It must be signed and be made by an identifiable individual (or in certain cases a group of individuals) falling within the jurisdiction of the state concerned at the time of the alleged violation(s). If the complainant is acting on behalf of another person, proof of that person's consent

<sup>39</sup> For a glossary of the terms applicable to treaty formalities, see: UN, *Treaty reference guide*, <https://treaties.un.org> To check whether a state is party to a treaty, see: UN, *UN Treaty collection – Chapter IV Human Rights*, <http://treaties.un.org/>

<sup>40</sup> See the summary table “Human Rights protection mechanisms and competence of treaty bodies” in appendix, which shows for each Committee the conditions that have to be met for an individual complaint to be admissible.

<sup>41</sup> For example in the event of a threatened extradition to a country where the person runs the risk of being tortured.

<sup>42</sup> OHCHR, Complaints procedure, Factsheet No. 7 (Rev.1). This document gives in particular the following examples: “For example, where parents bring cases on behalf of young children or guardians on behalf of persons unable to give formal consent, or where a person is in prison without access to the outside world, the relevant Committee will not require formal authorization to lodge a complaint on another's behalf”

<sup>43</sup> To get some idea of the differences between procedures, see table in appendix.

must be given, or the action must be justified by other means. The author of the communication, or the victims of the alleged violations, can also request that **the identity and personal information of the victim(s)** be kept **confidential**. This request, however, must be stated explicitly in the communication.

- The complainant must prove that he (or the person on whose behalf he is acting) is **personally and directly** affected by the acts, decisions or omissions of the state in question. General and abstract complaints are not admissible.
- In principle, the complaint should not be under consideration **in another international or regional mechanism**. There can however be some exceptions to this principle. For instance, it may be ruled that there is no duplication of procedure when a different individual is concerned, even if other parties to the domestic proceedings have referred the matter to other mechanisms of international settlement<sup>44</sup>, or if the legal arguments put forward are different.<sup>45</sup>
- The complaint must not be **manifestly ill-founded**. It must be sufficiently substantiated, both regarding the facts and the arguments put forward.
- The complaint must not be an **abuse of the complaints process**, i.e. frivolous, or an inappropriate use of the complaints procedure. This would be the case, for instance, if the same claim were repeatedly brought to the same Committee without there being any new circumstances, although it had already been dismissed.
- The complaint must not be precluded by a **reservation** made by the State to the treaty in question. This means that the State must not have made a formal statement limiting its obligations under the treaty provisions alleged to have been violated by the complainant.
- **Domestic remedies must have been exhausted, unless detailed reasons why the general rule should not apply are given.**<sup>46</sup> This means that victims, or their representatives, must first refer their matter to national authorities (judicial or administrative), including any appeal processes, in order to obtain protection and/ or just and fair reparation for the violations suffered.

Some treaties explicitly provide that the States Parties may set up a body at the national level to examine individual complaints in the first instance. In particular, Article 14

<sup>44</sup> CCPR, *Leirvag v. Norway*, Communication No. 1155/2003, 23 November 2004.

<sup>45</sup> CCPR, *Karakurt v. Austria*, Communication No. 965/2000, 4 April 2002.

<sup>46</sup> This requirement that the effective domestic remedies must have been exhausted is specified in particular in the following provisions: UN, ICCPR Protocol, adopted on 16 December 1966, entered into force on 23 May 1976, art. 2; UN, ICERD, adopted on 7 March 1966, entered into force on 4 January 1969, art. 11(3); UN, Convention on the Elimination of all forms of Discrimination Against Women, adopted on 18 December 1979, entered into force on 3 September 1981, art. 4; UN, Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, entered into force on 26 June 1987, art. 21. See also: OHCHR, "Complaints Procedure", *op.cit.*, p. 19.

of CERD specifies that if that body does not settle the case satisfactorily, the complainant is then entitled to address a communication to the Committee within a six months period. However, such a rule shall not apply if the domestic remedies are **unduly prolonged or clearly ineffective**.

The complainant must indicate clearly in the petition the steps taken at national level to obtain the realisation of the rights, or the reasons that prevented or discouraged him or her from doing so. Mere doubts as to the effectiveness of the domestic remedies are not enough.

- In general, there are **no formal deadlines** for lodging an individual complaint with a Committee, but it is best to do so as soon as it is practically possible.<sup>47</sup>

The treaty bodies are mandated to examine alleged violations of certain rights, when the events concerned took place after entry into force of the instrument for the state concerned.

Exceptionally, when the complaint concerns **facts before that date**, but which **continue to have effects** after the date of the entry into force of the mechanism, the Committee may decide to take into consideration the overall circumstances invoked in the petition and accept to deal with the complaint.<sup>48</sup>

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## HOW TO FILE COMPLAINT?

Although “model” complaint forms for communications are available online,<sup>49</sup> the petition does not have to be drafted in any particular way – an ordinary letter is sufficient. However, only petitions formulated in one of the UN official languages (Chinese, Russian, Arabic, English, French and Spanish) will be accepted. The petition must be **in writing and signed**, and include at least **the following**:

- Indication of the treaty and provisions invoked, and the Committee addressed.
- Information on the complainant or the person submitting the communication on behalf of another person (name, date and place of birth, nationality, gender, profession, e-mail address and mailing address to be used for confidential communications, etc.).
- In what capacity is the communication submitted (victim, parent of the victim, another person)
- Name of the state concerned.
- Information and description about the alleged perpetrator(s) of the violation(s).
- Description of the alleged violation(s).

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<sup>47</sup> In certain cases, a complaint can be declared inadmissible if such an unreasonable amount of time has elapsed since the effective domestic remedies have been exhausted that the examination of the complaint by the Committee or the state has become extremely difficult. The ICESCR Protocol requires that a complaint must be filed within 12 months after the domestic remedies have been exhausted (article 3.2).

<sup>48</sup> CCPR, *Könye v. Hungary*, Communication No. 520/1992, 7 April 1994, § 6.4.

<sup>49</sup> A model complaint form for submitting a communication is proposed in OHCHR, *Complaints procedure, op.cit.*, p. 41 and following.

- Description of the action taken to exhaust domestic remedies. If they have not been exhausted, explanation of why this has not happened.
- Action taken to apply to other international procedures (if any).
- Signature of the author, and date.
- Supporting documentation (copies), such as the authorisation to act for another person, decisions of domestic courts and authorities on the claim, the relevant national legislation, any document or evidence that substantiates the facts, etc.
- If this documentation does not exist in one of the official languages of the United Nations Committee secretariat, it will speed up the examination of the complaint to have them translated beforehand.

Communications to CCPR, the Committee against Torture (CAT), CERD, CRDP and CEDAW should be sent to the following address:

Petitions and Inquiries Section  
Office of the United Nations High Commissioner for Human Rights  
United Nations Office in Geneva 1211 Geneva 10, Switzerland  
Fax: +44 22 917 90 22 (for urgent complaints)  
E-mail: [petitions@ohchr.org](mailto:petitions@ohchr.org)

## ② Process and outcome

### *Process*<sup>50</sup>

Once the Committee has decided that the petition is admissible, it proceeds to examine the facts, the arguments and the alleged violation(s). During this process, it may decide to set up a **working group** or appoint a **rapporteur** for the examination of a specific complaint. It may also request further information or clarification.

The petitions are examined in **closed session**. Although some Committees have provisions for hearing parties or witnesses in exceptional cases,<sup>51</sup> the general practice has been to **consider complaints on the basis of written information** supplied by the complainant and the state concerned. In principle, information communicated through other means (e.g. audio or video) is not admissible.

The Committees do not investigate the alleged facts themselves. They base their understanding of the facts on the **information provided by the parties**. They can however request additional information from other United Nations bodies. They do not in principle consider reports by third parties (i.e. *amicus* briefs).<sup>52</sup>

<sup>50</sup> This paragraph is based on excerpts from OHCHR, *Complaints Procedure*, *op.cit.*

<sup>51</sup> For example the CAT, CERD and CEDAW. See table in appendix.

<sup>52</sup> OHCHR, *Complaints Procedure*, *op.cit.* However Article 8 of the ICESCR Optional Protocol specifies that the Committee examines complaints “in the light of all documentation submitted to it”.

## *Special interim measures*

Before making known its views on a particular complaint, each Committee has the ability, under its rules of procedure, to ask the State Party concerned to take interim or protective measures in order to prevent **irreparable harm being done** to the victim of the alleged violation.<sup>53</sup>

The request for urgent action must be **made, and be explicitly motivated**, by the complainant. The adoption of interim measures does not however prejudice the Committee's decision on the substance of the case.

### **CERD - Interim measures relating to an economic project in the USA**

In April 2006, CERD used the Early Warning and Urgent Action procedure in connection with a dispute between the United States and the indigenous representatives of the Western Shoshones, concerning the privatization of their ancestral lands. In accordance with its Rules of Procedure, the Committee first sent the state, in August 2005, a list of questions in order to examine the problem. On the basis of information received and in the absence of answers to the questions from the state, the Committee adopted a series of recommendations. In particular CERD urged the United States to establish a dialogue with the Western Shoshone representatives in order to reach an acceptable solution. Pending such an agreement, the Committee called upon the state to adopt a series of measures, including the freezing of "any plan to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers".<sup>54</sup>

## *Outcome*

The Committee then takes a decision on the petition, indicating the reasons for considering that there has or has not been a violation of the provisions mentioned. The Committee's decisions are published on the website of the Office of the United Nations High Commissioner for Human Rights<sup>55</sup>. There are two kinds of decision:

- **Recognition of the alleged violations:** If the Committee recognises wholly or in part that the allegations of human rights violations mentioned in the complaint are well-founded, the State Party will be invited to supply information to the

<sup>53</sup> For example: *CCPR, Rules of Procedure of the Human Rights Committee*, 11 January 2010, CCPR/C/3/Rev.10, Rule 92; *CAT, Rules of procedure of the Committee Against Torture*, 1 September 2014, CAT/C/3/Rev.6, art. 114; *CERD, Rules of procedure of the Committee on Elimination of Racial Discrimination*, 1 January 1989, CERD/C/35/Rev.3, Rule 94; *CEDAW, Rules of procedure of the Committee on the Elimination of Discrimination Against Women*, A/56/38, Rule 63.

<sup>54</sup> CERD, *Early warning and urgent action procedure – Decision 1 (68) Unites States of America*, 11 April 2006, CERD/C/USA/DEC/1.

<sup>55</sup> OHCHR, *Human rights Bodies – Complaints procedures*, [www2.ohchr.org/english/bodies/petitions/index.htm](http://www2.ohchr.org/english/bodies/petitions/index.htm)

Committee, by a certain deadline, on the steps it has taken to give effect to the Committee's findings, and to put an end to the violation(s).

- **The communication is considered to be ill-founded:** The procedure before the Committee comes to an end as soon as the decision has been forwarded to the complainant(s) and the state concerned.

In certain cases the Committee can appoint a **Special Rapporteur to follow-up** the findings with the state concerned. The Rapporteur can base their understanding of the situation on the information provided by civil society organisations.

## The Committees in action in corporate-related human rights abuses

### CCPR – Ángela Poma Poma v. Peru

*“Object: Reduction of water supply to indigenous pastures [...] In the present case, the Committee observes that neither the author nor the community to which she belongs was consulted at any time by the State Party concerning the construction of the wells. Moreover, the state did not require studies to be undertaken by a competent independent body in order to determine the impact that the construction of the wells would have on traditional economic activity, nor did it take measures to minimize the negative consequences and repair the harm done. The Committee also observes that the author has been unable to continue benefiting from her traditional economic activity owing to the drying out of the land and loss of her livestock. The Committee therefore considers that the state's action has substantively compromised the way of life and culture of the author, as a member of her community. The Committee concludes that the activities carried out by the State Party violate the right of the author to enjoy her own culture together with the other members of her group, in accordance with article 27 of the CPR Covenant.”<sup>56</sup>*

### CCPR – Länsman et al v. Finland

“The authors are all reindeer breeders of Sami ethnic origin from the area of Angeli and Inari; they challenge the decision of the Central Forestry Board to pass a contract with a private company, Arktinen Kivi Oy (Arctic Stone Company) in 1989, which would allow the quarrying of stone in an area covering ten hectares on the flank of the mountain Etelä-Riutusvaara.” (Paragraph 2.1)

“The authors affirm that the quarrying of stone on the flank of the Etelä-Riutusvaara-mountain and its transportation through their reindeer herding territory would violated their rights under article 27 of the Covenant, in particular their right to enjoy their own culture, which has traditionally been and remains essentially based on reindeer husbandry.”

“The Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community.”

<sup>56</sup> CCPR, *Angela Poma Poma v. Peru*, Communication No. 1457/2006, 24 April 2009.

The Committee recalls that the freedom of states to pursue their economic development is limited by their obligations under Article 27 (Paragraph 9.4), but concludes that the quarrying on the slopes of Mt. Riutusvaara does not constitute a violation of that Article.

“[The Committee] notes in particular that the interests of the Muotkatunturi Herdsmens’ Committee and of the authors were considered during the proceedings leading to the delivery of the quarrying permit, that the authors were consulted during the proceedings, and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred.”

However, the Committee warns that if these quarrying operations were to be expanded, “the State Party is under a duty to bear in mind the cultural rights of minorities when either extending existing contracts or granting new ones.”<sup>57</sup>

## Legal force of the Committees’ decisions

Although having **quasi-judicial status** and a certain authority, the **Committee’s rulings on individual complaints are not legally binding**. However, it is generally considered that **states have an obligation in good faith** to take Committees’ opinions into consideration and to implement their recommendations. Moreover, Committees’ decisions play an extremely important role in determining, on the basis of concrete situations, the content of the rights contained in the conventions. The Committee decisions also help determine the extent of the obligations of the states.

These individual complaints procedures are still **very rarely used** to invoke the responsibilities of states for violations of human rights by business enterprises.<sup>58</sup> The complaints procedure recently established by the Optional Protocol to the ICESCR will certainly play a central role in determining the roles and responsibility of states in relation to protecting human rights against violations involving non-state actors. Some civil society organisations are calling for the creation of a body that would have jurisdiction to directly examine the international responsibilities of transnational enterprises.

<sup>57</sup> CCPR, *Länsman et al v. Finland*, Communication No. 511/1992, 8 November 1994, CCPR/C/52D/511/1992.

<sup>58</sup> See in particular CCPR, *Hopu and Bessert v. France*, Communication No. 549/1993, 29 December 1997, CCPR/C/60/D/549/1993/Rev.1, concerning the Société Hôtelière du Pacifique Sud; CCPR, *Länsman v. Finland*, *op.cit.*



## 5. Inquiries or visits

The CAT, CEDAW, CRPD, CESC, CED, and CRC - when the procedures come into force - can initiate inquiries or visits to the territory of a State Party if they receive information on serious and systematic violations of the rights protected by the conventions in the country concerned.<sup>59</sup>

Inquiries and visits may only be undertaken in relation to states that have recognised such competence and after having received reliable information on grave and systematic violations of the rights concerned.<sup>60</sup>



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<sup>59</sup> UN, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *op. cit.*, art. 20; UN, *Optional Protocol to the Convention on the Elimination of all forms of Discrimination Against Women*, adopted on 6 October 1999, entered into force on 22 December 2000, art. 8; UN, *Optional Protocol to Convention on the Rights of Persons with Disabilities*, adopted on 13 December 2006, entered into force on 3 May 2008, art. 6 §2; UN, *ICESCR Protocol*, adopted on 10 December 2008, A/RES/63/117, art. 11 §3; UN, *Convention against Enforced Disappearances*, adopted on 20 December 2006, art. 33.

<sup>60</sup> The Convention Against Torture (art. 28) and the Optional Protocol to Convention on the Elimination of all forms of Discrimination Against Women (art. 10) also provide the possibility for states to exclude such competence at the time of ratification or accession to the treaties.

# CHAPTER II

## The Charter-Based Mechanisms

\* \* \*

Alongside treaty-based mechanisms, the mechanisms established by the organs of the Charter of the United Nations constitute the second type of procedure for reviewing state action as regards respect for and protection of human rights. These mechanisms differ from conventional mechanisms by their more “political” character. The mechanisms instituted by the Charter organs include principally:

- The Universal Periodic Review (established by the Human Rights Council)
- The Human Rights Advisory Committee, which functions as a think tank and replaced the old Sub-Commission on the Promotion and Protection of Human Rights
- The revised 1503 procedure
- The Special Procedures

## The Human Rights Council

In response to the numerous criticisms of partiality and inefficiency levelled at the old Human Rights Commission, amidst a wave of optimism, the **Human Rights Council (HRC)** was established by the United Nations General Assembly in March 2006.

The Human Rights Council is the **principal intergovernmental organ of the United Nations** for dialogue on human rights protection. As a subsidiary organ of the General Assembly, its role is to encourage respect for the obligations undertaken by states and, to that end, promote an efficient coordination of the activities of the United Nations system.

The primary objective of the Council is to **examine human rights violations**, particularly those of a gross and systematic nature, and to make recommendations thereon.

The Council is made up of the **representatives of 47 states**, elected directly and individually, using a secret ballot, by a majority of the members of the General Assembly. Council members are elected for a three-year term, and they sit in Geneva and meet at least three times per year.

**Observers** may participate in the work of the Council and be consulted, including states which are not members of the Council, special agencies, other intergovern-

mental organisations, national human rights institutions, and **non-governmental organisations**.

## 1. The Universal Periodic Review

The Universal Periodic Review (UPR) mechanism, established by Resolution 60/251 of 15 March 2006, is a system devised to regularly review the human rights performance of **all Member states**.<sup>61</sup> The UPR aims to be a cooperative undertaking based on dialogue, led by states, under the supervision of the Human Rights Council.

The **normative human rights framework** which the UPR draws from is made up of the United Nations Charter, the Universal Declaration of Human Rights, combined with the international human rights instruments, voluntary obligations and other commitments to which the state under review is a party.

The UPR's principal **information sources** are:<sup>62</sup>

- The information gathered by the state in question, presented orally or in writing.
- A compilation of information prepared by the Office of the High Commissioner for Human Rights from United Nations organs.
- A compilation of information provided by NGOs and national human rights institutions.

### ② Process and outcome

#### *Process*

All states, on a rotating basis, are subject to the UPR every four years.

The state undergoing the UPR is first subject to review within a **working group** for three hours. This session includes an 'interactive dialogue', where NGOs are not allowed to intervene (see box below). This 'peer review' leads to a **report**, comprising a summary of the debates as well as the conclusions, recommendations and voluntary commitments undertaken by the state examined. This document is adopted during the working group's session and later during a plenary session of the Human Rights Council.<sup>63</sup> The state is called upon to implement the recommendations contained in the outcome document and to report on it at its next UPR four years later. **The state has the right to accept or reject the report's recommendations.** The outcome document will mention those recommendations that are accepted by the state.

<sup>61</sup> UNGA, *Resolution 60/251- Human Rights Council*, 3 April 2006, A/RES/60/251. The basis of the review, its principles and objectives, the process and modalities are presented in, HRC, *Resolution 5/1 of the Human Rights Council - Institution-building of the United Nations Human Rights Council*, adopted on 18 June 2007, A/GRC/RES/5/1.

<sup>62</sup> HRC, *Resolution 5/1. Institution-building of the United Nations Human Rights Council*, *op.cit.*, § 15.

<sup>63</sup> For more information, see: Universal Periodic Review, [www.upr-info.org/](http://www.upr-info.org/)

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## ROLE OF NGOs IN THE UPR PROCESS

Resolution 5.1 repeatedly mentions the role that NGOs can play in the Universal Periodic Review in the following points:<sup>64</sup>

- States are encouraged to undertake broad consultations at the national level “with all relevant stakeholders” (i.e. NGOs, coalitions of NGOs, or National Human Rights Institutions) in order to gather the information they intend to submit to the UPR.
  - Additional “credible and reliable” information provided by “other relevant stakeholders” may be transmitted to the UPR.
  - The information provided by NGOs must be concise (maximum five pages per NGO or 10 pages for coalitions) and must be written in English, French or Spanish. Furthermore, reports should be submitted six months before the planned review, during a UPR session of the Human Rights Council by e-mail: [hrcngo@ohchr.org](mailto:hrcngo@ohchr.org). Organisations wishing to include information in the compilation of information prepared by the OHCHR (which will serve for the review of the state concerned) may send them to the following address: [UPRsubmissions@ohchr.org](mailto:UPRsubmissions@ohchr.org).
  - Other relevant stakeholders may attend the review by the Working Group. NGOs cannot intervene directly during the interactive dialogue session, however, they may organise parallel events during the UPR of the state concerned. Moreover, NGOs may meet with government representatives of the Member States of the Council, who may be inspired by their questions and recommendations ahead of and during the UPR session. It is through these informal means that NGOs’ recommendations and questions may influence the UPR proceedings and outcome.
  - The state concerned and other relevant stakeholders, such as NGOs, have the opportunity to make general comments before the plenary session of the Council adopts the final document. During this session, NGOs may give their views on the recommendations.
  - The recommendations made at the outcome of the UPR should be implemented primarily by the state concerned and, where appropriate, by ‘other relevant stakeholders’.
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<sup>64</sup> HRC, *Resolution 5/1 - Institution-building of the United Nations Human Rights Council*, *op.cit.* See also: OHCHR, “Information note for relevant stakeholders regarding the Universal Periodic Review mechanism”, 8 January 2008.

### Using the process in the context of corporate activities

So far, taking into account the fact that states submit a national report on the human rights situation in their country, the possibility of using the UPR process in order to raise the extraterritorial responsibilities of states, regarding the activities of their companies abroad, seems limited. However, this should not prevent members of civil society from demanding that states under review be questioned on the measures they take to ensure the respect of human rights by companies operating on their territory. Likewise, questions regarding the measures taken by the home country of transnational corporations to regulate their activities abroad could be addressed during the review of the national legislation of that country.

#### ➔ FIDH and Lao Movement for Human Rights (LMHR) joint Submission for the second Universal Periodic Review (UPR) of Laos (January-February 2015).<sup>65</sup>

This joint UPR submission focused on land rights violations and the targeting of land and environmental rights defenders in the Lao Peoples' Democratic Republic (PDR). FIDH and LMHR denounced the human rights violations resulting from large-scale land leases and concessions to domestic and mostly foreign investors (in particular Chinese, Thai, and Vietnamese investors), including widespread evictions and land confiscation without adequate consultation, compensation and resettlement, which led to inadequate access to education and health facilities as well as loss of livelihood and food insecurity. The report pointed to how investors are taking advantage of poor enforcement of the legal framework for the approval and management of land concessions and lack of administrative oversight to violate the land concession approval process as well as their contractual obligations, which leads to serious socio-economic and environmental impacts. The examination of four case studies involving large-scale investment project stemming from land concessions illustrated the gap between legislative provisions and their poor implementation on the ground.

#### ➔ Submission of the Institute for Human Rights and Business for the USA's UPR Review Session 9 (April 2010).<sup>66</sup>

"(...)this submission by the Institute for Human Rights and Business (IHRB) addresses select aspects of the United States government's record of protecting against human rights abuses committed by or involving business. The submission offers recommendations for consideration by the US government and members of the Human Rights Council", including "passing legislation that specifically provides an avenue for individuals to seek redress under US law for human rights abuses involving US registered companies at home and abroad (...)" ; "ensuring that US produced technology products are not used to violate rights to privacy and freedom of expression of internet users at home and abroad. (...)" ; and "increasing the oversight and regulation of private military companies when they operate abroad (...), through tighter license requirements and more effective monitoring and accountability mechanisms (...)" .

<sup>65</sup> See FIDH and LMHR's joint UPR submission at <https://www.fidh.org>

<sup>66</sup> Institute for Human Rights and Business, *Submission to the United Nations Human Rights Council Universal Periodic Review Session 9: United States of America*, April 2010, [http://www.ihrb.org/pdf/US-IHRB\\_UPRsubmission-19April.pdf](http://www.ihrb.org/pdf/US-IHRB_UPRsubmission-19April.pdf)

## Outcome

The UPR aims at dealing with all states equally, in an “objective, transparent, non-selective, constructive, non-confrontational and non-politicized”<sup>67</sup> manner. However, in practice, reviews remain all too often an international diplomatic exercise which produces results below the expectations of civil society.

Positive aspects:

- Universality of the exercise.
- Opportunity to insist on implementation of recommendations from treaty bodies and Special Procedures.
- The state commits to implement recommendations.
- Important media attention.

Limitations:

- Partiality in the interventions of other states.
- Evaluations are often in contradiction with those of the independent experts of the UN Committees and Special Procedures.
- NGOs play a limited role.
- Governmental NGOs (GONGOs) sometimes dominate the interventions reserved for NGOs (example of the review of Cuba and China).
- No follow-up procedure.
- States may accept or reject recommendations.

## 2. The complaint procedure of the Council – revised 1503 procedure

The objective of the so-called revised 1503 procedure is to enable the examination of **individual communications** regarding any **consistent pattern of gross and reliably attested violations of all human rights and all fundamental freedoms** occurring in any part of the world and under any circumstances.<sup>68</sup>

Its potential impact is extremely wide. The individual communications submitted under the revised 1503 procedure may concern all Member States of the United Nations. Thus, in principle, no government may derogate from this procedure.

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<sup>67</sup> HRC, *Resolution 5/1. Institution-building of the United Nations Human Rights Council*, *op.cit.*, § 3(g).

<sup>68</sup> HRC, *Resolution 5/1. Institution-building of the United Nations Human Rights Council*, *op.cit.*, §§ 85 and following.

## ② Who can file a communication?

The communication must come from a **person** or a **group of persons** alleging a violation of their human rights and fundamental freedoms.

In addition, a **non-governmental organisation** is permitted to lodge a communication provided they have **direct and reliable** knowledge of the violations at stake. NGOs must act in good faith and not resort to making politically motivated stands, or contrary to the provisions of the Charter of the United Nations. If the evidence is sufficiently compelling, communications from authors with **second-hand** knowledge of the violations may be declared admissible.

## ② Under what conditions?

### HOW TO FILE A COMPLAINT?

A communication submitted for the “revised 1503” procedure shall only be admissible under the following conditions:

- It must not be manifestly politically motivated and **its object must be consistent with the Charter of the United Nations**, the Universal Declaration of Human Rights and other applicable instruments in the field of human rights law.
- The communication must give a **factual description** of the alleged violations, including the rights which are alleged to be violated.
- The language of the communication must not be **abusive**.<sup>69</sup>
- The communication must not be based **exclusively** on reports disseminated by **mass media**.
- The situation in question must **not have already been dealt with** by a Special Procedure, a treaty body, or any other United Nations or similar regional complaints procedures in the field of human rights.
- **Domestic remedies** must have been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged.

Individual communications must be addressed to:

**Human Rights Council and Treaties Division**

**Complaint Procedure**

**OHCHR-UNOG 1211 Geneva 10, Switzerland**

**E-mail: 1503@ohchr.org (French) or cp@ohchr.org (English)**

<sup>69</sup> However, such a communication may be considered if it meets the other criteria for admissibility after deletion of the abusive language.

## ② Process and outcome

### *Process*

The complainant is informed when their communication is registered by the complaint procedure. If the complainant requests that their identity be kept **confidential**, it will not be transmitted to the state concerned. Both the complainant and the state concerned will be informed of the stages of the review procedure.<sup>70</sup>

Two distinct working groups are responsible for examining the communications: the Working Group on Communications and the Working Group on Situations. They meet twice a year and work, to the greatest extent possible, on the basis of consensus. In the absence of consensus, their decisions must be taken by simple majority of the votes.

After having transmitted the communications to the States Parties concerned, the Working Group on Communications **examines the admissibility and merits of the allegations**. If it finds sufficient evidence to establish the existence of a consistent pattern of gross and systematic human rights violations, it transmits a file containing all admissible communications as well as recommendations to the Working Group on Situations.

The Working Group on Situations presents the Human Rights Council with a **report on any consistent pattern of gross and reliably attested violations** of human rights and fundamental freedoms. It also makes **recommendations** to the Council on the course of action to take with respect to the situations referred to it (normally in the form of a draft resolution or decision).

If the Working Group requires **further consideration** or additional information, its members may keep the case under review until its next session. They may also decide to dismiss a case.

The Human Rights Council **examines the violations of human rights and fundamental freedoms brought to its attention** by the “Working Group on Situations” as frequently as is required. However the Council must review them at least once a year. The state concerned is expected to cooperate fully and promptly with the investigation procedure.<sup>71</sup>

The reports are examined in a **confidential** manner, unless the Council decides otherwise. When the Working Group on Situations recommends to the Council that it consider a situation in a public meeting (in particular in case of manifest and unequivocal lack of cooperation by the state concerned), the Council shall

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<sup>70</sup> HRC, *Resolution 5/1. Institution-building of the United Nations Human Rights Council, op.cit.*, § 106.

<sup>71</sup> HRC, *Resolution 5/1. Institution-building of the United Nations Human Rights Council, op.cit.*, §§ 103-105.



consider such recommendations on a priority basis at its next session. In principle the period of time between the transmission of the complaint to the state concerned and consideration by the Council shall not exceed 24 months.

### ***Outcome***

The Council may decide to:<sup>72</sup>

- **Cease considering the situation** when further consideration or action is not warranted.
- Keep the situation under review and request the state concerned to provide **further information** within a reasonable period of time.
- End the review of the matter under the confidential complaint procedure in order to take up public consideration of the same.
- Recommend to the **Office of the High Commissioner for Human Rights** to provide technical cooperation, capacity-building assistance or advisory services to the state concerned.
- Keep the situation under review and appoint an **independent** and highly qualified expert to monitor the situation and report back to the Council.

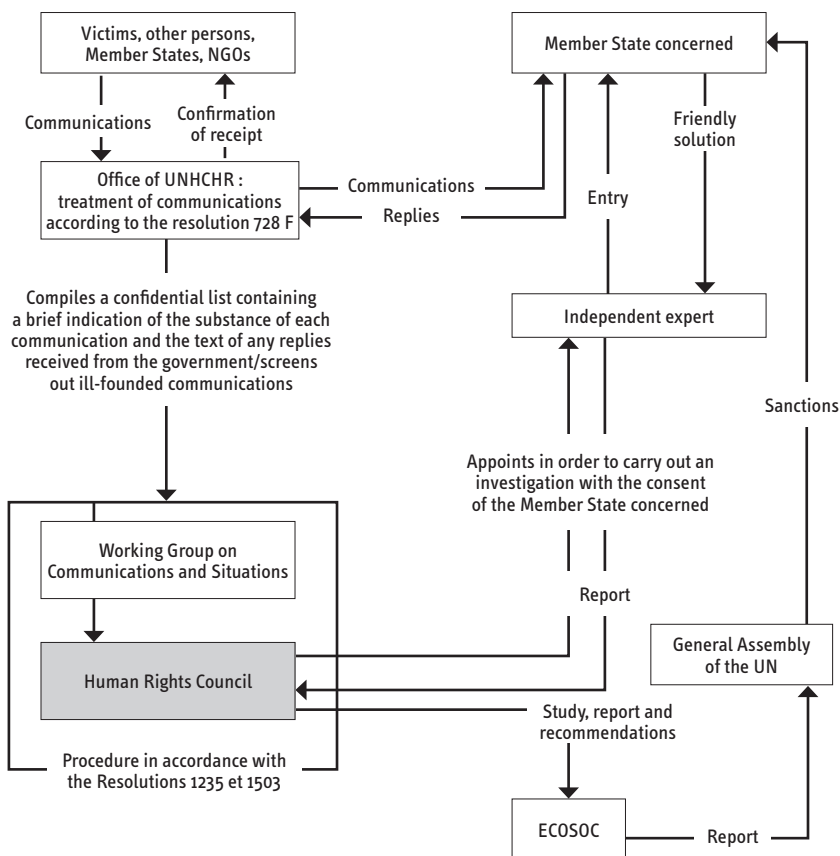
This last option could be particularly interesting for communications relating to allegations of a state's complicity in human rights abuses committed by multinational companies in its jurisdiction.

It is difficult to judge the effectiveness of this mechanism because, except for a very small proportion of communications, all measures taken by the Council under the 1503 procedure remain confidential, unless the Council decides to refer the situation to the Economic and Social Council.

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<sup>72</sup> *Ibid.*, § 109.

## The “revised 1503” procedure: summary scheme<sup>73</sup>



<sup>73</sup> This scheme is taken from UNESCO, *Claiming Human Rights: Guide to International Procedures Available in Cases of Human Rights Violations in Africa*, United Nations petition system (procedure 1503), Regional Economic Communities in Africa, Deutsche UNESCO, *Kommission e.V., Bonn, et Commission française pour l'UNESCO*, Paris, [www.claiminghumanrights.org](http://www.claiminghumanrights.org)

# The Special Procedures of the Human Rights Council

The Special Procedures of the Human Rights Council include various functions originally set up by the Human Rights Commission. These Special Procedures exist to either examine a human rights situation in a specific country, or promote specific human rights or related-themes.

The mandates are generally entrusted to **individual, independent and unpaid experts**, who are assisted in their work by the Office of the High Commissioner for Human Rights<sup>74</sup>. Different titles may be given to the mandates (i.e. Special Rapporteur, Special Representative of the Secretary-General, Representative of the Secretary-General, Independent Expert, etc.). However, in certain cases, **Working Groups** are created, usually composed of five independent experts.

## Thematic Procedures and Country Procedures

The experts appointed under **Thematic Special Procedures** are mandated to investigate and report on the issue covered by their mandate. Their activities may apply to all regions of the world **irrespective of whether or not the state under review is a party to any of the relevant human rights treaties**.

The mandate-holders of **Country mandates** examine the situation as a whole with regard to respect for and protection of human rights in a given country. This review may examine civil, political, economic, social and cultural rights.

### 1. Main Missions

The functions of Special Procedures mandate-holders are numerous:

- **Analyse** the relevant thematic issue or country situation on behalf of the United Nations.
- **Assist the governments concerned** and other relevant actors by advising them on the measures which should be taken.
- **Alert United Nations organs** and the international community on the need to address specific situations and issues, thereby playing the role of an “early warning” mechanism and encourage formation and adoption of preventive measures.
- **Advocate on the behalf of the victims** of violations, such as requesting urgent action by relevant states and calling upon governments to respond to specific allegations of human rights violations and provide redress.

<sup>74</sup> This whole chapter is essentially based on the following document: OHCHR, *Manual of Operations of the Special Procedures of the Human Rights Council*, draft – June 2006, and on its revised version of June 2008. See also: OHCHR, *Seventeen Frequently Asked Questions about United Nations Special Rapporteurs*, Fact Sheet No. 27, April 2001; HRC, *Resolution 5/2 - Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*, 7 August 2007, A/HRC/5/21, § 40.

- **Activate and mobilise the international community** and national communities to address particular human rights issues, and to encourage cooperation among governments, civil society and intergovernmental organisations.
- **Follow-up** on recommendations.

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## WORKING GROUP ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES

As a follow-up to the mandate of the Special Representative on the issue of human rights and transnational corporations and other business enterprises John Ruggie,<sup>75</sup> in 2011 the Human Rights Council decided to establish a Working Group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts of balanced geographical representation, appointed for three years.<sup>76</sup> In June 2014, the Human Rights Council decided to extend the Working Group's mandate for another three years.<sup>77</sup>

The Working Group is requested to:

- Promote the effective and comprehensive dissemination and implementation of the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework;
- Identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles and to assess and make recommendations thereon and, in that context, to seek and receive information from all relevant sources, including Governments, transnational corporations and other business enterprises, national human rights institutions, civil society and rights-holders;
- Provide support for efforts to promote capacity-building and the use of the Guiding Principles, as well as, upon request, to provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights;
- Conduct country visits and to respond promptly to invitations from States;
- Continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas;

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<sup>75</sup> See Chapter I on United Nations Treaty Based Mechanisms

<sup>76</sup> HRC, Resolution 17/4, *Human rights and transnational corporations and other business enterprises*, <http://www.ohchr.org>

<sup>77</sup> HRC, Resolution 26/2, *Human rights and transnational corporations and other business enterprises*, <http://ap.ohchr.org/>

- Integrate a gender perspective throughout the work of the mandate and to give special attention to persons living in vulnerable situations, in particular children;
- Work in close cooperation and coordination with other relevant special procedures of the Human Rights Council, relevant United Nations and other international bodies, the treaty bodies and regional human rights organisations;
- Develop a regular dialogue and discuss possible areas of cooperation with Governments and all relevant actors, including relevant United Nations bodies, specialized agencies, funds and programmes, in particular the Office of the United Nations High Commissioner for Human Rights, the Global Compact, the International Labour Organisation, the World Bank and its International Finance Corporation, the United Nations Development Programme and the International Organisation for Migration, as well as transnational corporations and other business enterprises, national human rights institutions, representatives of indigenous peoples, civil society organisations and other regional and subregional international organisations;
- Guide the work of the Forum on Business and Human Rights;
- Report annually to the Human Rights Council and the General Assembly.

The Working Group will not be able to receive individual communications from victims of human rights violations. However, the Working Group will be in a position to look at concrete cases, through site visits in particular.

The Working Group can receive information on alleged human rights abuses or violations and intervene directly with States, business enterprises and others on such allegations where deemed appropriate, through the Communications procedure.<sup>78</sup> FIDH sent communications to the Working Group on human rights issues relating to the 2014 World Cup in Brazil and Olympic games in Russia. It has also brought to its attention human rights situations in Bangladesh, the Occupied Palestinian Territory (OPT) and in Cambodia.

Since its establishment, the Working Group has realised a number of country visits, including in Mongolia (2012), the USA (2013), Ghana (2013) and Azerbaijan (August 2014), after which it published country visit reports which include recommendations.<sup>79</sup>

The Working Group encourages States to develop national action plans (NAPs) on business and human rights, to implement the Guiding Principles on Business and Human Rights. In December 2014, the Working Group issued its *Guidance on National Action Plans on Business and Human Rights*,<sup>80</sup> which provides recommendations on the development, implementation and the update of NAPs. In addition, the Working Group created a repository of states' national action plans.<sup>81</sup>

<sup>78</sup> The Working Group's Communications procedure is described at [www.ohchr.org](http://www.ohchr.org)

<sup>79</sup> See the Working Group's country visit reports at [www.ohchr.org](http://www.ohchr.org)

<sup>80</sup> UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, December 2014, [www.ohchr.org](http://www.ohchr.org)

<sup>81</sup> For more information and to access states' NAPs, visit [www.ohchr.org](http://www.ohchr.org)

FIDH expects that the working group which members were appointed in September 2011, will tackle the gaps of the Guiding Principles and make recommendations to ensure access to effective remedies for victims.

The Working Group can be contacted at [wg-business@ohchr.org](mailto:wg-business@ohchr.org)

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## 2. Working methods

Special Procedures mandate-holders are called upon to consult, to the best extent possible, various sources of information. When determining whether action should be taken the mandate-holder generally takes the following criteria into account: **the reliability of the source**, the internal coherence of the information received, the factual details provided, and the **relevance of the issue** as regards the scope of the mandate. He may also seek additional information from any appropriate source.

The mandate-holders must give government representatives the opportunity to comment on allegations made against them and, for those alleging violations, to comment on these government responses. However, they are not required to inform those who provide information about any subsequent measures they have taken.

Moreover, **they must take all feasible precautions to ensure that providers of information are not subjected to retaliation**. Where the persons who have provided the mandate-holder with information have suffered from reprisals or retaliation, the mandate-holder must be informed promptly so that appropriate follow-up action can be taken. Special Procedures contribute to the **interpretation of international law provisions and the elaboration of principles for states and businesses**. (See summary table with examples of reports and documents issued by the Special Procedures in relation to business and human rights.)

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### **Special Rapporteur on the right to health – Human rights responsibilities of pharmaceutical companies in relation to access to medicines**

In August 2008, Paul Hunt, then Special Rapporteur on the right to health, published a report including guidelines for pharmaceutical companies. This report followed numerous public consultations, including with some pharmaceutical companies who agreed to take part in the process. The guidelines contain nearly 50 recommendations aimed at identifying and clarifying the human rights responsibilities of pharmaceutical companies, especially relating to their role in individuals' access to medicine.

Highlighting the fact that **pharmaceutical companies have a deep impact – both positive and negative – on governments' capacity to guarantee the right to health and access medicines for their citizens**, the recommendations cover the full range of activities of pharmaceutical companies – from patents and advocacy activities, through to public-private partnerships

and donations. The recommendations follow a rights-based approach by emphasising the importance for pharmaceutical companies to integrating human rights, especially the right to health, into all their spheres of activity, including their policies and strategies.<sup>82</sup>

Depending on their mandate Special Procedures may undertake **various types of activity** including:

- Receive **individual complaints**.
- Send communications to states (**urgent appeals or letters**).
- Alert international public opinion (**press releases**).
- Advise states, especially through the publication of **reports**.
- Undertake **country visits**.

### a) Communications to states

Mandate-holders may send a **communication** to a government in relation to any actual or anticipated human rights violation(s) which fall within the scope of their mandate. Communications may be of two kinds: **urgent appeals** or **letters of allegation**.

Communications detail **issues concerning individuals**, groups or communities. They can focus on **general trends and patterns of human rights violations** in a particular country or across various countries. An existing or draft **legislation** can also be a matter of concern. Their purpose is to obtain **clarification** by the state concerned and to promote measures designed to protect human rights on its territory. In light of the government's response, the mandate-holder determines how best to proceed. This might include the initiation of enquiries, the elaboration of recommendations or other appropriate steps.

Communications and governments' responses are **confidential** until they are published in the mandate-holder's periodic report, or the latter determines that the specific circumstances require action to be taken before that time. The names of alleged victims are reflected in the periodic reports, except for children and other victims of violence in relation to whom publication of names would be problematic.

Mandate-holders are encouraged to send **joint communications** whenever this seems appropriate.

<sup>82</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *The right to health*, 11 August 2008, A/63/263.

## Special Rapporteur on the Right to food – Communications to Austria, Germany and Switzerland

On 8 October 2008, the Austrian, German and Swiss governments announced that they would withdraw from a project to build the Ilisu Dam and hydro-electric power plant project on the river Tigris if the Turkish authorities did not solve, within 60 days, the social and environmental problems that such a dam would entail.

All governments concerned had received a communication from the Special Rapporteur on the Right to Food in October 2006, which warned that the building of the Ilisu Dam in Turkey would displace and impoverish more than 50,000 Kurdish people and inundate the 10,000-year-old town of Hasankeyf.<sup>83</sup>

### *Urgent appeals*

Urgent appeals are used by mandate-holders to communicate information in cases where the **alleged violations are ongoing or imminent**, and risk causing possible irreparable damage to the victim(s). This procedure is used when the letters of allegation procedure would not prove a rapid enough response to a serious human rights situation (see below).

The object of these appeals is to rapidly **inform the competent state authorities** of the circumstances so that they can intervene to end or prevent the violations in question. They generally consist of **four parts**:

- A reference to the UN resolution creating the mandates concerned.
- A summary of the available facts and, when applicable, indicate previous action taken on the same case.
- An indication of the specific concerns of the mandate-holder, in light of the provisions of relevant international instruments and case law.
- A request to the government concerned to provide information on the substance of the allegations and to take urgent measures to prevent the alleged violations.

Urgent appeals are transmitted directly to the Ministry of Foreign Affairs of the state concerned, with a copy to the Permanent Representative of the United Nations in the country concerned. These appeals are based on humanitarian grounds in order to guarantee the protection of the persons concerned, and do not imply any kind of judgment as regards the merits. The content of the questions or requests addressed to the government varies significantly, according to the situation in each case. Governments are generally requested to provide a substantive response **within 30 days**.

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<sup>83</sup> OHCHR, *UN Special Procedures - Facts and Figures 2008*, [www2.ohchr.org](http://www2.ohchr.org)



In certain cases, mandate-holders may decide to make urgent appeals public by issuing press releases or statements.

### *Letters of allegation*

Letters of allegation are the second type of communication which may be issued by Special Procedures mandate-holders. These letters are used to communicate information about **violations that are alleged to have already occurred**, when it is no longer possible to use urgent appeals, and to request the state to provide information on the substance of the allegations and measures taken.

Governments are usually requested to provide a substantive response to a letter **within two months**. Some mandate-holders forward the Government replies they receive to the alleged victim for their comments.

### ② Who can submit information?

Information submitted to the mandate-holders may be sent by **a person or a group of persons** who claim to be the victim(s) of human rights violations. Non governmental organisation, acting in good faith, and free of political motivations that are contrary to the provisions of the Charter of the United Nations, may submit information, provided they **have direct and reliable knowledge of the alleged violations**.<sup>84</sup> It is left to the discretion of a mandate-holder to decide whether to act on a given situation.

### ② Under what conditions?

In order to be admissible, communications must fulfil the following **criteria**:

- Communications must not be exclusively based on reports disseminated by **mass media**.
- **Anonymous petitions** are not admissible. However, in communications to the governments the mandate-holders normally preserve the confidentiality of their information source, except where the source requests that its identity be revealed.
- **Exhaustion of domestic remedies is not a precondition to the examination of an allegation by Special Procedures**. They do not preclude in any way the taking of appropriate judicial measures at the national level.

<sup>84</sup> OHCHR, *Manual of Operations of the Special Procedures of the Human Rights Council*, *op.cit.*, §§ 38 and following.

### ➔ **UN Rapporteurs call on the State to provide reparation for the community of Piquiá de Baixo in Açailândia, Brazil**

In the municipality of Açailândia in the Brazilian state of Maranhão, the activities of the pig iron and coal-burning industries have caused serious environmental pollution. Two hundred and sixty-eight families in the rural settlement of California and more than 300 families in the Piquiá de Baixo community have been affected by this pollution. Accidents (related to the proximity of waste products and pig iron production) and serious health issues caused by the coal-burning and pig iron pollution have been reported, including respiratory and vision problems, and even death in some cases.<sup>85</sup>

Special Rapporteurs, together with the UN Working Group on Business and Human Rights, sent a joint communication to the government of Brazil on 9 January 2014 with regard to this situation: they specifically asked questions in relation to prevention and remediation measures taken by the government to address the situation. The government responded.

FIDH, its member organisation Justiça Global and Justiça nos Trilhos are calling upon Brazil to implement prevention and reparation measures, including the immediate and integral resettlement of the community of Piquiá de Baixo.

## **HOW TO SUBMIT INFORMATION?**

Communications must:

- Be in written, printed or electronic format.
- Include full details of the sender's identity, address, the name of each victim (or any other identifying information), or of any community or organisation subject to the alleged violations.
- Contain a detailed description of the facts or situation at stake, especially any available information as to the date and place of the incidents, alleged perpetrators, suspected motives and contextual information.
- Indicate any steps already taken at the national, regional or international level in relation to the case.

Any communication addressed to Special Procedures mandate-holders must clearly indicate what the concern is in the subject heading of the message and be addressed to:

**Special Procedures**

**Division c/o OHCHR-UNOG**

**8-14 Avenue de la Paix**

**1211 Genève 10, Switzerland**

**Fax: +4122 917 90 06**

**Email: [urgent-action@ohchr.org](mailto:urgent-action@ohchr.org) (for complains and individual cases)**

**For any other information: [spinfo@ohchr.org](mailto:spinfo@ohchr.org)**

<sup>85</sup> Brazil: How much are human rights worth in the Brazilian mining and steel industry? The human rights impacts of the steel and mining industry in Açailândia" FIDH, Justiça Global, Justiça nos Trilhos, March 2011.

## b) Press statements

In appropriate situations, especially those of grave concern or in which a government has repeatedly failed to provide a substantive response, the Special Procedure mandate-holder may **issue a press statement or hold a press conference** either individually or jointly with other mandate-holders.

### Special Procedures in action in corporate-related human rights abuses

#### ➔ **Special Rapporteur on toxic waste<sup>86</sup> demands measures to counter the damaging effects of chemical substances in cleaning and food products – Press release**

“The large number of people whose human rights to life, health and food, among others, have been adversely affected by toxic and hazardous chemicals, and the gravity of the suffering of some of the worst-hit individuals and communities, make exposure to hazardous chemicals contained in household and food products one of the major human rights issues facing the international community. They also make the adequate regulation of hazardous chemicals most urgent. [...] There is a proliferation of products and foods containing toxic chemicals. In a globalized world, such products are **traded internationally or produced locally by subsidiaries of trans-national companies**, thereby affecting the enjoyment of human rights of individuals and communities in all parts of the world.

Many of the individual cases brought to the attention of the Special Rapporteur relating to hazardous chemicals deal with allegations of **irresponsible or illegal corporate behaviour** which has direct adverse effects on the enjoyment of human rights by individuals and communities. Such behaviour is too often met with impunity. International human rights law compels states to take effective steps to regulate corporate behaviour in relation to hazardous chemicals and **holds private companies accountable** for any actions taken in breach of such regulations.”<sup>87</sup>

#### ➔ **Special Rapporteur on adequate housing denounces forced evictions in Cambodia - Press release**

“More than 130 families were forcibly evicted during the night of 23 and 24 January 2009 from Dey Krahorm, in central Phnom Penh to make way for a private company to redevelop the site. [...] In Cambodia, a consistent pattern of violation of rights has been observed in connection with forced evictions: systematic lack of due process and procedural protections; inadequate compensation; lack of effective remedies for communities facing eviction; excessive use of force; and harassment, intimidation and criminalization of NGOs and lawyers working on this issue.

<sup>86</sup> Full title: *Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*.

<sup>87</sup> OHCHR, “Special Rapporteur on toxic wastes urges measures to counter harmful effects of chemicals contained in household and foods”, Press release, 7 April 2006.

Forced evictions constitute a grave breach of human rights. They can be carried out only in exceptional circumstances and with the full respect of international standards. Given the disastrous humanitarian situation faced by the victims of forced evictions, I urge the Cambodian authorities to establish a national moratorium on evictions until their policies and actions in this regard have been brought into full conformity with international human rights obligations.”<sup>88</sup>

### c) Country visits

Finally, Special Procedures mandate-holders may also undertake visits to countries in order to **investigate the human rights situation at the national level**. These visits are an essential means to obtain direct and first-hand information necessary to evaluate the situation.

During these visits, experts may meet with:

- National and local authorities, including members of the judiciary and parliament
  - Members of national human rights institutions
  - Non-governmental organisations and other representatives of civil society
  - Victims of human rights violations
  - United Nations organisations and other intergovernmental organisations
  - The press
- Mandate-holders must request an invitation from the state they wish to visit.

However, a government may take the initiative to invite mandate-holders.

After their visit, mandate-holders prepare a mission report containing their conclusions and recommendations.<sup>89</sup>

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## STATISTICS<sup>90</sup>

### In 2013:

- 528 Communications were sent to 117 states.
- 84% of all communications were sent jointly by more than one mandate.
- Communications covered at least 1520 individuals, 18% of whom were women.
- Governments replied to 45% of communications.
- 22.72 % of the communications were followed-up by mandate-holders.

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<sup>88</sup> OHCHR, *Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, Press release, 30 January 2009.

<sup>89</sup> See OHCHR, *Country visits*, [www2.ohchr.org](http://www2.ohchr.org).

<sup>90</sup> See OHCHR, *Publications on Special Procedures*, [www.ohchr.org/EN/HRBodies/SP/Pages/Publications.aspx](http://www.ohchr.org/EN/HRBodies/SP/Pages/Publications.aspx).

## Meeting with non-state actors

As the revised draft *Manual of Operations of the Special Procedures* highlights, it is essential that during their visits mandate-holders meet – and enter into dialogue with – non-state actors, **including private business enterprises**. Such meetings are particularly relevant where these actors bear responsibility for the alleged human rights violations or where they exercise de facto control over part of the territory.<sup>91</sup>

### ADDITIONAL RESOURCES

- Charter of the United Nations  
[www.un.org/en/documents/charter/index.shtml](http://www.un.org/en/documents/charter/index.shtml)
- United Nations Treaties and their Protocols  
[www2.ohchr.org/english/law/index.htm](http://www2.ohchr.org/english/law/index.htm)
- Ratifications of human rights instruments  
<http://treaties.un.org>
- Office of the High Commissioner for Human Rights  
[www.ohchr.org](http://www.ohchr.org)
- Human Rights Committee  
[www2.ohchr.org/english/bodies/hrc](http://www2.ohchr.org/english/bodies/hrc)
- Committee on Economic, Social and Cultural Rights  
[www2.ohchr.org/english/bodies/cescr](http://www2.ohchr.org/english/bodies/cescr)
- Human Rights Council  
[www2.ohchr.org/english/bodies/hrcouncil](http://www2.ohchr.org/english/bodies/hrcouncil)
- Universal Periodic Review  
[www.ohchr.org/EN/HRBodies/UPR](http://www.ohchr.org/EN/HRBodies/UPR)
- Review of the “1503” procedure  
[www2.ohchr.org/english/bodies/chr/complaints.htm](http://www2.ohchr.org/english/bodies/chr/complaints.htm)
- Special Procedures  
[www2.ohchr.org/english/bodies/chr/special](http://www2.ohchr.org/english/bodies/chr/special)
- Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises  
[www2.ohchr.org](http://www2.ohchr.org)
- Working Group on the issue of human rights and transnational corporations and other business enterprises  
[www.ohchr.org](http://www.ohchr.org)

<sup>91</sup> OHCHR, *Manual of Operations of the Special Procedures of the Human Rights Council*, *op.cit.*, §§ 81 and following.

## Publications

- OHCHR, *Working with the United Nations Human Rights Programme: a Handbook for Civil Society*, 2009  
[www.ohchr.org/EN/AboutUs/CivilSociety/Pages/Handbook.aspx](http://www.ohchr.org/EN/AboutUs/CivilSociety/Pages/Handbook.aspx)
  - OHCHR, *Manual of Operations of the Special Procedures of the Human Rights Council*, August 2008  
[www2.ohchr.org/english/bodies/chr/special/Manual.htm](http://www2.ohchr.org/english/bodies/chr/special/Manual.htm)
  - OHCHR, *Practical Guide for Civil Society*  
<http://www.ohchr.org/EN/HRBodies/UPR/Documents/PracticalGuideCivilSociety.pdf>
  - Danish Institute for Human Rights (DIHR), *Fact sheet, Engaging in the Universal Periodic Review process and follow-up on business and human rights*  
<http://nhri.ohchr.org>
  - ECSR-Net, *Advocacy guide on business and human rights in the United Nations*, October 2009  
[https://docs.escr-net.org/usr\\_doc/ESCRNet\\_BHRGuideI\\_Updated\\_Oct2009\\_eng\\_FINAL.pdf](https://docs.escr-net.org/usr_doc/ESCRNet_BHRGuideI_Updated_Oct2009_eng_FINAL.pdf)
  - FIDH, *The Universal Periodic Review Handbook*, August 2009  
[www.fidh.org/IMG/pdf/UPR\\_HANDBOOK.pdf](http://www.fidh.org/IMG/pdf/UPR_HANDBOOK.pdf)
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➤ Jakarta, Indonesia © AFP PHOTO/ Bay ISMOYO

## ➤ Human Rights mechanisms and competence of treaty bodies

TREATY BODIES	HUMAN RIGHTS COMMITTEE	COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS	COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION	COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN	
<b>Instruments monitored by the Committees</b>	International Covenant on Civil and Political Rights (16/12/66 (ICCPR)) Optional Protocol aiming at the abolition of the death penalty (15/12/89)	International Covenant on Economic, Social and Cultural Rights (16/12/66 (ICESCR)) Optional Protocol to the ICESCR (10/12/2008)	International Convention on the Elimination of All Forms of Racial Discrimination (21/12/65 (ICERD))	Convention on the Elimination of All Forms of Discrimination against Women (18/12/79 (CEDAW))  CEDAW Optional Protocol (6/10/1999)	
<b>Inter-State Communications</b>	Art. 41-43 ICCPR  Possibility of appointing an <i>ad hoc</i> Conciliation Commission  This procedure only applies to States that recognise this competence of the ICCPR Committee	Article 10 OP-ICESCR  This procedure only applies to States that recognise this competence of the CESCR Committee	Art. 11-13 CERD  Possibility of appointing an <i>ad hoc</i> Conciliation Commission  This procedure applies to all CERD State parties		
<b>Individual complaints</b>	<b>Yes</b>  The State concerned must have ratified the 1 <sup>st</sup> Optional ICCPR Protocol	<b>Yes</b>  The State concerned must have ratified the CESCR Optional Protocol to the ICESCR	<b>Yes</b>  The State concerned must have made the Declaration specified in CERD Article 14	<b>Yes</b>  The State concerned must have ratified the CEDAW Optional Protocol	
<b>Urgent interim measures in connection with individual complaints</b>	Article 92  Rules of Procedure of ICCPR	Art. 5  CESCR Protocol	Article 94  Rules of Procedure of CERD Committee	Article 63  Rules of Procedure of CEDAW Committee	
<b>Inquiries and visits</b>	No	Art. 11 OP-ICESCR		Art. 8-10  CEDAW Optional Protocol. The States parties to the CEDAW Protocol can refuse this competence of the Committee by making a declaration under Article 10 of the Protocol	

\* The Convention on the Rights of the Child does not allow the committee of experts set up to monitor its implementation to receive individual complaints. Complaints by individuals concerning alleged violations of the rights of the child must therefore be brought before other committees.



	COMMITTEE AGAINST TORTURE	COMMITTEE ON THE RIGHTS OF THE CHILD	COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES	COMMITTEE ON MIGRANT WORKERS	COMMITTEE ON ENFORCED DISAPPEARANCES
	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (10/12/84 (CAT))	Convention on the Rights of the Child (20/11/89 (CRC)) Optional Protocol on the involvement of children in armed conflicts (25/05/00) Optional Protocol on the sale of children, child prostitution and child pornography (25/05/00)	Convention on the Rights of Persons with Disabilities (13/12/06 (CRPD)) Optional Protocol on the Rights of Persons with Disabilities (12/12/06)	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (18/12/90 (ICRMW))	International Convention for the Protection of All Persons from Enforced Disappearances (20/12/06)
	Art. 21 CAT  This procedure only applies to States that recognise this competence of the CAT Committee			Art. 76 CMW  This procedure only applies to States that recognise this competence of the CMW Committee	
	<b>Yes</b>  The State concerned must have made the Declaration specified in CAT Article 22	<b>No*</b>  This committee cannot consider complaints from individuals	<b>Yes</b>  The State concerned must have ratified the CRPD Optional Protocol	<b>Yes (on entry into force)</b>  For this committee to be able to consider individual complaints, 10 State parties must have accepted the procedure (CMW Article 77)	<b>Yes</b>  For this committee to be able to consider individual complaints, 10 State parties must have accepted the procedure (Article 31)
	Article 108  Rules of Procedure of CAT Committee				
	Art. 20 CAT  The States parties can refuse this competence of the Committee by making a declaration under Article 28 of CAT		Art. 6(2)		

➤ Examples of reports and documents issued by the Special Procedures in relation to business and human rights

TITLE	NAME OF CURRENT MANDATE HOLDER	PRACTICE OF COMMUNICATION TO GOVERNMENTS	COUNTRY VISITS	REFERENCES TO NON-STATE ACTORS IN THE MANDATE	COMPLAINT SUBMISSION AND CONTACT	
Special Rapporteur on adequate <b>housing</b> as a component of the right to an adequate standard of living	Ms. Leilani Farha, Canada, (since 2014)	- Urgent appeals - Allegation Letters	Yes	Not specifically mentioned	E-mail: srhousing@ohchr.org urgent-action@ohchr.org  Fax: +41 22 917 90 06  Postal Address: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland	
Special Rapporteur on <b>extrajudicial, summary or arbitrary executions</b>	Mr Christof Heyns, South Africa, (since august 2010)	- Urgent appeals - Allegation Letters	Yes	Not specifically mentioned	E-mail: eje@ohchr.org urgent-action@ohchr.org  Fax: +41 22 917 90 06  Postal Address: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland	
Independent expert on the question of human rights and <b>extreme poverty</b>	Mr. Philip Alston, Australia, (since 2014)	Not specifically mentioned	Yes	Yes <b>A/HRC/RES/8/11</b> , §6.	E-mail: ieextremepoverty@ohchr.org	
Special Rapporteur on the <b>right to food</b>	Ms. Hilal, Elver, Turkey, (since 2013)	- Urgent appeals - Allegation Letters	Yes	Yes <b>A/HRC/7/L.6/Rev.1</b> , § 13, 25, 39.	E-mail: srfood@ohchr.org urgent-action@ohchr.org  Fax: +41 22 917 90 06  Postal Address: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland	

	RELEVANT DOCUMENTS AND LINKS ON NON-STATE ACTORS (REPORTS, GUIDELINES, PRINCIPLES)	WEBSITE
	<p><b>A/HRC/4/18 Annex 1</b> Basic principles and guidelines on development-based evictions and displacement.</p> <p><b>A/69/274 (Report to GA 2014)</b> § 52 to § 56: the Special Rapporteur highlights the role of transnational corporations and multilateral or bilateral financial institutions in the implementation of the right to adequate housing; and stresses the obligation of States to <b>regulate</b> businesses to ensure that their actions are consistent with this right.</p>	<p><a href="http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx">http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx</a></p>
	<p>See especially § 46,56,70,80 and annex II. See Annex II on the legal framework to prosecute private contractors and government employees. § 80 : <b>Congress should adopt legislation that comprehensively provides criminal jurisdiction over all private contractors and civilian employees</b>, including those working for intelligence agencies.</p> <p><b>A/65/321 (Report 2010)</b> § 47: the Special Rapporteur seek to work with the private sector on the issue of “potential human rights applications of new technologies and the obstacles to their effective use”.</p>	<p><a href="http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx">http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx</a></p>
	<p><b>A/63/274 (Report 2008)</b> “§ 72. The independent expert will seek to work with the private sector with a view to identifying initiatives that can contribute to reduce poverty, and assess their integration of a human rights approach.”</p>	<p><a href="http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx">http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx</a></p>
	<p><b>A/HRC/RES/7/14 (2008)</b> § 13. <i>Requests</i> all States and <b>private actors</b>, as well as international organisations within their respective mandates, <b>to take fully into account the need to promote the effective realization of the right to food for all</b>.</p> <p><b>A/HRC/10/5 Add. 2 – Mission to WTO (2009)</b> § 46. In the medium to long term, a <b>multilateral framework may have to be established to ensure a more adequate control of transnational corporations</b>.</p> <p><b>A/HRC/13/33 (report 2009)</b> Agribusiness and the right to food - the role of commodity buyers, food processors and retailers <b>in the realization of the right to food. Contains recommendations towards private sector</b>.</p> <p><b>A/65/223 (Report 2010)</b> §41b), §43c) the role of private investors in favor of liberalization of the lands and the role of State in the supervision of their behavior.</p>	<p><a href="http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx">http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx</a></p>

➤ Examples of reports and documents issued by the Special Procedures in relation to business and human rights (continued)

TITLE	NAME OF CURRENT MANDATE HOLDER	PRACTICE OF COMMUNICATION TO GOVERNMENTS	COUNTRY VISITS	REFERENCES TO NON-STATE ACTORS IN THE MANDATE	COMPLAINT SUBMISSION AND CONTACT	
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental <b>health</b>	Mr. Dainius Pūras, Lithuania, (since August 2014)	- Urgent appeals - Allegation Letters	Yes	Not specifically mentioned	E-mail: srhealth@ohchr.org urgent-action@ohchr.org  Fax: +41 22 917 90 06  Postal Address: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland	
Special Rapporteur on the situation on <b>human rights defenders</b>	Mr. Michel Forst, France, (since 2014)	- Urgent appeals - Allegation Letters	Yes	Not specifically mentioned	E-mail: defenders@ohchr.org urgent-action@ohchr.org  Fax: +41 22 917 90 06  Postal Address: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland	
Special Rapporteur on the situation of human rights and fundamental freedoms of <b>indigenous people</b>	Ms. Victoria Tauli Corpuz, Philippines, (since 2014)	- Urgent appeals - Allegation Letters	Yes	Not specifically mentioned	E-mail: indigenous@ohchr.org urgent-action@ohchr.org  Fax: +41 22 917 90 06  Postal Address: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland	
Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to selfdetermination	5 members	- Urgent appeals - Allegation Letters	Yes	Yes E/CN.4/RES/2005/2 and A/HRC/7/21, §e A/HRC/10/L.24, §13a	E-mail: urgent-action@ohchr.org mercenaries@ohchr.org  Fax: +41 22 917 90 06  Postal Address: Working Group on the use of mercenaries Office of the High Commissioner for Human Rights Palais des Nations CH-1211 Geneva 10	

	RELEVANT DOCUMENTS AND LINKS ON NON-STATE ACTORS (REPORTS, GUIDELINES, PRINCIPLES)	WEBSITE
	<p><b>A/63/263 (in report to GA 2008)</b> Human rights guidelines to pharmaceutical companies in relation to access to medicines, former Special Rapporteur Paul Hunt.</p> <p><b>A/69/299 69(b) (Report to GA 2014)</b> Section V focuses on corporate accountability for human rights violations. The SR calls for: the adoption of an international treaty and an accessible and effective adjudicatory mechanism, and for specific binding human rights obligations on transnational corporations.</p>	<p><a href="http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx">http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx</a></p>
	<p><b>A/68/262 (Report to GA 2013)</b> The report focuses on the increased vulnerability of human rights defenders operating in the context of large-scale development projects, in particular threats by private security companies.</p>	<p><a href="http://www2.ohchr.org/english/issues/defenders">www2.ohchr.org/english/issues/defenders</a></p>
	<p><b>A/HRC/24/41 (Report to HRC 2013)</b> The report focuses on human rights concerns of indigenous peoples relating to extractive industries, calls on extractive companies to conduct due diligence and on states to establish adequate protection regulatory regimes (both domestic and extraterritorial).</p> <p><b>A/HCR/15/37 (Report 2010)</b> The second part is devoted “to an analysis of corporate responsibility with respect to indigenous rights, in the framework of the international community’s expectations in that regard”.</p>	<p><a href="http://www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/SRIPeoplesIndex.aspx">http://www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/SRIPeoplesIndex.aspx</a></p>
	<p><b>A/63/325 (Report 2010)</b> The report focuses on the responsibility of private military and security companies and contains draft principles “in view of the possible development of national and international regulation mechanisms”.</p> <p><b>A/68/339 (Report to GA 2013)</b> The Working Group stresses gaps in transparency and accountability of private military and security companies and reiterates the need for an international regulatory framework to monitor their activities.</p> <p><b>A/HRC/27/50 (Report to HRC 2014)</b> The SR reiterates the need for effective regulation of the activities of private military and/or security companies.</p>	<p><a href="http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/WGMercenariesIndex.aspx">http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/WGMercenariesIndex.aspx</a></p>

➤ Examples of reports and documents issued by the Special Procedures in relation to business and human rights (continued)

TITLE	NAME OF CURRENT MANDATE HOLDER	PRACTICE OF COMMUNICATION TO GOVERNMENTS	COUNTRY VISITS	REFERENCES TO NON-STATE ACTORS IN THE MANDATE	COMPLAINT SUBMISSION AND CONTACT	
Special Rapporteur on the human rights of migrants	Mr. François Crépeau, Canada, (since 2011)	- Urgent appeals - Allegation Letters	Yes	Not specifically mentioned	E-mail: urgent-action@ohchr.org migrant@ohchr.org  Fax: +41 22 917 90 06  Postal Address: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland	
Special Rapporteur on contemporary forms of slavery, including its causes and consequences	Ms. Urmila Bhoola, South Africa, (since 2014)	- Urgent appeals - Allegation Letters	Yes	Not specifically mentioned	E-mail: urgent-action@ohchr.org srslavery@ohchr.org  Fax : +41 22 917 90 06  Postal Address: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland	
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment	Mr. Juan Endersto Mendez, Argentine, (since 2010)	- Urgent appeals - Allegation Letters	Yes	Yes, <b>E/CN/4/RES/2005/47, §16</b>	E-mail: sr-torture@ohchr.org urgent-action@ohchr.org  Fax: +41 22 917 90 06  Postal Address: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland	
Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes	Mr. Baskut Tuncak, Turkey, (since 2014)	Not specifically mentioned	No	Yes, <b>A/HRC/RES/9/1, §5B</b>	E-mail: urgent-action@ohchr.org srtoxicwaste@ohchr.org  Fax: +41 22 917 90 06  Postal Address: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland	

RELEVANT DOCUMENTS AND LINKS ON NON-STATE ACTORS (REPORTS, GUIDELINES, PRINCIPLES)	WEBSITE
<p><b>A/HRC/20/24 (Report to HRC 2012)</b> The SR stresses the lack of monitoring in privately run detention centre and recalls that such contracting out does not absolve states of their human rights obligations.</p> <p><b>A/HRC/26/35/Add.1 (Report 2014, Add.1 Mission to Qatar)</b> § 75-77 are devoted to the responsibilities of the private sector.</p>	<p><a href="http://www.ohchr.org/english/issues/torture/rapporteur/index.htm">www.ohchr.org/english/issues/torture/rapporteur/index.htm</a></p>
<p><b>A/HRC/12/21 (report 2009)</b> In her conclusions, the Special Rapporteur recommends that private actors take specific prevention, prosecution and protection measures to combat forced and bonded labour.</p> <p><b>A/HRC/30/35 (Report to HRC 2015)</b> The reports looks at states and business' responsibilities for preventing, mitigating and redressing contemporary forms of slavery in supply chains.</p>	<p><a href="http://www.ohchr.org/english/issues/slavery/rapporteur/index.htm">www.ohchr.org/english/issues/slavery/rapporteur/index.htm</a></p>
<p><b>Preliminary findings on the Mission to Papua New Guinea (25 mai 2010).</b></p> <p><b>A/HRC/28/68 (Report to HRC 2015)</b> Report focuses on children deprived of their liberty. The SR calls for the establishment of independent monitoring mechanisms in all places of deprivation of liberty, including those run by private actors.</p>	<p><a href="http://www.ohchr.org/english/issues/torture/rapporteur/index.htm">www.ohchr.org/english/issues/torture/rapporteur/index.htm</a></p>
<p><b>A/HRC/RES/21/17 (2012)</b> The SR's mandate includes "The human rights issues raised by transnational corporations and other business enterprises in connection with the environmentally sound management and disposal of hazardous substances and wastes".</p> <p><b>A/HRC/24/39/Add.1 (Report 2013, Mission to Hungary)</b> The report touches on the liability of private actors for environmental damage.</p> <p><b>A/HRC/21/48 (Report to HRC 2012)</b> The report focuses on the adverse effects on the enjoyment of human rights of the unsound management of hazardous substances and waste used in and generated by extractive industries.</p>	<p><a href="http://www.ohchr.org/english/issues/trans_corporations/index.htm">www.ohchr.org/english/issues/trans_corporations/index.htm</a> and <a href="http://www.business-humanrights.org/SpecialRepPortal/Home">www.business-humanrights.org/SpecialRepPortal/Home</a> (special portal)</p>

➤ Examples of reports and documents issued by the Special Procedures in relation to business and human rights (continued)

TITLE	NAME OF CURRENT MANDATE HOLDER	PRACTICE OF COMMUNICATION TO GOVERNMENTS	COUNTRY VISITS	REFERENCES TO NON-STATE ACTORS IN THE MANDATE	COMPLAINT SUBMISSION AND CONTACT	
Special Rapporteur on <b>trafficking in persons</b> , especially women and children	Ms. Maria Grazia Giammarinaro, Italy, (since 2014)	- Urgent appeals - Allegation Letters	Yes	Not specifically mentioned	Email: SRtrafficking@ohchr.org urgent-action@ohchr.org  Fax: +41 22 917 90 06  Postal Address: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland	
Working Group on the issue of human rights and transnational corporations and other business enterprises	5 members, (three years from June 2014)	Allegation Letters	Yes	Yes	E-mail: wg-business@ohchr.org urgent-action@ohchr.org  Fax: +41 22 917 90 06  Postal Address: Working Group on the issue of on the issue of human rights and transnational corporations and other business enterprises c/o OHCHR-UNOG Office of the High Commissioner for Human Rights Palais Wilson 1211 Geneva 10 Switzerland	
Independent Expert on the issue of human rights obligations related to access to <b>safe drinking water and sanitation</b>	Mr. Léo Heller, Brazil, (since 2014)	Not specifically mentioned	Yes	Yes  <b>A/HRC/17/L.17/Rev.1</b>	Email: srwatsan@ohchr.org urgent-action@ohchr.org  Fax: +41 22 917 90 06  Postal Address: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland	
Special Rapporteur on <b>violence against women</b> , its causes and consequences	Dr. Dubravka Šimonović, Croatia, (since 2015)	- Urgent appeals - Allegation Letters	Yes	Not specifically mentioned	Email: vaw@ohchr.org urgent-action@ohchr.org  Fax: +41 22 917 90 06  Postal Address: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland	



RELEVANT DOCUMENTS AND LINKS ON NON-STATE ACTORS (REPORTS, GUIDELINES, PRINCIPLES)	WEBSITE
<p><b>A/70/260, (Report to GA 2015)</b>  <a href="http://www.un.org">http://www.un.org</a>  The SR looks at the role of non-State actors in due diligence on trafficking in persons.</p> <p><b>A/67/261 (Report to GA 2012)</b>  <a href="http://daccess-dds-ny.un.org">http://daccess-dds-ny.un.org</a>  This report looks at the corporate responsibilities to prevent and combat human trafficking in supply chains.</p>	<p><a href="http://www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx">http://www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx</a></p>
<p><b>See the Working Group's reports</b>  <a href="http://www.ohchr.org">http://www.ohchr.org</a></p>	<p><a href="http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx">http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx</a></p>
<p><b>A/HRC/27/55 (Report to HRC 2014)</b>  <a href="http://daccess-dds-ny.un.org">http://daccess-dds-ny.un.org</a>  This report looks at failures to comply with human rights responsibilities by non-State actors, and violations of extraterritorial obligation including states failing to regulate the activities of corporations operating abroad.</p> <p><b>A/HRC/15/31 (Report to HRC 2010)</b>  <a href="http://daccess-dds-ny.un.org">http://daccess-dds-ny.un.org</a>  This report focuses on human rights obligations related to non-state service provision in water and sanitation.</p>	<p><a href="http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx">http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx</a></p>
<p><b>A/HRC/11/6 (report 2009)</b>  “§90. Develop mechanisms to hold non-State actors, including corporations and international organisations accountable for human rights violations and for instituting gender-sensitive approaches to their activities and policies;”</p> <p><b>A/HRC/14/L.9/Rev.1 (Report 2010)</b>  §8: “States have to support initiatives undertaken by (...) the private sector (...) aimed at promoting gender equality (...) and preventing violence against women and girls”.</p> <p><b>A/ HRC/17/26 (Report 2011)</b>  §§ 48, 55, 63, 88, 103, 105, 107, 108: the report states that violence against women can be found in both the public and private sectors.</p> <p><b>A/ HRC/17/26/Add.5 (Report 2011)</b>  Mission to the United States of America  § 70: Obligations of State to take reasonable measures to protect and ensure a citizen's rights against violations by private actors.</p>	<p><a href="http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx">http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx</a></p>

➤ Examples of reports and documents issued by the Special Procedures in relation to business and human rights (continued)

TITLE	NAME OF CURRENT MANDATE HOLDER	PRACTICE OF COMMUNICATION TO GOVERNMENTS	COUNTRY VISITS	REFERENCES TO NON-STATE ACTORS IN THE MANDATE	COMPLAINT SUBMISSION AND CONTACT	
Special Rapporteur on the rights to freedom of peaceful assembly and of association	Mr. Maina Kiai, Kenya (since 2011)	- Urgent appeals - Allegation Letters	Yes	Not specifically mentioned	Email: freeassembly@ohchr.org  Fax: +41 22 917 90 06  Special Rapporteur on the rights to freedom of peaceful assembly and of association Palais des Nations CH-1211 Geneva 10 Switzerland	

RELEVANT DOCUMENTS AND LINKS ON NON-STATE ACTORS (REPORTS, GUIDELINES, PRINCIPLES)	WEBSITE
<p><b>A/HRC/29/25 (Report to HRC 2015)</b>  <a href="http://www.ohchr.org">http://www.ohchr.org</a>            The report looks at the rights to freedom of peaceful assembly and of association in the context of natural resource exploitation. The SR addresses various recommendations to states vis-a-vis private actors, and to corporations, and calls for an international instrument on enterprises and human rights.</p> <p><b>A/70/266 (Report to GA 2015)</b>  <a href="http://freeassembly.net">http://freeassembly.net</a>            The SR finds that States and multilateral organisations often impose more burdensome regulation upon associations than to businesses, both in law and in practice.</p>	<p><a href="http://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/SRFreedomAssemblyAssociationIndex.aspx">http://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/SRFreedomAssemblyAssociationIndex.aspx</a></p>

In order to facilitate the receipt of your communications, please include the special procedure concerned (for instance, Special rapporteur on the Human Rights of Migrants) in the subject box of your e-mail, of your fax or on the cover of the envelope. If several e-mail addresses are mentioned, please use the following one: [urgent-action@ohchr.org](mailto:urgent-action@ohchr.org) to submit an individual complaint; for other purposes, use the other ones as referred to in the table below (for instance, [srhousing@ohchr.org](mailto:srhousing@ohchr.org)).

For more information please refer to the websites of the special procedures, and for more information on submitting communications see [www.ohchr.org](http://www.ohchr.org)

## PART II

### ILO Mechanisms

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The International Labour Organisation (ILO) was founded in 1919. Since 1946, the ILO has functioned as a specialised agency of the United Nations, responsible for developing and overseeing international labour standards. It has a unique tripartite structure that enables the representatives of workers' and employers' organisations to take part in all discussions and decision-making on an equal footing with governments.

The ILO regularly examines the application of labour standards in Member States and points out areas where they could be better applied. In this regard, the ILO has developed two kinds of supervisory mechanism aiming at overseeing the application of these standards, in law and practice, following their adoption by the International Labour Conference and their ratification by states.

The **regular system of supervision** involves the examination, by two ILO bodies (the Committee of Experts on the Application of Conventions and Recommendations and the Tripartite Committee on the Application of Standards of the International Labour Conference), of the periodic reports submitted by Member States.<sup>92</sup> These reports detail the measures that these states have taken to implement the provisions of the ILO Conventions they have ratified. Employer and worker organisations can comment on the reports before they are given to the Committee of Experts, which publishes its observations in an annual report released at the end of February/early March every year. Civil society organisations can send any reports or observations they may have related to one of the ILO conventions to a union in their country of origin or to the International Trade Union Confederation. The deadline for the submission of such reports is normally 31 August. It is, however, advisable to submit reports earlier in order to allow for unions to review the documentation prior to subsequent transfer to the ILO. Observations can subsequently be used as an advocacy tool to pressure governments. A select number of cases (approximately 25) negotiated between employers and workers are examined by the Conference Committee on the Application of Standards during the International Labour Conference every June in Geneva. The representatives of the governments concerned are then requested to provide information on the measures they intend to

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<sup>92</sup> States have an obligation to report every three years on fundamental and governance conventions and every five years on technical conventions. CEACR can also request "out of cycle" reports, where necessary.

adopt to comply with their international obligations. The Committee subsequently adopts conclusions, which include recommendations to the government. The ILO can also send a technical and/or tripartite mission ahead of the next International Labour Conference to verify the status of implementation of the recommendations by the government. The Committee can decide to include a special paragraph in its final report in cases considered to be serious. Such “special paragraphs” can be referred to by countries to justify, for instance, the withdrawal of trade preferences (as the US and the EU have done in some cases).

Under article 19, paragraph 5(e), of the ILO’s Constitution, a Member State undertakes, in respect of any Convention that it has not ratified, to report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, on the position of its law and practice in regard to the matters dealt with in that Convention. Such communication should show the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise, and should also state the difficulties that prevent or delay the ratification of that Convention.

In addition, the **special procedure of supervision** involves a *representations’ procedure* and a *complaints’ procedure*, together with a special procedure for freedom of association. The guide discusses separately each of the three main supervisory mechanisms available through the ILO:

- Complaints regarding freedom of association
- Complaints regarding a states’ failure to respect an ILO convention it has ratified (complaints under Article 26 of the ILO Constitution)
- Representations regarding a states’ failure to secure the effective observance of an ILO convention it has ratified (representations under Articles 24 and 25 of the ILO Constitution).

The section concludes with a comparative table that highlights key facts regarding each of the supervisory mechanisms.

## ② What rights are protected?

### *ILO Conventions*

There are 189 ILO Conventions covering a broad range of subjects concerning work, employment, social security, social policy and related human rights. The Conventions are legally binding on the states that ratify them.

ILO procedures are **mainly used by employers’ and workers’ organisations. Individuals themselves cannot initiate proceedings** with the ILO. The only way they can file a complaint is by doing so **via an employer or workers’ organisation.**

Complaints regarding violations of ILO conventions are made in the form of complaints against the relevant Member State's government, for failure to adequately enforce the convention. This is the case **even if the actual author of the violation is a private company or an individual employer**. Complaints can be brought either in national courts or via the ILO supervisory mechanisms discussed in this guide.

### ***The fundamental conventions***

The ILO's Governing Body has identified eight conventions as "fundamental", covering subjects that are considered as fundamental principles and rights at work:

- Freedom of association and the effective recognition of the right to collective bargaining
- The elimination of all forms of forced or compulsory labour
- The effective abolition of child labour
- The elimination of discrimination in respect to employment and occupation

These same principles are also covered in the ILO's Declaration on Fundamental Principles and Rights at Work (1998). Furthermore, the ILO launched a campaign in 1995 to achieve universal ratification of the eight fundamental conventions. There are over 1,200 ratifications of these conventions, representing 86% of the total possible number of ratifications.<sup>93</sup>

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<sup>93</sup> ILO, Table of ratifications of the fundamental conventions, [www.ilo.org/ilolex](http://www.ilo.org/ilolex).

## Workers' rights protected in the core ILO Conventions frequently impacted by corporate-related human rights abuses

FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK	CORE ILO CONVENTIONS	RIGHTS PROTECTED
Freedom of association and collective bargaining	Freedom of Association and Protection of the Right to Organize Convention, 1948 (n°87)	<ul style="list-style-type: none"> <li>- Right for workers and employers to establish and join organisations of their own choosing without previous authorization</li> <li>- Right to organize freely and not liable to be dissolved or suspended by administrative authority</li> <li>- Right to establish and join federation and confederation</li> </ul>
	Right to Organize and Collective bargaining Convention, 1949 (n°98)	<ul style="list-style-type: none"> <li>- Right to adequate protection against acts of anti-union discrimination</li> <li>- Right to adequate protection against any acts of interference by each other, in particular the establishment of workers' organisations under the domination of employers or employers' organisations</li> <li>- Right to collective bargaining</li> </ul>
Elimination of forced labour and compulsory labour	Forced Labour Convention, 1930 (n°29)	<ul style="list-style-type: none"> <li>- Prohibition of all forms of forced or compulsory labour defined as all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily</li> <li>- Protocol to the Forced Labour Convention, 2014</li> </ul>
	Abolition of Forced Labour Convention, 1957 (n°105)	<ul style="list-style-type: none"> <li>- Prohibition of forced or compulsory labour as a means of political coercion or education</li> </ul>
Abolition of child labour	Minimum Age Convention, 1973 (n°138)	<ul style="list-style-type: none"> <li>- Minimum age for admission to employment or work at 15 years</li> <li>- Minimum age for hazardous work at 18</li> </ul>
	Worst Forms of Child Labour Convention, 1999 (n°182)	<ul style="list-style-type: none"> <li>- Elimination of the worst forms of child labour, including all forms of slavery or practices similar to slavery</li> </ul>
Elimination of discrimination in respect of employment and occupation	Equal Remuneration Convention, 1951 (n°100)	<ul style="list-style-type: none"> <li>- Right to equal remuneration for men and women workers for work of equal value</li> </ul>
	Discrimination (Employment and Occupation) Convention, 1958 (n°111)	<ul style="list-style-type: none"> <li>- Equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in these fields</li> <li>- Elimination of discrimination in relation to access to vocational training, access to employment and to particular occupations, and terms and conditions of employment</li> </ul>

## Other ILO conventions

Beyond the fundamental conventions, the ILO has developed additional conventions that define general labour rights (such as labour inspection, employment policy, employment promotion, employment security, wages, working time, occupational safety, social security, maternity protection, and migrant workers) as well as some conventions that are sector-specific such as those relating to seafarers, fishers, dock workers and other specific categories of workers.<sup>94</sup>

### Indigenous and Tribal Peoples Convention (n°169)

In addition to the eight fundamental conventions, the Indigenous and Tribal Peoples Convention also warrants special mention in the context of corporate related human rights abuses. The Indigenous and Tribal Peoples Convention, 1989 (No. 169), which revised the earlier Indigenous and Tribal Populations Convention, 1957 (No. 107), “provides for consultation and participation of indigenous and tribal peoples with regard to policies and programs that may affect them. It provides for enjoyment of fundamental rights and establishes general policies regarding indigenous and tribal peoples’ customs and traditions, land rights, the use of natural resources found on traditional lands, employment, vocational training, handicrafts and rural industries, social security and health, education and cross-border contacts and communication”.<sup>95</sup>

No article 26 complaints (see section on Article 26 below) have been filed with the ILO under Conventions Nos. 107 or 169.<sup>96</sup> However, the Convention has been the subject of several representations.<sup>97</sup>

#### ➔ Using ILO conventions in national courts: the case of Arco Oriente Inc.

Convention No. 169 has influenced national legislation and policies and has been used in national litigation to protect indigenous peoples’ rights. For example, in 1998 the oil company Arco Oriente Inc. signed a hydrocarbon development agreement with the government of Ecuador. Much of the land belonging to the Federación Independiente del Pueblo Shuar del Ecuador (FIPSE), an indigenous group, was based in the project area. FIPSE had met as a group and had agreed to prohibit individual negotiations or agreements with the company. Both the government and the company were notified of this agreement. However, Arco signed an agreement with several persons obtaining authorization to perform an environmental impact survey. FIPSE filed an amparo action demanding its right of inviolability of domicile,

<sup>94</sup> ILO, *Subjects covered by International Labour Standards*, [www.ilo.org](http://www.ilo.org)

<sup>95</sup> ILO, *Indigenous and tribal peoples*, [www.ilo.org](http://www.ilo.org)

<sup>96</sup> ILO, *ILO Website on Indigenous and tribal peoples: standards and supervision*, [www.ilo.org](http://www.ilo.org)

<sup>97</sup> The complaint and representation procedures are described in the next sections of this guide.



political organisation and internal forms of exerting authority.<sup>98</sup> The Constitutional Court found that Arco's behavior was incompatible with ILO Convention No. 169 and with the Constitution, as both protect the rights of indigenous peoples. These include the right to be part of the consultation and the participation in the projects throughout the whole process of a project when the plans potentially affect them directly, the right to protect and exercise their individual customs and institutions, to keep their cultural identity, as well as the rights to property and possession of ancestral land. The Court ordered the company to refrain from approaching or seeking dialogue with individuals, FIPSE Centers, or Associations without prior authorization from FIPSE's Meeting of Members.<sup>99</sup>

## The MNE Declaration

In addition to the conventions, the ILO has also formulated the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the MNE Declaration), a joint declaration that was prepared by a tripartite group representing governments, employers and workers. The Declaration was approved by the Governing Body of the ILO, and is intended to give MNEs, governments and employers' and workers' organisations **basic guidance in the domain of employment, training, working conditions and life, and industrial relations**. It refers to many ILO conventions and recommendations.<sup>100</sup> The Declaration sets out principles that governments, employers' and workers' organisations and multinational enterprises are recommended to observe on a **voluntary basis**.<sup>101</sup>

Although an interpretation procedure was set up to clarify the content of the Declaration in cases of disagreement between parties, it has been dormant for many years. This is partly due to the fact that this mechanism cannot be used simultaneously with other mechanisms. Many potential applications overlap with other complaints mechanisms and hence **this recourse has become virtually obsolete**.<sup>102</sup> Furthermore its main purpose is to provide social policy guideline. This means that it is not very useful as a direct recourse strategy for victims of violations of human rights by TNCs. As such, the MNE interpretation procedure will not be further discussed in this guide. The ILO's MNE Declaration reflects an agreed understanding that, whilst ILO Conventions and recommendations address the responsibilities of governments and are intended for application by

<sup>98</sup> Amparo Action: An action that can be filed mainly in the Spanish-speaking world when constitutional rights have been infringed upon. They are generally heard by Supreme or Constitutional courts and are seen as inexpensive and efficient ways of dealing with the protection of constitutional rights.

<sup>99</sup> *Federación Independiente del Pueblo Shuar del Ecuador (FIPSE) c. Arco Oriente s/ Amparo*, Tribunal Constitucional del Ecuador, 2000, available at ESCR-Net, "Caselaw", [www.escri-net.org/caselaw](http://www.escri-net.org/caselaw)

<sup>100</sup> ILO, *List of international labour Conventions and Recommendations referred to in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, Annex, in ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 4<sup>th</sup> edition, 2006.

<sup>101</sup> ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 4<sup>th</sup> edition, 2006, art. 7.

<sup>102</sup> E. Sims, Manager, ILO Helpdesk, ILO, Telephone Interview with FIDH, 23 September 2009.

governments, many of their underlying principles can also be applied by business enterprises. This is arguably one of the Declarations' most important contributions to the corporate responsibility debate. Over the years, the MNE Declaration has provided an unambiguous refutation of the argument sometimes made by business that, as ILO Conventions and Recommendations address governments, they are not for application to business activities. **Some stakeholders, especially unions, would like the ILO to revise the MNE Declaration.**

### **Protocol to Convention 29 on Forced Labour**

The alarming numbers of men, women and children trapped in forced labour led to the successful adoption of the Protocol to the Forced Labour Convention and the Forced Labour Recommendation (No. 203) in June 2014. In conjunction with the ILO Conventions on Forced Labour (No. 29), and the Abolition of Forced Labour (No. 105), they provide a comprehensive policy framework to effectively abolish forced labour. They include provisions to better protect people trapped in forced labour, improve access to justice and strengthen the role of workers' and employers' organisations as well as labour inspection.

# CHAPTER I

## Complaints Regarding Freedom of Association – The Committee on Freedom of Association

\* \* \*

The ILO's Committee on Freedom of Association (CFA) was set up in 1951 to examine violations of workers' and employers' organizing rights. The Committee is tripartite and handles complaints in ILO Member States, whether or not they have ratified conventions guaranteeing the right to freedom of association. The Committee has examined over 3000 cases since its creation in 1951.

**Individual victims are not permitted to file complaints before the Committee.** Rather, the complainant must be a government or an organisation of workers or employers. Therefore, individuals who are unable to find an organisation willing to submit a complaint on their behalf will be unable to resort to this mechanism.

### ② Who can file a complaint?

Complaints must be submitted by organisations of workers, organisations of employers, or governments. In addition, complaints are valid only if they are submitted by one of the following:

- A national organisation directly interested in the matter – although the ILO in some cases may consider applications that are not endorsed by a national union.
- The Committee has full freedom to decide whether an organisation is an employers' or workers' organisation under the meaning of the ILO Constitution. The Committee is not bound by national definitions of the term.
- Complaints are not rejected merely because the government has dissolved or has proposed to dissolve the complainant organisation, or because the person or persons making the complaint have taken refuge abroad.

The fact that a trade union has not deposited its by-laws, or that an organisation has not been officially recognized is not sufficient to reject their complaints, in accordance with the principle of freedom of association.<sup>103</sup>

If no precise information is available regarding the complainant organisation, the ILO may request the organisation furnishes “information on the size of its membership, its statutes, its national or international affiliations and any other information calculated, in any examination of the admissibility of the complaint, to lead to a better appreciation of the precise nature of the complainant organisation”.<sup>104</sup>

<sup>103</sup> *Special procedures for the examination in the International Labour Organisation of complaints alleging violations of freedom of association - Annex I*, § 35, <http://www.ilo.org>

<sup>104</sup> *Ibid.*, § 36.

Hence a complaint can be submitted by:

- An international organisation of employers or workers having consultative status with the ILO.
- Another international organisation of employers or workers, where the allegations relate to matters directly affecting their affiliated organisations.
- The Committee will consider anonymous complaints from persons who fear reprisals only where the Director-General, after examining the complaint, determines that the complaint “contains allegations of some degree of gravity which have not previously been examined by the Committee”.<sup>105</sup> The Committee can then decide what action, if any, to take regarding the complaint.

## 🕒 Under what conditions?

### 1. Ratification status

The mandate of the Committee is very specific and a complaint must relate to infringements of freedom of association / trade union rights only. It is **not necessary** that the state against which the complaint is lodged has **ratified the relevant freedom of association conventions**. Solely by membership to the ILO, each Member State is bound to respect a certain number of core principles, including the principles of freedom of association, which are enumerated in the Preamble of the ILO Constitution.

For example, there have been six cases filed with the Committee on Freedom of Association against China, even though China has ratified neither Convention No. 87 nor No. 98. All six of the complaints have been filed by the International Confederation of Free Trade Unions (ICFTU). One of the complaints was filed jointly with the International Metalworkers’ Federation (IMF).

### 2. Deadline

There is no specific deadline for when to submit complaints each year, as the Committee meets three times annually. The average time it takes to process a complaint is around 11 months, the equivalent of three sessions.

### 3. (Non) Exhaustion of domestic remedies

You are **not required** to exhaust domestic remedies before filing a freedom of association complaint. However, if national remedies or appeals procedures are available to you and have not been utilised, the Committee will take this into account when examining the complaint. If there is a case pending before a national court, the Committee will often wait before giving a recommendation or issuing a generic statement highlighting the importance of meeting due process requirements (such as

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<sup>105</sup> *Ibid.*, § 37.

impartiality and independence) for judicial procedures at the national level. In some cases, while awaiting the national decision, it may remind the relevant country of its international obligations under the ILO principles on freedom of association.<sup>106</sup>

#### 4. Time limits for complaints

Although there is no established time limit or “statute of limitations” for filing these complaints, the Committee has recognized that “it may be difficult – if not impossible – for a government to reply in detail to allegations regarding matters which occurred a long time ago”.<sup>107</sup> Furthermore, because the Committee is concerned with ensuring that freedom of association rights are respected and is not concerned with levelling charges against governments or providing financial remedies, complaints regarding situations that occurred in the past, which a government is probably not going to be able to remedy, are unlikely to result in any direct action by the Committee.

#### ➤ Process and outcome

Complaints can be filed directly with the ILO. For non-Member States of the ILO,<sup>108</sup> complaints can also be filed with the United Nations, which will forward to the Economic and Social Council to the ILO.<sup>109</sup> This situation remains exceptional.

The Committee on Freedom of Association (CFA) is responsible for examining complaints. The CFA consists of an independent chairperson and three representatives each from the government members, employers, and workers groups.

The Committee meets three times a year. It examines complaints and makes one of the following recommendations to the Governing Body of the ILO:

- The complaint requires no further examination;
- That the Governing Body should draw the attention of the government concerned to the problems that have been found, and invite it to take the appropriate measures to resolve them;

<sup>106</sup> B. Vacotto, Senior Specialist in International Labour Standards and Legal Issues, Bureau for Workers’ Activities, ILO, Telephone Interview with FIDH, 17 September 2009.

<sup>107</sup> *Special procedures for the examination in the International Labour Organisation of complaints alleging violations of freedom of association - Annex 1*, § 49, opus. cited

<sup>108</sup> There are 9 countries who are members of the UN but not of the ILO: Andorra, Bhutan, Democratic People’s Republic of Korea, Liechtenstein, Federated States of Micronesia, Monaco, Nauru, Palau, and Tonga. ILO, “Alphabetical list of ILO member countries”, [www.ilo.org/public/english/standards/relm/country.htm](http://www.ilo.org/public/english/standards/relm/country.htm). UN, “United Nations Member States”, [www.un.org/members/list.shtml](http://www.un.org/members/list.shtml)

<sup>109</sup> Provided it had previously obtained the consent of the government concerned.

– That the Governing Body should endeavour to obtain the agreement of the government concerned for the complaint to be referred to the Fact-Finding and Conciliation Commission.<sup>110</sup>

After submitting a complaint, complainants have one month to send additional information related to the complaint. If the complaint is sufficiently substantiated, the ILO Director-General will communicate the complaint to the government concerned and will ask the government to submit observations.

If a government does not reply within a reasonable period of time (approximately one year), and after having sent an urgent appeal to the government, the Committee will inform the relevant government that the case will be examined without its reply. As it is in the government's interest to defend itself, they usually issue observations.<sup>111</sup>

The ILO commitments are binding on states rather than on private parties, hence the Committee considers whether, in each particular case, the government has ensured the free exercise of trade union rights within its territory. The ILO considers that its function is to secure and promote the right of association for workers and employers. It does not level charges or condemn governments, but rather makes recommendations.

All of the Committee's reports are published on the Committee on Freedom of Association website<sup>112</sup>. Therefore, even if the Governing Body does not take strong action in the case, the complaint and the Committee's recommendations are made public and can be used to draw attention to the situation in question.

## 1. Procedural capabilities

In cases where there are serious violations, the ILO may choose, at any stage in the process, to send a representative to the country concerned. It is most likely to do this when difficulties have been encountered in communicating with the government concerned or when there is a complete contradiction between the allegations made and the government's response. This procedure, known as the 'direct contact' method, may only be used at the invitation of the government concerned or with the consent of the government. The objective of 'direct contact' is to obtain direct information from the parties concerned, and if possible, to propose solutions to existing problems.<sup>113</sup> This procedure can present challenges, however; for example, in 2009 the ILO "direct contact mission" on freedom of association was forced to leave Fiji without having completed its mandate.<sup>114</sup>

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<sup>110</sup> Note that the government's consent is only required where the country has not ratified the conventions on freedom of association.

<sup>111</sup> B. Vacotto, *op. cit.*

<sup>112</sup> ILO, *Committee on Freedom of Association*, <http://www.ilo.org>

<sup>113</sup> ILO, *Special procedures for the examination in the International Labour Organisation of complaints alleging violations of freedom of association* - Annex 1, § 67, [www.ilo/dyn/normlex](http://www.ilo/dyn/normlex)

<sup>114</sup> ILO, "Mission to Fiji aborted", Press release, 12 September 2009, [www.ilo.org](http://www.ilo.org)

In order to obtain more information on the case, the Committee may also decide to hold consultations in order to hear the parties, or one of them, during one of the Committee's sessions.<sup>115</sup>

## 2. Fact-finding and Conciliation Commission on freedom of Association

The Fact-Finding and Conciliation Commission on Freedom of Association (mentioned above) examines complaints referred to it by the Governing Body. This Commission is used only rarely: as of 2014, it had published six case reports since its inception in 1950.<sup>116</sup> The Commission is essentially a fact-finding body, but it may also work with the concerned government to come to an acceptable agreement for addressing the complaint. The Commission's procedure is determined on a case-by-case basis, but it typically includes the hearing of witnesses and a visit to the country concerned. The Commission provides traditional procedural, oral and written guarantees.

### The Committee on Freedom of Association in action

#### **General Confederation of Peruvian workers against Jockey Club del Peru**

On 8 September 2004, the General Confederation of Peruvian Workers (CGTP) filed a complaint alleging that the enterprise Jockey Club del Perú had removed 34 unionised permanent workers, including three trade union leaders, and had replaced them with temporary workers. The complaint alleged that the enterprise had taken these actions in order to undermine the union and destroy its leadership. The enterprise cited financial reasons for the move which stood in violation of Peruvian legislation that permits such action only as a result of technical advances, not for financial reasons. The enterprise had considerable financial resources and political influence, hence, the CGTP feared they would apply pressure to obtain a ruling in its favour. Therefore, CGTP filed a complaint with the Committee on Freedom of Association.

According to the Government, the employer had submitted a request on 13 August 2004 to terminate the employment contracts of workers for financial reasons. On 30 September 2004 the government rejected the enterprise's request for the collective termination of the workers contracts on the basis of the reason cited for the dismissals, since such action was not permitted for financial reasons. The Government also called for the immediate resumption of work and the payment of unpaid wages to the dismissed workers. The Union of Workers of the Jockey Club del Perú and the enterprise concluded an agreement in which the enterprise agreed from 16 November 2004 to reinstate the workers and the parties undertook negotiations to reach an agreement on the outstanding wages.

<sup>115</sup> ILO, *Special procedures for the examination in the International Labour Organisation of complaints alleging violations of freedom of association - Annex I*, § 69, [www.ilo.org](http://www.ilo.org).

<sup>116</sup> ILO, *Reports of the Fact-Finding and Conciliation Commissions on Freedom of Association*, [www.ilo.org](http://www.ilo.org).

In light of the ruling issued by the Peruvian government concerning the enterprise's request to dismiss the workers, and considering the union agreement concluded with the enterprise, the Committee recommended that the case did not require any further examination.<sup>117</sup>

### **Freedom of association complaint against China**

In 2002 and 2003, the International Confederation of Free Trade Unions (ICFTU) and the International Metalworkers' Federation (IMF) filed a complaint against the People's Republic of China for violations of freedom of association. The complaint alleged "repressive measures, including threats, intimidation, intervention by security forces, beatings, detentions, arrests and other mistreatment meted out to leaders, elected representatives and members of independent workers' organisations in Heilongjiang, Liaoning and Sichuan Provinces",<sup>118</sup> in connection with events that occurred in March 2002.

The Committee requested the government to institute impartial and independent investigations into the allegations, to provide specific information on the whereabouts, treatment and charges brought against trade union leaders. The Committee requested that law enforcement workers be trained to reduce the threat of excessive violence when exercising crowd control during demonstrations.<sup>119</sup>

### **➔ Complaints against the Government of the United States presented by the American federation of labor and the Congress of Industrial organisations (AFL-CIO) and the Confederation of Mexican workers (CTM)<sup>120</sup>**

The case concerned a Supreme Court decision (*Hoffman Plastic Compounds v. National Labor Relations Board*) which led to millions of migrant workers losing the only available protection of freedom of association right. The Confederation of Mexican Workers (CTM) submitted a complaint (30 October 2002) on the issue on behalf of its 5.5 million members who have close family and labour ties with Mexican workers working abroad and whose rights are directly and indirectly affected by the decision. "The Hoffman decision and the continuing failure of the United States administration and Congress to enact legislation to correct such discrimination puts the United States squarely in violation of its obligations under ILO principles on freedom of association from a human rights and labour rights perspective, workers' immigration status does not diminish or condition their status as workers holding fundamental rights."<sup>121</sup>

<sup>117</sup> Informe definitivo - Informe núm. 337, Junio 2005. Caso núm. 2389 (Perú), 8 September 2004, [www.ilo.org](http://www.ilo.org).

<sup>118</sup> Committee on Freedom of Association, *The International Confederation of Free Trade Unions (ICFTU) and the International Metalworkers' Federation (IMF): Report, China (Case No. 2189)*, 27 March 2002, Report no. 330 (Vol. LXXXVI, 2003, Series B, No. 1).

<sup>119</sup> *Ibid.*

<sup>120</sup> ILO, *Complaints against the Government of the United States presented by the American Federation of Labor and the Congress of Industrial Organisations (AFL-CIO) and the Confederation of Mexican Workers (CTM): Report United States (Case No. 2227)*, 18 October 2002, Report N°332 (LXXXVI, 2003, Serie B, No. 3)

<sup>121</sup> For more information about other cases see, International Labour Office, 333rd Report of the Committee on Freedom of Association, 289<sup>th</sup> session, Geneva, March 2014.



ILO Convention No. 87 protects the right of workers 'without distinction whatsoever' to establish and join organisations of their own choosing. The Committee notes that the allegations in this case refer to the consequences for the freedom of association rights of millions of workers in the United States following the United States Supreme Court ruling that, because of his immigration status, an undocumented worker was not entitled to back pay for lost wages after having been illegally dismissed for exercising the trade union rights protected by the National Labour Relations Act (NLRA)."

The Committee's recommendations were:

- The US government should explore all possible solutions, including amending the legislation to bring it into conformity with freedom of association principles.
- The aforementioned should be done in full consultation with the social partners concerned in order to ensure effective protection for all workers against acts of anti-union discrimination in the wake of the Hoffman decision.
- The Government is asked to inform the Committee of the measures taken in this regard. Unfortunately, it seems that the report of the Committee was not followed by any enforcement mandate or apparent strategy to pursue justice on this matter. The situation of migrant workers (notably Mexican workers) is still precarious and remains a highly politicized issue.

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The Committee on Freedom of Association has several advantages for victims of violations of trade union rights. First, the Committee appears to give a thorough evaluation to all eligible cases it receives. As mentioned, it has examined over 3000 cases. Second, it does not require that the state complained against have ratified the relevant conventions – it requires only that the state be a member of the ILO. Third, because the Committee's reports to the Governing Body are made public on the website, a complaint with the Committee may be a good way to draw attention to a particular case. Finally, victims are not required to exhaust domestic remedies before filing a complaint with the Committee, which may provide an advantage in situations that are time-sensitive or where resorts to national remedies are expensive or appear unlikely to achieve a satisfactory result.

However, it is important to note that the ILO's function is to secure and promote workers and employers right' to organise, not to level charges or condemn governments. It does not provide financial reparations to victims, although it may work with the government concerned to see that workers are reinstated in their posts and that their trade union rights are protected. Therefore, the Committee is a good mechanism for **victims who want help to remedy an ongoing situation**. It is not a good mechanism for those who have been harmed by a failure to effectively secure trade union rights in the past. Trade unions and civil society organisations should use the Committee's conclusions which are favourable to workers as tools to pressure governments.

# CHAPTER II

## Representations Regarding Violations of ILO Conventions

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Articles 24 and 25 of the ILO Constitution provide for a representation process under which an employers' or workers' organisation may present a representation against any Member State that "has failed to secure in any respect the effective observance within its jurisdiction of any convention to which it is a party".<sup>122</sup> Overall, 170 representations have been submitted to date.<sup>123</sup>

### ② Who can file a complaint?

An employers' or workers' organisation may make a representation. The representation must allege that a Member State has failed to adhere to a convention which it has ratified.<sup>124</sup>

### ② Process and outcome

Procedure for the examination of representations:

- (a) The Office acknowledges receipt and informs the government concerned;
- (b) The matter is brought before the Officers of the Governing Body;
- (c) The Officers report to the Governing Body on the admissibility of the representation. To be admissible, the communication must:
  - (i) be communicated to the ILO in writing;
  - (ii) come from an industrial association of employers or workers;
  - (iii) make specific reference to article 24 of the Constitution;
  - (iv) concern a Member of the ILO;
  - (v) refer to a Convention to which the Member in question is a party; and
  - (vi) indicate in what respect it is alleged that that Member has failed to secure the effective observance within its jurisdiction of that Convention;
- (d) The Governing Body reaches a decision on admissibility without discussing the substance of the matter;
- (e) If the representation is admissible, the Governing Body either sets up a tripartite committee to examine the matter according to rules laid down in the Standing Orders, or (if the matter relates to a convention concerning trade union rights) it may refer it to the Committee on Freedom of Association;

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<sup>122</sup> ILO, *Representations*, [www.ilo.org/global/standards](http://www.ilo.org/global/standards)

<sup>123</sup> ILO, Normlex, *Representations* (Art 24), [www.ilo.org/dyn/normlex](http://www.ilo.org/dyn/normlex)

<sup>124</sup> ILO, *Representations*, *opus cited*

- (f) The Committee reports to the Governing Body, describing the steps taken to examine the representation and giving its conclusions and recommendations for decisions to be taken by the Governing Body;
- (g) The government concerned is invited to be represented during the Governing Body's consideration of the matter;
- (h) The Governing Body decides whether to publish the representation and any government statement in reply and notifies the association and government concerned.

Representations concerning the Fundamental Conventions on freedom of association and collective bargaining (Conventions Nos. 87 and 98) are usually referred to the Committee on Freedom of Association.<sup>125</sup>

In general, follow-up of the recommendations of the ad hoc Committee is the responsibility of the Committee of Experts.

## The Representation Procedure in action

### ➔ FAMIT against Greece

"Greece ratified the Labour Inspection Convention, 1947 (No. 81) in 1955. In 1994 it passed a law which decentralized the labour inspectorate and placed it under the responsibility of the autonomous prefectural administrations. The Federation of the Associations of the Public Servants of the Ministry of Labour of Greece (FAMIT) subsequently made a representation to the ILO claiming that the law contravened the principle of Convention No. 81, that labour inspection should be placed under the supervision and control of a central authority. The tripartite committee set up to examine this representation agreed and urged the Greek government to amend its legislation to comply with the convention. In 1998, the Greek government adopted new laws, bringing the labour inspectorate under a central authority once again".<sup>126</sup>

### ➔ Representation under Convention No. 169

In 1999, the Single Confederation of Workers of Colombia (CUT) made a representation alleging that the government of Colombia had failed to secure the effective observance of Convention No. 169. The representation alleged three specific cases where the government had failed to uphold the Convention: "[1] the promulgation of Decree No. 1320 of July 1998 on prior consultation; [2] the work on the Troncal del Café highway, which cuts through the Cristianía Reservation, without previously consulting the indigenous community involved; and [3] the issuing of a petroleum exploration license to Occidental of Colombia (henceforth 'Occidental') without conducting the requisite prior consultations with the U'wa indigenous community".

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

The Governing Body established a tripartite Committee to investigate the representation and the Committee made findings concerning the three cases raised in the representation: The Committee held that Decree No. 1320 did not provide adequate opportunity for prior consultation and participation of indigenous peoples in “the formulation, application and evaluation of measures and programmes that directly affect them”.

Although work on the Troncal del Café highway began before the Convention came into effect in Colombia, work on the highway continued after the Convention came into effect, and the government had an obligation to consult the affected community from the time the Convention came into effect.

The government violated the convention when it granted environmental licenses to Occidental without first conducting prior consultation with the affected communities.<sup>127</sup>

### ➔ **National Confederation of Dominican Workers against Dominican Republic**

In a communication dated 20 October 2010, the National Confederation of Dominican Workers (CNTD) submitted a representation to the International Labour Office, under article 24 of the ILO Constitution. The representation alleged the non-observance by the Government of the Dominican Republic of the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19). This convention had been ratified by the Dominican Republic on 5 December 1956 and is currently in force.

The complainant organisation considered that the government of the Dominican Republic was not complying satisfactorily with the Convention, both from a legislative and a practical point of view, and that it should take legal, institutional and administrative measures to guarantee equality of treatment between national and foreign workers in respect of compensation for occupational accidents.

The Committee recommended that the government request technical assistance from the ILO in order to take the necessary action:

- fully include social partners in the implementation of requested actions;
- provide detailed information on the measures adopted to give effect to the recommendations in a report to the Committee of Experts on the Application of Conventions and Recommendations at its next session, so that the Committee could examine the issues raised in connection with the application of the Convention;
- make this report publicly available; and
- close the procedure initiated by the representation of the National Confederation of Dominican Workers (CNTD) alleging non-observance by the Dominican Republic of Convention No. 19.

<sup>127</sup> ILO, *Representation (article 24): Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), 1999.*

\* \* \*

Representations can only be made in relation to a convention that has been ratified. As with the complaints procedure before the Committee of Freedom of Association, it is not necessary to exhaust all domestic remedies before applying for representation with the ILO. If a case is pending before a national court, this will be taken into consideration by the ad hoc Committee. This procedure is particularly useful for conventions dealing with subjects other than freedom of association.<sup>128</sup>

It should be noted that representation procedures may extend over several years without interim outcomes that can be used for advocacy. However, the process is perceived as “less political” and more achievable than, for instance, requesting a Commission of Inquiry. Thus for example, a Committee was set up in 2014 to examine a representation alleging non-observance by Qatar of the Discrimination Convention.<sup>129</sup>

<sup>128</sup> B. Vacotto, *op. cit.*

<sup>129</sup> *Representation (article 24) - QATAR - C029 - (Lodged: 2013 - Report: 2014)*, International Trade Union Confederation, Building and Wood Workers' International, [www.ilo.org/dyn/normlex](http://www.ilo.org/dyn/normlex)

# CHAPTER III

## Complaints Under Article 26 Regarding Violations of ILO Conventions – Commissions of Inquiry

\* \* \*

Under Articles 26 to 34 of the ILO Constitution, a complaint may be filed against a Member State for not complying with a ratified convention. “Upon receipt of a complaint, the Governing Body may form a Commission of Inquiry, consisting of three independent members, which is responsible for carrying out a full investigation of the complaint, ascertaining all the facts of the case and making recommendations on measures to be taken in order to address the problems raised by the complaint”.<sup>130</sup> “A Commission of Inquiry is the ILO’s highest-level investigative procedure; it is generally set up when a Member State is accused of committing persistent and serious violations and has repeatedly refused to address them”.<sup>131</sup>

So far around 30 complaints have been filed and 13 complaints lodged have led to the establishment of Commissions.<sup>132</sup> In some cases the complaint simply withers and in others the cases are treated through other mechanisms, such as establishing a special representative to deal with the matter. If a Commission of Inquiry is established, it is perceived as a weighty sanction in comparison to the other mechanisms of the ILO.

### ② Who can file a complaint?<sup>133</sup>

Under Article 26 of the ILO Constitution, only the following entities may file a complaint:

- A Member State that has ratified the relevant convention (the complaint must allege that the state has violated a convention it has ratified)
- A delegate to the International Labour Conference: each Member State has four delegates to the International Labour Conference: two delegates representing the government, one representing workers, and one representing employers<sup>134</sup>
- The Governing Body of the ILO

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<sup>130</sup> ILO, “Complaints”, [www.ilo.org/global/standards](http://www.ilo.org/global/standards)

<sup>131</sup> ILO, “Complaints”, *op. cit.*

<sup>132</sup> ILO, NormLex, Complaints/Commissions of Inquiry (Art 26), [www.ilo.org/dyn/normlex](http://www.ilo.org/dyn/normlex)

<sup>133</sup> ILO, “Complaints”, *op. cit.*

<sup>134</sup> ILO, *Constitution, op. cit.*, art. 3 (5) - The Members nominate workers’ and employers’ delegates in agreement with the industrial organisations which are most representative of employers or work people in their respective countries. Furthermore once the Conference is over, the delegates can no longer lodge a complaint, as they are officially relieved of their duties as representatives and delegates. [www.ilo.org/dyn/normlex](http://www.ilo.org/dyn/normlex)

Unlike the complaint's procedure in the context of Freedom of Association, unions are not allowed to file an article 26 complaint. However, unions are permitted to send comments once the complaint has been lodged.<sup>135</sup> Unions can also file a request as delegates to the International Labour Conference.

### ② Process and outcome<sup>136</sup>

The process of the Commission of Inquiry involves extensive investigation normally carried out inside the country and includes the examination of the judiciary and human rights institutions of the country. Interviews are carried out with a wide range of victims.

Within three months of receiving the report of the Commission of Inquiry, the government must indicate whether it accepts the recommendations. If it does not accept the recommendations, it may submit a dispute to the International Court of Justice (ICJ), whose decision becomes final.<sup>137</sup>

So far no government has appealed the recommendations of the Commission to the ICJ, even if in some cases they have disagreed with the outcome.

If the government refuses to fulfil the recommendations, the Governing Body can take action under article 33 of the ILO Constitution. In such a case, the Governing Body may recommend to the Conference “such action as it may deem wise and expedient to secure compliance” with the recommendations.<sup>138</sup> Article 33 has been used only once – in 2002, against Myanmar/Burma.<sup>139</sup>

Overall establishing a Commission of Inquiry is the most complex complaints procedure within the ILO. Once a complaint is filed, strong support is needed from the three groups of the Governing Body (employers, workers and governments) in order to obtain its establishment. The establishment of a Commission of Inquiry is reserved only for serious allegations of violations of ILO conventions.<sup>140</sup>

<sup>135</sup> B. Vacotto, *op. cit.*

<sup>136</sup> ILO, *Constitution, op. cit.*, art. 26-34.

<sup>137</sup> ILO, *Constitution, op. cit.*, art. 29, 31.

<sup>138</sup> *Ibid.*, art. 33.

<sup>139</sup> ILO, “Complaints”, *op. cit.*

<sup>140</sup> B. Vacotto, *op. cit.*

## Commissions of Inquiry in action

### ➔ Case of forced labour in Myanmar/Burma<sup>141</sup>

In June 1996, 25 worker delegates to the International Labour Conference lodged a complaint with the ILO regarding forced labour in Myanmar. The ILO appointed a Commission of Inquiry in March 1997 with the mandate to examine Myanmar's observance of the Forced Labour Convention. Myanmar ratified the convention in 1955. In the course of its inquiry, the Commission reviewed documents, conducted hearings in Geneva, and visited the region. In the course of the hearings and the visit, the Commission heard testimony given by representatives of several non-governmental organisations and by some 250 eye witnesses with recent experience of forced labour practices.

The Commission found:

Abundant evidence of pervasive use of forced labour imposed on the civilian population by the authorities and the military in Myanmar. Forced labour had been exacted for: portering; the construction and maintenance of military camps; other work in support of the military; work on agriculture and logging and other production projects undertaken by the authorities or the military; the construction and maintenance of roads and railways; other infrastructure work and a range of other tasks. Sometimes, this forced labour had been imposed for the profit of private individuals.

Allegations of the use of forced labour in the construction of the Ye-Dawei (Tavoy) railway were raised in the complaints to the ILO. The railway was allegedly related to the construction of the Yadana gas pipeline, a project that involved the transnational corporation TOTAL. TOTAL denied the connection between the railway and the pipeline. However, because the Commission was denied access to Myanmar, it found itself "unable to make a finding as to whether TOTAL, companies working for TOTAL or the Yadana gas pipeline project were the beneficiaries of those helipads built in the region of the Yadana gas pipeline for which there is information that they were constructed with forced labour".<sup>142</sup> However, the Commission held that whether or not the forced labour used for the helipads was imposed for private benefit, "the use of forced labour constitutes a breach of the obligation of the Government to suppress the use of forced or compulsory labour in all its forms".<sup>143</sup>

In light of its findings, the Commission made a series of recommendations to the government of Myanmar, including that they bring relevant legislation into compliance with the convention, that they cease the use of forced labour in practice, and that they enforce penalties

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<sup>141</sup> ILO, *Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 89<sup>th</sup> Session, Report I (B), 2001, p. 45, [www.ilo.org](http://www.ilo.org); and Commission of Inquiry, "Forced labour in Myanmar (Burma): Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance by Myanmar of the Forced Labour Convention (no. 29), 1930", ILO, 2 July 1998.; Part I: Establishment of the Commission.

<sup>142</sup> *Ibid.*, Part IV: Examination of the case by the Commission.

<sup>143</sup> *Ibid.*



against those who exact forced labour.<sup>144</sup> Even after the recommendations and findings of the Commission of Inquiry, forced labour continued to be a problem in Myanmar. In 2000, for the first time in its history, the ILO invoked Article 33 of its constitution. Under Article 33, “the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith”. Accordingly, the Governing Body made several recommendations concerning the continued monitoring of the situation. Notably, they also “recommend[ed] to the Organisation’s constituents – governments, employers and workers – that they review their relations with Myanmar (Burma), take appropriate measures to ensure that such relations do not perpetuate or extend the system of forced or compulsory labour in that country, and contribute as far as possible to the recommendations of the Commission of Inquiry”.<sup>145</sup>

In February 2007, the ILO concluded a supplementary understanding<sup>146</sup> with the Government of Myanmar “designed to provide, as previously requested by the International Labour Conference and the ILO Governing Body, a mechanism to enable victims of forced labour to seek redress”.<sup>147</sup>

### ➔ Case of Violation of Freedom of Association in Zimbabwe

Through a statement addressed to the 97<sup>th</sup> Session of the International Labour Conference during its 16<sup>th</sup> plenary sitting held on 13 June 2008, 13 worker delegates filed a complaint under article 26 of the Constitution of the International Labour Organisation against the Government of Zimbabwe. The complaint alleged the non-observance of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), ratified by Zimbabwe on 9 April 2003 and 27 August 1998, respectively. In particular, the complaint alleged serious violations of basic civil liberties, including the quasi-systematic arrest, detention, harassment and intimidation of trade union leaders and members for the exercise of legitimate trade union activities.

The Commission informed the Government of Zimbabwe and the complainants that it intended to perform its task with complete objectivity, impartiality and independence. It made clear that it did not consider its role to be confined to an examination of the information furnished by the parties themselves or in support of their contentions and that it would take all appropriate measures to obtain information that was as full and objective as possible on the matters at stake.

<sup>144</sup> *Ibid.*, Part V, Conclusions and recommendations.

<sup>145</sup> Communication and Public Information, “ILO Governing Body Concludes 279<sup>th</sup> Session: Committee on Freedom of Association cites Guatemala”, 21 November 2000, [www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Press\\_releases/lang--en/WCMS\\_007919/index.htm](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_007919/index.htm)

<sup>146</sup> Supplementary Understanding between the Government of the Union of Myanmar and the International Labour Office (2007), [www.ilo.org](http://www.ilo.org).

<sup>147</sup> ILO, “Office of the ILO Liaison Officer: Yangon”, [www.ilo.org/public/english/region/asro/yangon/](http://www.ilo.org/public/english/region/asro/yangon/)

The Commission offered a number of Member States neighbouring Zimbabwe an opportunity to present information on the matters raised in the complaint. This opportunity was also offered to members and deputy members of the Governing Body, international and regional organisations with consultative status before the ILO, organisations from within the United Nations system, the SADC, and the African Union. In a communication dated 16 April 2009, the Commission received some information from the United Nations High Commissioner for Human Rights. Other organisations and Member States did not provide substantive information to the Commission.

The Commission of Inquiry concluded that a systematic, and even systemic, violation of the Conventions at issue was taking place in Zimbabwe. It referred to a clear pattern of arrests, detentions and violence, and the torture of trade union leaders and members by security forces, which coincided with Zimbabwe Congress of Trade Unions (ZCTU) nationwide events. These measures evinced some centralized direction to Zimbabwean security forces to take such action and a clear pattern of control over ZCTU trade union gatherings through the application of the Public Order and Security Act (POSA). The Commission noted the systematic targeting of ZCTU officials and members, particularly in rural areas, involving significant violence and anti-union discrimination in employment. It found that this appeared to be a calculated attempt to intimidate and threaten ZCTU members. The Commission also noted with particular concern the routine use of the police and army against strikes, widespread interference in trade union affairs and the failure to guarantee judicial independence and the rule of law, resulting in a situation of impunity for those perpetrating atrocities.

The Commission concluded with the following recommendations for the government of Zimbabwe:

- “the harmonization of the relevant legislative texts, and particularly the Labour Act, the Public Service Act and the Public Order and Security Act, with Conventions Nos 87 and 98, as requested by the ILO supervisory bodies;
- the cessation with immediate effect of all anti-union practices, as documented in its report;
- the Zimbabwe Human Rights Commission to be rendered operational as soon as possible, with adequate resources;
- the provision of training on freedom of association and collective bargaining, civil liberties and human rights to key personnel in the country, most notably the police, security forces and the social partners;
- the reinforcement of the rule of law and the role of the courts in Zimbabwe, by ensuring that the courts are respected, properly resourced and provided with appropriate training and support;
- the continued strengthening of social dialogue; and the continuation of ILO technical assistance in these areas.”<sup>148</sup>

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<sup>148</sup> ILO, *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance by the Government of Zimbabwe of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, [www.ilo.org](http://www.ilo.org).

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Commissions of Inquiry are considered to be the ILO’s “highest-level investigative procedure” and are rarely invoked. A government must be accused of committing continual and serious violations that it has time and again refused to address. This mechanism is therefore only **valuable for victims of very serious and ongoing abuses of labour rights**. Furthermore, the government must have ratified the convention under which the victim is complaining and not all worker organisations are permitted to file a complaint. Complainants must be delegates to the International Labour Conference. Furthermore for a Commission to be established the tripartite Governing Body (employers, workers and government representatives) has to agree and consent to it.

Hence, it is difficult to generate the necessary consensus for establishing a Commission of Inquiry, due to the fact that political support is needed. Plaintiffs who are trying to obtain a result may be advised to use the other tools at their disposal before considering applying for a Commission of Inquiry.<sup>149</sup> For example, it is easier to file a complaint before the Committee on Freedom of Association (if the case relates to freedom of association issues) or make a representation. However, because Commissions of Inquiry are only formed in very serious cases, in a case where victims do believe that the government has committed persistent and serious violations and has refused to address them, the mere formation of a Commission will send a strong message.

## HOW TO SUBMIT A REQUEST TO THE ILO?<sup>150</sup>

- It is always necessary to indicate the dates concerned and a signature of a representative is paramount, as the process cannot be instigated without.
- The procedure that the plaintiff intends to use should be indicated to ensure a smooth running of the process.
- Languages: English, French and Spanish are the official languages of the ILO and hence any applications sent in one of these three languages will be processed quicker. It is however possible to send it in the language of the country of origin, as the ILO will then have it translated.
- Format: the application can be sent electronically (bearing in mind that a signature is required, it has to be a scanned copy), by fax or by post; all further documents and annexes are usually sent by post.
- All applications should be addressed to the Director General.

<sup>149</sup> B. Vacotto, *op. cited.*

<sup>150</sup> B. Vacotto, *op. cited.*

– Address:

4 route des Morillons  
CH-1211 Genève 22  
Switzerland  
Email: [normes@ilo.org](mailto:normes@ilo.org)  
Fax: +41 (0) 22 798 8685

ILO Helpdesk on the Declaration on MNEs:

- In order to obtain clarification or help on issues dealt with by the ILO, it is possible to contact the help desk.
  - There are no specific application procedures and specifications concerning queries addressed to the help desk
  - TNCs, worker's unions, employers and individuals can all use this service.
  - The questions are analysed by a group of experts from various fields before being fed back to those concerned.
  - Contact: [assistance@ilo.org](mailto:assistance@ilo.org)
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The ILO supervisory mechanisms have produced many positive achievements, but like many other instruments, it remains difficult to ensure implementation of these international observations and recommendations at the national level. In overcoming this challenge, national unions and workers' organisations have a crucial role to play in disseminating these recommendations into the national arena, and using them to support their claims.

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## ADDITIONAL RESOURCES

### Useful websites

- **List of ratifications of ILO conventions:** [www.ilo.org/dyn/normlex/en](http://www.ilo.org/dyn/normlex/en)
- **Table of ratifications of the fundamental conventions:** [www.ilo.org/ilolex/english/docs/decl-world.htm](http://www.ilo.org/ilolex/english/docs/decl-world.htm)
- **ILO Multinational Enterprises and Social Policy (MULTI):** [www.ilo.org/public/english/employment/multi/tripartite/index.htm](http://www.ilo.org/public/english/employment/multi/tripartite/index.htm)
- **Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (full text in all languages):** [www.ilo.org/public/english/employment/multi/tripartite/declaration.htm](http://www.ilo.org/public/english/employment/multi/tripartite/declaration.htm)
- **ILO standards and legal issues (including link to publication on “ILO, Employers’ organisations and the ILO supervisory machinery”):** [www.ilo.org/public/english/dialogue/actemp/whatwedo/projects/standards.htm](http://www.ilo.org/public/english/dialogue/actemp/whatwedo/projects/standards.htm)

- **International Trade Union Confederation (ITUC), “ILO complaints”:** [www.ituc-csi.org/-ilo-complaints](http://www.ituc-csi.org/-ilo-complaints)

## Databases

- **ILOLEX** – Full-text database of ILO conventions and recommendations, ratification information, comments of the Committee of Experts and the Committee on Freedom of Association, discussions of the Conference Committee, representations, complaints, General Surveys, and numerous related documents [www.ilo.org/ilolex/english/index.htm](http://www.ilo.org/ilolex/english/index.htm)
  - **LIBSYND** – Freedom of association cases <http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?Lang=EN &hdroff=1>
  - **NATLEX** – Bibliographic database of national laws on labour, social security, and related human rights. Includes numerous laws in full text. Records and texts in NATLEX are either in English, French, or Spanish. [www.ilo.org/dyn/natlex](http://www.ilo.org/dyn/natlex)
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## ➤ Comparing the ILO Mechanisms

	REPRESENTATION PROCEDURE	COMMITTEE ON FREEDOM OF ASSOCIATION	COMMISSION OF INQUIRY
Rights protected	Rights under any ILO Convention the relevant government has ratified.	Rights to freedom of association and collective bargaining	Rights under any ILO Convention the relevant government has ratified. However, a Commission is generally only established in cases where "a Member State is accused of committing persistent and serious violations and has repeatedly refused to address them"
Type of mechanism and outcome	The Governing Body will request a response from the government regarding the representation. If the response is not satisfactory, the Governing Body may choose to publish the representation and the government response. The Governing Body then establishes an ad hoc tripartite committee to investigate the representation and to present a report on its findings.	The Committee examines complaints and then recommends to the Governing body: 1) That a case requires no further examination; 2) That the Governing Body should alert the government to the problems identified; 3) That a case should proceed to the Fact-Finding and Conciliation Commission (this is only done on rare occasions)  The recommendations of the Committee are made public.	The Governing Body decides whether to form a Commission of Inquiry. If a Commission is formed, they will complete a full investigation and will make recommendations to the Member State.  - If the government refuses to fulfill the recommendations, the Governing Body can take action under article 33 of the ILO Constitution and may recommend to the Conference such action it considers necessary to ensure compliance.
Parties permitted to submit a request	(1) employers' organisation (2) workers' organisation	(1) a national organisation directly interested in the matter  (2) an international organisation of employers or workers having consultative status with the ILO  (3) an other international organisation of employers or workers, where the allegations relate to matters directly affecting their affiliated organisations	(1) a Member State that has ratified the relevant convention  (2) a delegate to the International Labour Conference  (3) the Governing Body of the ILO
Ratification status required	The government concerned must have ratified the relevant Convention(s)	No requirement that the government (Member State of the ILO) has ratified the relevant Convention(s)	The government concerned must have ratified the relevant Convention(s)
Number of cases decided	170 representation have been submitted	Over 3000 cases of which 6 cases passed onto the Fact-Finding and Conciliation Commission	13 Commissions of Inquiry have been formed around 30 complaints have been received
Required to exhaust domestic remedies first?	No	No, but failure to appeal to domestic remedies will be taken into account	No, but usually there has to be proof of ongoing and consistent violations of the issue concerned.



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# **PART III**

## **Regional Mechanisms**

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### **CHAPTER I**

#### **The European System of Human Rights**

##### **A. European Court of Human Rights**

##### **B. European Social Charter**

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The Council of Europe, based in Strasbourg (France), is composed of 47 Member States from the European continent, 28 of which are also Member States of the European Union. Founded on 5 May 1949 by 10 states, the aim of the Council of Europe is to promote human rights, democracy and the rule of law, common principles stemming from the European Convention on Human Rights, and other related international conventions.

The Council of Europe is composed of six main bodies. One of these is a judicial body, the European Court of Human Rights (ECHR) based in Strasbourg, not to be confused with the European Court of Justice (ECJ).<sup>151</sup> Unlike many regional and international human rights mechanisms, the ECHR is an international court with the authority to hear cases and issue binding judgements concerning alleged violations of the Convention. Another human rights mechanism within Europe's jurisdiction is the European Committee of Social Rights, whose mission is to monitor the application of the European Social Charter, a Council of Europe treaty, its 1988 Additional Protocol and its 1996 revised version.

In addition to these bodies, the Commissioner for Human Rights, an independent non-judicial institution within the Council of Europe, plays an important role in the protection of human rights. This institution was set up in 1997. Although the Commissioner cannot act upon individual complaints, he can draw conclusions and take wider initiatives on the basis of reliable information regarding human rights violations suffered by individuals. In addition, the Commissioner is also

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<sup>151</sup> The European Court of Justice (ECJ), officially renamed the Court of Justice of the European Union (CJEU), is the main judicial body of the European Union and based in Luxembourg. Although all European Union Member States (28 states) are members of the ECHR, not all members of the ECHR are part of the European Union.



able to conduct official country visits to evaluate the human rights situation. The Commissioner for Human Rights is also mandated to provide advice and information on the protection of human rights and the prevention of human rights violations. When the Commissioner considers it appropriate, he/she may adopt recommendations regarding human rights issues in one or several Member States.<sup>152</sup> The Commissioner closely cooperates with national Ombudsmen, National Human Rights Institutions and other structures entrusted to protect human rights, while also maintaining close working relations with the European Union's Ombudsman. The Commissioner also has the right to intervene as a third party in the proceedings of the ECHR, either through taking part in the Court's hearings or by submitting written information.

## A. European Court of Human Rights

The European Court of Human Rights (ECHR), a regional court based in Strasbourg (France), was established by the European Convention for the Protection of Human Rights and Fundamental Freedoms (also called the European Convention on Human Rights).<sup>153</sup> Set up in 1959, submission to the ECHR's jurisdiction only became compulsory for all COE member States on 1 November 1998, following the entry into force of Protocol No. 11 to the Convention. This same instrument simplified the procedural and institutional arrangements for the functioning of the Court which has, since then, been permanently in session. On 1 June 2010 the Additional Protocol No. 14 "entered into force,"<sup>154</sup> amending the control system of the Convention in order to deal with the Court's excessive caseload.

The ECHR exercises jurisdiction over the 47 Member States of the Council of Europe<sup>155</sup>, whose own jurisdiction is principally limited to their own territory.<sup>156</sup> The Court cannot initiate cases on its own motion, and only hear cases upon receipt of individual or inter-State applications.<sup>157</sup> The European Union is to become the 48<sup>th</sup> contracting party to the Convention, but this is not expected to happen anytime soon

<sup>152</sup> For more information on the mandate and activities of the Commissioner for Human Rights, see: Council of Europe (CoE), Commissioner for Human Rights, <http://www.coe.int>

<sup>153</sup> CoE, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted on 4 November 1950, entered into force on 3 September 1953.

<sup>154</sup> CoE, *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, amending the control system of the Convention, adopted on 13 May 2004, entered into force on 1 June 2010.

<sup>155</sup> Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia", Turkey, Ukraine, and United Kingdom.

<sup>156</sup> See below for discussion on the extra-territorial dimension of the European Convention on Human Rights.

<sup>157</sup> CoE, *The ECHR in 50 Questions*, question 18, [www.echr.coe.int](http://www.echr.coe.int)

due to a number of legal and practical complications that must first be resolved.<sup>158</sup>

On 1 January 2014, the new Rule 47 of the Court's rules came into force, introducing significantly stricter conditions for lodging a complaint. The Court is obliged to reject any application non-compliant with Rule 47 of the Court's Rules, which sets out the required information and documents for a complete application. The decision declaring a case inadmissible is final, and it will not be possible to lodge a new application raising the same complaint. It is therefore essential to respect every aspect of the application procedure, which is well described on the ECHR's website<sup>159</sup> and in this guide (up to date as of early 2015).

## 🕒 What rights are protected?

The ECHR hears cases concerning alleged violations of individual rights protected under the European Convention on Human Rights and its Protocols (if these are ratified by the Member State(s) in question), which are mainly civil and political rights. However, since 1979 the ECHR has developed interesting case law that has extended the scope of the European Convention with regard to social rights, and established a link between the rights protected by the European Convention and those protected by the European Social Charter.<sup>160</sup>

In particular, the European Convention covers the following:

- The right to life (art.2)
- The prohibition of torture (art. 3)
- The prohibition of slavery and forced labour (art.4)
- The right to liberty and security (art.5)
- The right to a fair trial (art.6)
- The right to respect for private and family life (art.8)
- The freedom of thought, conscience and religion (art. 9)
- The freedom of expression (art. 10 )
- The freedom of assembly and association (art. 11)
- The right to an effective remedy (art.13)
- The prohibition of discrimination in the enjoyment of the rights set forth in the

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<sup>158</sup> The 2009 Lisbon Treaty of the European Union creates an obligation on the EU to accede to the Convention. The EU's highest court, the Court of Justice of the European Union, delivered on 18 December 2014 an opinion on the draft agreement of 5 April 2013 on the accession of the EU to the Convention, where it declared that the draft agreement was not compatible with EU law. For more information see *Opinion 2/13 of the Court, 18 December 2014*, and *CJEU's Press release No 180/14, Luxembourg, 18 December 2014*, accessible on <http://curia.europa.eu>.

<sup>159</sup> European Court of Human Rights, [www.echr.coe.int](http://www.echr.coe.int)

<sup>160</sup> ECHR, *Airey v. Ireland*, App. No. 6289/73, (1979) Serie A32, 2 EHRR 305. For an analysis of the jurisprudence of the European Court of Human Rights, see S. Van Drooghenbroeck, *La convention européenne des droits de l'homme et la matière économique*, in *Droit économique et Droits de l'Homme / sous la dir. de L. Boy, J-B. Racine, F. Siirainen, Larcier*, Bruxelles, 2009. Interesting cases include: ECHR, *James and other v. United Kingdom*, App. No. 8793/79, (1986) Serie A98, 8 EHRR 123; ECHR, *Koua Poirrez v. France*, App. No. 40892/98, 30 September 2003.

Convention (art.14)

- The right to hold free elections at reasonable intervals by secret ballot (art.3 of the Protocol No.1 to the Convention)

The Protocols to the Convention cover:<sup>161</sup>

- The protection of property (art. 1 of Protocol No. 1)
- The right to education (art. 2 of Protocol No. 1 )
- The right to free elections (art. 3 of Protocol No. 1)
- The expulsion by a State of its own nationals or its refusing them entry (art.3 of Protocol No. 4)
- The death penalty (art.1 of the Protocol No. 6)
- The collective expulsion of aliens (art.4 of the Protocol No. 4)
- The prohibition of discrimination (Protocol No. 12)

### Ⓢ Against whom may a complaint be lodged?<sup>162</sup>

The ECHR may only hear complaints against **State Parties that have allegedly violated the European Convention on Human Rights or one of its Additional Protocols**, if the Convention has been ratified by the State Party in question. The act or omission complained of must have been committed by one or more public authorities of the state(s) concerned (for example, a court of law or an administrative authority).

### The horizontal effect of the Convention

Being originally a German legal concept, the “*drittwirkung* theory” in the framework of the European Convention means that the Convention itself can apply to legal relations between individuals and other private parties, not only between individuals and public authorities. It can be also defined as the possibility for individuals to enforce their rights against another private party.

In Strasbourg it is only possible to lodge a complaint against State authorities. However, the Court has indirectly admitted the “*drittwirkung* theory”, by noting the State’s failure to take appropriate measures necessary to ensure respect for the rights and freedoms protected by Convention, “even in the sphere of the relations of individuals between themselves”.<sup>163</sup> In this way, it deals with the responsibility of the State and not the responsibility of the private actor. As such, the ECHR can rule that a Member state is in violation of the Convention if it fails to protect the rights of individuals under its jurisdiction from third party violations. This is called the horizontal effect of the Convention.

<sup>161</sup> CoE, “Human Rights” (Conventions and Protocols only), [www.coe.int](http://www.coe.int)

<sup>162</sup> CoE, Conventions, Full list, Chart of signatures and ratifications of Treaty, [www.coe.int](http://www.coe.int)

<sup>163</sup> ECHR, *X and Y v. Netherlands*, App. No. 8978/80, (1985) Serie A91, 7 EHHR 152, § 23

## Extra-territorial application

With regard to violations involving transnational corporations originating from Council of Europe Member States that occur beyond the territorial jurisdiction of the State, it is relevant to question whether the European Convention can be applied extra-territorially.

As provided by Article 1 of the Convention, the Court must first determine whether the matter complained of falls within the jurisdiction of the state concerned. In this regard, it is important to distinguish territory from jurisdiction. Although jurisdiction is mainly territorial, the court has pointed out that the term “jurisdiction” is not limited to a state’s national territory; rather, its responsibility can be engaged by acts carried out by its own agents where those acts produce effects outside its own territory, or where foreign territory falls, legally or illegally, under the control of the State. In other words, Convention provisions may apply extra-territorially, or have extra-territorial dimensions. Although there have been several cases in which **the Court has confirmed the extra-territorial applicability of the Convention**, in recognizing that States may have responsibility for human rights violations outside of their own territory, these cases remain “**exceptional circumstances**”.<sup>164</sup> Moreover, until now, **these extra-territorial cases have only involved violations attributable to state organs or agents**, where the state has failed to respect the rights and freedoms of individuals, rather than having failed to protect individuals from violations by a third, non-state party. Corporate human rights violations usually entail that the state has failed to protect the human rights of individuals from violation by a corporate entity. Considering the Court’s strict approach to the extra-territorial application of the Convention, it is questionable whether it would admit a state duty to protect human rights beyond a state’s borders.<sup>165</sup> Indeed, where violations are occurring outside the territory of the State concerned, that State cannot regulate or control the private actors to the same extent as it can on its own territory. This is not to say that extra-territorial cases of human rights violations by corporate actors stand no chance of success, but rather that caution should be shown in considering whether or not to bring such a case before the ECHR, as the threshold for such cases, if deemed admissible, would be high. However, as a State is sovereign in its own territory, several commentators argue that it has the **obligation to regulate** business enterprises that are based or

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<sup>164</sup> *Al-Skeini And Others v. The United Kingdom*, (Application no. 55721/07), 7 July 2011, § 132, available at <http://hudoc.echr.coe.int>. However, some scholars would argue the issue of repeated violations of human rights by transnational corporations based in States signatories to the Convention outside their territory has made these issues “no longer exceptional”.

<sup>165</sup> Marco Milanovic suggests in his book *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*, Oxford Monographs in International Law (2011) to strike a balance between full universal jurisdiction and full territorial jurisdiction by making a distinction between the State duty to respect human rights extraterritorially and the duty to protect human rights territorially. This, he argues, in order to mitigate the tension between universality and effectiveness. Whether this would also exclude the obligation to regulate business enterprises based in the territory of that State is uncertain.

have their main place of business in that State, in order to ensure that they do not nullify or impair the enjoyment of human rights beyond the territory of the State.<sup>166</sup> This could be interpreted in light of state responsibility for harm originating from or occurring on its territory under international law. Some would also argue States have an obligation to provide victims of human rights abuse access to their courts when harm is caused by a corporate actor based in their territory, in line with the obligation to provide access to justice.<sup>167</sup>

Below follows a general presentation of the Court's approach to extra-territorial jurisdiction to date, which does not include any cases of corporate accountability.<sup>168</sup>

## Summary of ECHR principles applicable to extra-territorial jurisdiction

Establishing **state jurisdiction** in a given situation is key for admissibility to the ECHR.

In the *Al-Skeini* case, the Court sought to summarize the principles governing extra-territorial jurisdiction.<sup>169</sup> After underscoring the importance of the **territorial principle**, meaning that “a State’s jurisdictional competence under Article 1 is primarily territorial”,<sup>170</sup> the Court recalls that it has “in its case-law [...] recognized **a number of exceptional circumstances** capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries”. In all cases, the question “must be determined with reference to the particular facts” of the case.<sup>171</sup>

These exceptional circumstances include, but are not necessarily limited to, “state agent authority and control” and “effective control over an area”.<sup>172</sup>

<sup>166</sup> *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (2011), Principle 24.

<sup>167</sup> This position, however, seems to have been recently rejected by the Court. See the *Nestlé/Romero* case against Switzerland. This application was declared inadmissible without any reason given, so it is currently difficult to assume that the Court has made a final determination. See *ECCHR, Nestlé precedent case: Murder of trade unionist Romero in Colombia: European Court of Human Rights blocks Nestlé/Romero case*, [www.ecchr.eu](http://www.ecchr.eu)

<sup>168</sup> As of early 2015, a case lodged by Sinaltrainal and the European Center for Constitutional and Human Rights (ECCHR) involving corporate accountability and extra-territorial jurisdiction (“the Nestlé case”) is pending before the ECHR. For further information about the case, see below “The ECHR in action in corporate-related human rights abuses”.

<sup>169</sup> *Al-Skeini and Others v. the United Kingdom*, §§ 130-142, *op. cited*.

<sup>170</sup> *Al-Skeini*, § 131

<sup>171</sup> *Id.* § 132

<sup>172</sup> *Id.* § 138-140

## *Effective control over an area*

The ECHR has noted that “as a consequence of lawful or unlawful military action, a Contracting State effectively exercises control of areas outside of its national territory. The obligation to secure the rights and freedoms set out in the Convention, derives from the fact of such control, whether exercised directly, through the Contracting State’s own armed forces, or indirectly, through a subordinate local administration”.<sup>173</sup> The Court considers that it **is a question of fact whether a Contracting State exercises effective control over an area outside its own territory.** In establishing this fact, the Court will not only look at **the strength of the State’s military presence in the area, but may also consider the military, economic, and political support of the local subordinate administration which may have been provided “with influence and control over the region.”**<sup>174</sup> The Court does not have competence to examine questions of jurisdiction in cases where States are acting under a UN mandate.<sup>175</sup>

## *State agent authority and control*

This is a situation in which a State’s jurisdiction may extend to acts of its authorities carried out abroad, without the territory being generally under the control of said State.<sup>176</sup> The Court’s case-law provides several examples. First, it has been established that “acts by diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others.”<sup>177</sup> Secondly, when a State, through the consent, invitation, or acquiescence of another Government, “exercises all or some of the public powers normally exercised by that Government” over a certain territory or services, that conduct may fall within that State’s jurisdiction.<sup>178</sup>

Thirdly, the Court has, under certain circumstances, recognized that the “use of force by a State’s agent operating outside its territory may bring the individual under

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<sup>173</sup> *Al-Skeini*, § 138, citing *Loizidou*, § 62; *Cyprus v. Turkey* § 76 and others.

<sup>174</sup> *Ilascu and others v. Moldova and Russia*, (Application no. 48787/99), 8 July 2004, §§ 388-394, <http://hudoc.echr.coe.int>

<sup>175</sup> When the acts are attributable to an organisation that is not a party to the ECHR, the alleged violation no longer falls within the jurisdiction of the States undertaking military or police operations. See ECHR, *Behrami & Behrami v. France*; *Saramati v. France, Germany & Norway*, App. Nos. 71412/01 & 78166/01, (2007) 45 EHRR SE10; and *Stichting Mothers of Srebrenika and Others v. the Netherlands*, App. No. 65542/12 (2013). On the mutually exclusive relationship between international organisations and their member States, see ECHR, *Bosphorus Hava Yolları Turizm Ve Ticaret Anonim Şirketi v. Ireland*, (Application no. 45036/98).

<sup>176</sup> *Al-Skeini*, § 133-137

<sup>177</sup> *Id.* § 134

<sup>178</sup> *Id.* § 136. The court underlines that the jurisdiction of the territorial State will prevail when the acts of the invited State are attributable to the territorial State. For instance, this includes situations in which one State lends agents or organs to another State (see ILC Articles on State Responsibility, Article 6).

the control of the State’s authorities through the State’s Article 1 jurisdiction”.<sup>179</sup> “The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the building, aircraft, or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question”.

#### ➔ **Hassan v. United Kingdom (2014)**<sup>180</sup>

The recent judgment is of great significance as the Court attempted to clarify its view on the interaction between international humanitarian law and international human rights law. It is also significant due to its decision on extra-territorial jurisdiction: the Court clearly established the extra-territorial jurisdiction of the United Kingdom for events that occurred in Iraq. The case concerned the claimant’s brother, Tarek Hassan – an Iraqi national, who was captured and detained by the British armed forces in Iraq and held at Camp Bucca in 2003. About four months after his release from the camp, he was found dead in a distant part of the country that was not controlled by the British forces.

The Court could not find any breach of the Convention relative to Hassan’s capture, detention, or death. However, it unanimously held that, **from the time of his arrest on 23 April 2003 until his release in May 2003, the claimant’s brother had been within the jurisdiction of the United Kingdom.**<sup>181</sup>

### ② Who can file a complaint?

**Any private individual person, whether a private individual or a legal entity (such as a company or an association), may file an application to the ECHR if the person considers that he/she has personally and directly been the victim of a violation of the rights and freedoms enshrined in the Convention.** This means that an NGO may apply to the Court, but only **if the NGO is itself a victim**, and not as a representative for other individuals. An applicant may be represented by a lawyer, but this is not required.

Submissions by individual persons, groups of individuals, or NGOs are referred to as “individual applications”, in contrast to those filed by Contracting States. **The complainant does not need to be a national of one of the states bound by the Convention, but needs to have been within the State’s “jurisdiction” at the time the alleged violation occurred, which generally means within its territory** (see discussion on extra-territoriality above).

<sup>179</sup> *Al-Skeini, op. cit.* § 136

<sup>180</sup> *Hassan v. The United Kingdom*, Application no. 29750/09, 16 September 2014, <http://hudoc.echr.coe.int>

<sup>181</sup> *Hassan v. The United Kingdom*, para 80, *op. cit.*

## Amicus curiae

NGOs cannot apply to the Court for deprivations of an individual's rights. At present, with the exception of those cases in which it is acting in the defence of its own rights, the participation of an NGO before the Court may only take the form of an *amicus curiae*, and may express its views on the subject matter of a pending case without being a party.<sup>182</sup>

According to Protocol No. 14, the Council of Europe Commissioner for Human Rights “may submit written comments and take part in hearings” in all cases pending before a Chamber or the Grand Chamber.<sup>183</sup>

### 🕒 Under what conditions?<sup>184</sup>

Individual applications must meet the following conditions:

- a) The violation complained of must have been **committed by a state party within its “jurisdiction”** (Article 1 of the Convention).
- b) **The complainant must have directly and personally been the victim of the alleged violation.** The ECHR extended the application of the Convention from the “**direct victims**”, to “**indirect victims**” (for instance close relatives of deceased or disappeared persons raising a separate complaint). It has also accepted appeals from “**potential victims**” in cases where a national measure in a domestic legal system may violate rights protected under the Convention.<sup>185</sup>

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<sup>182</sup> For a study on the role of *amicus curiae* submitted by human rights NGOs before the ECHR, see Van den Eynde, Laura, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights* (March 20, 2013). Netherlands Quarterly of Human Rights, 2013, Vol. 31/3, 271–313. Available at <http://papers.ssrn.com>

<sup>183</sup> CoE, *Protocol No. 14*, *op. cit.*, art.13; CoE, *European Convention on Human Rights*, *op.cit.*, art. 36 § 3.

<sup>184</sup> ECHR, *Practical Guide on Admissibility Criteria*, 2014, [www.echr.coe.int](http://www.echr.coe.int)

<sup>185</sup> The Court has held that a person facing the risk of expulsion to a territory in which her right to life or physical integrity may be at risk need not have been expelled in order to introduce a claim (Case of *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989; Case of *Saadi v. Italy*, Application no. 37201/06, 28 February 2008). The same general rule has been followed by the Court in cases involving the risk of expulsion from housing (Case of *Yordanova and others v. Bulgaria*, Application no. 25446/06, 24 September 2012), or the risk of one parent losing the custody of her child in international custody cases (Case of *Neulinger et Shuruk v Switzerland*, Application no. 41615/07, 6 July 2010). In all these cases, a violation of Convention rights had not yet occurred and the complainant was therefore only a “potential” victim. These cases can be found on the ECHR’s database HUDOC at <http://hudoc.echr.coe.int>



- c) The complainant **cannot make a general complaint about a law or a measure**. For example a complaint on the grounds that a law or policy seems unfair or may potentially affect a group of persons would not generally be accepted by the ECHR.<sup>186</sup> Similarly, people cannot complain on behalf of other people (unless they are clearly identified and the complainant is their official representative).
- d) **The complainant must have exhausted all available domestic legal remedies in the State concerned**. Applicants are only required to exhaust domestic remedies that are available and effective. The remedy is meant to be accessible, capable of providing redress in respect of the applicant's complaints<sup>187</sup> and must offer reasonable prospects of success in order to be considered both effective and available.<sup>188</sup> In determining whether any particular remedy meets the criteria of availability and effectiveness, regard must be given to the particular circumstances of the individual case. Therefore, not only must formal remedies be available, but there must also be consideration of the general legal and political context in which these remedies operate, as well as the personal circumstances of the applicant.<sup>189</sup> Applications before bodies of the executive branch, such as ombudsmen, are not considered as effective remedies.
- e) **The complainant must have specifically raised before the domestic court those articles of the Convention that he/she alleges have been violated**. This exhaustion rule has usually been considered satisfied if the right has been raised whether implicitly or in substance. For example, if the applicant has raised the issue of torture in the domestic courts, it would satisfy this rule even if there was no explicit reference to Article 3 of the Convention. However, it is recommended to explicitly point out the breaches of the Convention as early as possible in national proceedings in order to eliminate any doubts. The rationale of the rule is simple: due to the subsidiary role of the Court – its role is essentially to control

<sup>186</sup> Exceptions exist where the mere existence of a law or general policy may affect the rights of an individual. The Court has held that an illegitimate child need not wait for the death of a parent in order to claim discriminatory treatment under inheritance law (Case of *Marckx v. Belgium*, Application no. 6833/74, 13 June 1979). In another case, the Court held that a person fearing she had been subjected to arbitrary communications surveillance under a new law, need not prove that she was individually targeted in order to challenge its application (Case of *Klass and others v. Federal Republic of Germany*, Application no. 5029/71, 6 September 1978). In a similar vein, a homosexual person need not be subjected to individual enforcement measures in order to challenge a law that prohibits consensual sex between same-sex individuals (Case of *Dudgeon v. the United Kingdom*, Application no. 7525/76, 22 October 1981).

<sup>187</sup> ECHR, *Cardot v. France*, App No. 11069/84 (1991), 13 EHRR 853, § 34.

<sup>188</sup> ECHR, *Akdivar v. Turquie*, App. No. 21893/93 (1996), Reports 1996-IV, § 68. See also: ECHR, *Dalia v. France*, App No. 26102/95 (1998), Reports 1998-I, § 38; ECHR, *Vernillo v. France*, App No. 11889/85 (1991), Serie A No. 198, § 27: “[...] the only remedies which that [the Convention] requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied”.

<sup>189</sup> ECHR, *Van Oosterwijck v. Belgique*, App No. 7654/76, Serie A No. 40, §§ 36 à 40; ECHR, *Akdivar v. Turquie*, *op.cit.*; §§ 68-69.

the domestic courts' protection of the rights enshrined in the Convention – the Court simply cannot condemn the State for not having protected a right that was not brought to the attention of the domestic court.

- f) **The complaint must be filed within six months of the final decision of the domestic court being delivered**, or from the moment the applicant has sufficient knowledge of the final domestic decision.<sup>190</sup>

In an attempt to deal with the Court's massive caseload (as of 1 November 2014, about 78.000 applications were pending before the Court), the conditions for admissibility have become significantly stricter after Protocol 14 and Rule 47 came into force:<sup>191</sup> Reducing the amount of time in which the complaint must be filed contributes to this aim.

- g) All applicants **must use the formal application form**, which is accessible on the Court's website. **Any incomplete application will not be examined by the Court, and it is neither possible to challenge this decision, nor to send in a new application.** It is therefore essential to follow these procedures. See below for further information or an **abuse of the right of individual application**; or

- h) The applicant must have “suffered **a significant disadvantage**<sup>192</sup>”. This is intended to discourage applications from persons whose disadvantage is not considered significant, and to allow the Court to focus on the most serious violations. Even if the application is compatible with the Convention, and all of the formal admissibility criteria are respected, the application can still be declared inadmissible if it is deemed “**manifestly ill-founded**” on the merits. In other words, “if it is immediately obvious to the average reader that it is far-fetched and lacks foundation”.<sup>193</sup>

- i) An application will also be declared inadmissible if it is considered to be an “**abuse of the right of individual application**”, although this has only occurred in exceptional circumstances. So far four categories have been identified: misleading information; use of offensive language; violation of the obligation to keep friendly-settlement proceedings confidential; application manifestly vexatious or devoid of any real purpose.

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<sup>190</sup> When Protocol No. 15 to the Convention comes into force, this six-month period will be reduced to four months.

<sup>191</sup> Protocol No 14 came into force in 2010. The new Article 47 of the Court's Rules came into force 1 January 2014.

<sup>192</sup> For an analysis of case-law following the implementation of this criterion, see the Case-law research report *New admissibility criterion under Article § 3(b) of the Convention: case-law principles two years on* (2012), accessible on the website of the ECHR.

<sup>193</sup> III. Inadmissibility based on the merits; A. Manifestly ill-founded, in Practical Guide on Admissibility Criteria, p 82; CoE, ECHR, 2014, *op. cited*.

## HOW TO FILE A COMPLAINT

As of 1 January 2014, the new Rule 47 came into force, which introduced significantly stricter conditions for applying to the Court. The extremely rigorous application procedure must be meticulously respected.

**Any application non-compliant with Rule 47 of the Court's Rules, which sets out the required information and documents for a complete application, will not be examined by the Court. It is mandatory to use the Court's official application form that can be found on its website, and it must be properly completed. An incomplete application will not be examined by the Court, and will be declared inadmissible. The case and the file will subsequently be destroyed. This decision is final, and it is not possible to challenge or request any further information about it. Moreover, it is not possible to lodge a new application raising the same complaint. In other words, it is absolutely essential to correctly fill in all the fields of the application form because you only have one chance. As more than 90% of the applications examined by the Court are declared inadmissible, you should become familiar with the admissibility requirements of the Court and take great care when filling out the application form.**

- **The official languages of the ECHR are English and French. However, it is possible to file an application in any of the official languages of a Member State.** Please note that if the Court decides to ask the Government to submit written comments regarding your complaints, correspondence with the Court will from then on only be conducted in English or French, and you or your representative will be required to use English or French in subsequent submissions.
- **Do not come to the Court personally to state your complaint orally.** The proceedings are conducted in writing, and public hearings are exceptional.
- **Only use the application form that you find on the Court's website.<sup>194</sup> No other form must be used (Rule 47). Download the form, fill it out and print it. It must contain:**
  - **Information about the applicant, individual (A) or organisation (B)**
  - **If you are represented by someone, information about your representative, including your authorization for him/her to act on your behalf (C)**
  - **The State against which the application is directed (D)**
  - **Statement of the facts (E).** Three pages are reserved to this. You may however supplement this information by appending further details, but the additional explanation must not exceed 20 pages. The page limit does not include copies of accompanying documents and decisions.
  - **Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments (F).**
  - **Information about the use of available effective remedies for each complaint, including appeals (G).** You must also indicate the date of delivery/receipt of the final decision at the domestic level in order to show that you have applied within the six-month time limit.
  - **Information about international proceedings, if any (H).**
  - **List of accompanying documents (I), and enclose full and legible copies of all documents.** Since no documents will be returned to you it is important to send only copies and not originals.
  - **Declaration and signature of the applicant or the representative.**

<sup>194</sup> ECHR, “Apply to the Court”, “Application form”; [www.echr.coe.int](http://www.echr.coe.int). For more information on applications see [www.echr.coe.int](http://www.echr.coe.int)

The completed and signed application form should be sent by post to:

**The Registrar  
European Court of Human Rights  
Council of Europe 67075 STRASBOURG CEDEX  
FRANCE**

For additional information, please refer to “Notes for filling out the application form” and other updated documents, available in several languages at <http://www.echr.coe.int> under “Applicants” and “Apply to the court”.

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## Process and outcome

### *Process*<sup>195</sup>

If the Court requires further information after your application is submitted, it will contact you. Once it has your full application and all the information it needs, your application will be allocated to one of the following judicial formations of the Court:

- **Single judge:** “A single judge may declare inadmissible or strike out of the Court’s list of cases an application submitted under Article 34, where such a decision can be taken without further examination.” The decision is final, and it is not possible to challenge this decision nor to request any more information about it. If your case is declared inadmissible, the Court will close the case and destroy the file at a later date. In this case, you will receive a letter informing you of the decision, but you will not receive a copy of the decision. “If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.” (Article 27 of the European Convention)
- **Committee of 3 judges:** If the matter in the case (“underlying question in the case”) is already a “subject of well-established case-law of the Court”, in other words, if your case is considered to be a repetitive case, a Committee of 3 judges can declare the application admissible and render a judgement on the merits. This Committee may also - by an unanimous vote - declare an application inadmissible, or decide to strike it out of its list of cases where such a decision can be taken without further examination. In this case, a letter will be sent to you explaining the procedure. The decisions and judgements are final.

Single-judges and Committees operate as “filters” in order to reduce the workload on the Court.

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<sup>195</sup> ECHR, “How the Court Works”, “Case processing”, [www.echr.coe.int](http://www.echr.coe.int)

- **Chamber of 7 judges:** If your case is not considered to be repetitive, a Chamber of 7 judges will examine it. Here, too, the case may be declared inadmissible. However, if it considers the application admissible, it will examine the merits of your case.

Before examining the merits of the case it will **communicate the application to the Government against which it is lodged, informing it about the existence of the complaint and inviting it to respond**. This is the first time the Government will be informed about your application. The Court will then communicate the Government's observations to you, and allow you to reply to those observations. At this stage you will be invited to **use a lawyer** if you were not represented by one at an earlier stage. You will also be invited to present any claims for financial compensation (so-called "just satisfaction").

The Chamber then decides on the case by a majority vote. The admissibility stage is usually only in writing, but the designated chamber may choose to hold a public hearing, in which it will normally also address issues relating to the merits of the case.

**Within three months of delivery of the judgement** of the Chamber, any party may request that the case be referred to the **Grand Chamber of 17 judges** if it raises a serious question of interpretation, application, or a serious issue of general importance. The Court only accepts such referral requests in exceptional cases. The Grand Chamber decides by a majority vote and its judgements are final.

No case is ever sent directly before the Grand Chamber of 17 judges. However, a Chamber may relinquish jurisdiction in favour of the Grand chamber in the event that your case raises a serious question affecting the interpretation of the Convention, or in case there is a risk of inconsistency with the case-law of the Court.

Although individual applicants may present their own cases when lodging an application with the Court, legal representation is recommended in order to be well-founded and to avoid any risk of inadmissibility. Legal representation becomes mandatory once an application has been communicated to the respondent Government. **The Council of Europe has set up a legal aid scheme for applicants who do not have sufficient funds**<sup>196</sup>.

The **length of the process** is uncertain: although the Court examines the applications in a certain order, it prioritises cases of specific importance or urgency. Due to the massive case-load of the Court, the procedures tend to take a few years at the minimum. See the website for up-to-date information.

<sup>196</sup> If the case reaches a stage of the proceedings where representation by a lawyer is required, applicants may be eligible for free legal aid if he or she has insufficient means to pay a lawyer's fees. See ECHR, "Notes for filling in the application form", 2014, [www.echr.coe.int](http://www.echr.coe.int)

## *Interim measures*

Rule 39 of the Rules of Court empowers the Chamber, if necessary, to take interim measures. Also known as “precautionary measures” or “provisional measures”, interim measures apply in case of emergency, **only when there is a risk of irreparable damage**. According to the ruling of the Court, interim measures are **binding**.<sup>197</sup> Usually they are only allowed when Articles 2 and 3 are concerned (right to life and not to be submitted to torture, inhuman or degrading treatment). However the Court accepted in particular cases the applicant’s request when Article 8 was allegedly violated (right to respect for private and family life).

## *Outcome*

The judgements of the Court – with the exception of rare referrals to the Grand Chamber – are final and binding on the states concerned. The Court is not responsible for the execution and implementation of its judgements. It is the task of the Council of Europe Committee of Ministers to monitor the execution of the Court’s judgements and to ensure that any compensation is paid. It also confers with the country concerned and the department responsible for the execution of judgements to decide how the judgement should be executed and how to prevent similar violations of the Convention in the future.

If the Court finds there has been a violation, it may:

- Award the complainant “just satisfaction” – a sum of money in compensation for certain forms of damage;
- Require the state concerned to refund the expenses you have incurred in presenting your case. If the Court finds that there has been no violation, there is no additional cost (such as those incurred by the respondent state).

For more information on how your application will be processed, see the documents “Your application to the ECHR: How to apply and how your application is processed”, “Questions and Answers”, and the Flowchart, available on the Court’s website.<sup>198</sup>

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<sup>197</sup> ECHR, *Cruz Varas and Others v. Sweden*, App. No. 15576/89, (1991) Serie A201, 14 EHRR 1; *Mamatkulov and Askarov v. Turkey*, App. Nos. 46827/99 & 46951/99, (2005) Reports of Judgments and Decisions 2005-I.

<sup>198</sup> ECHR, “Applicants” and “Apply to the court”, [www.echr.coe.int](http://www.echr.coe.int)

## The ECHR in action in corporate-related human rights abuses

In the cases related below, the European Court condemned Contracting Parties for their failure to regulate private industry. In doing so, the judges accept the applicability of the Convention to environmental issues despite the lack of an explicit right to a safe and clean environment in the text.<sup>199</sup>

### ➔ **Lopez Ostra v. Spain**<sup>200</sup>

In the town of Lorca, several tanneries belonging to a company called SACURSA had a waste-treatment plant, built with a State subsidy on municipal land twelve metres away from the applicant's home. The plant caused nuisance and health problems to many local people. Mrs. Lopez Ostra lodged a complaint with the ECHR on the grounds of her right to respect for her home, under Article 8 paragraph 1 and her right not to be subjected to degrading treatment under Article 3.

The Court declared that **“naturally, severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.** [The Court acknowledged the State was not the actual polluter]. Admittedly, the **Spanish authorities,** and in particular the Lorca municipality, were **theoretically not directly responsible** for the emissions in question. **However, as the Commission pointed out, the town allowed the plant to be built on its land and the state subsidized the plant’s construction.** [The Court recognized the State’s responsibility] and needs only to establish whether the national authorities took the measures necessary for protecting the applicant’s right to respect for her home and for her private and family life under Article 8. [At the end, the Court considered] that the State did not succeed in striking a fair balance between the interest of the town’s economic well-being – that of having a waste-treatment plant – and the applicant’s effective enjoyment of her right to respect for her home and her private and family life”.<sup>201</sup>

<sup>199</sup> The ECHR has considered environmental issues in relation to different provisions of the European Convention: art.2 (right to life), art.3 (right not to be subjected to torture or to inhuman or degrading treatment or punishment), art.5 (right to liberty and security), art.6 (right to a fair trial), art.8 (right to respect for private and family life), art.11 (freedom of assembly and association) and art.1 of the Protocol No. 1 (protection of property).

<sup>200</sup> ECHR, *Lopez Ostra v. Spain*, App. No. 16798/90, (1995) 20 EHRR 277.

<sup>201</sup> *Ibid.*, § 51-58.

### ➔ **Fadeyeva v. Russia**<sup>202</sup>

On December 1999, Mrs. Fadeyeva lodged an application with the Court against the Russian Federation alleging that the operation of a steel plant (Severstal PLC) close to her home endangered her health and well-being. The “very strong combination of indirect evidence and presumptions” lead the Court to conclude that the applicant’s health deteriorated as a result of her prolonged exposure to the industrial emissions from the Severstal steel-plant. Russia did not directly interfere with the applicant’s private life or home. However, the state did not offer any effective solution to help the applicant to move from the dangerous area, nor did it reduce the industrial pollution to acceptable levels, despite the violation of domestic environmental standards by the company. The Court stated “that the **state’s responsibility in environmental cases may arise from a failure to regulate private industry**. Accordingly, the applicant’s complaints were considered in terms of a **positive duty on the state to take reasonable and appropriate measures to secure the applicant’s rights under Article 8 § 1 of the Convention**”.<sup>203</sup> The Court concluded that the State had failed “**to strike a fair balance between the interests of the community and the applicant’s effective enjoyment of her right to respect for her home and her private life**”. Hence, the Court concluded there had been a violation of Article 8 of the Convention.<sup>204</sup>

Subsequently, the Court reiterated that “even if there is no explicit right in the Convention to a clean and quiet environment, Article 8 of the Convention may apply in environmental cases, regardless of whether the pollution is directly caused by the State or the State’s responsibility arises from failure to regulate private-sector activities properly”.<sup>205</sup>

### ➔ **Recourse before the European Court of Human Rights challenging Belgium for failing to guarantee the right to a fair trial for victims of corporate abuse in Burma**

In 2002, a complaint was introduced to a court in Belgium by four Burmese citizens against Total for alleged complicity in the violation of human rights in Burma, under a 1993 Belgian law that established universal jurisdiction in its domestic courts. This law was abrogated in August 2003 and a new law relative to serious violations of international humanitarian law was adopted which required a link of the victim to Belgian territory. Despite the Burmese applicants residing in Belgium, and that one of them was a refugee under the 1961 Geneva Convention, the Belgian Highest Court (Cour de cassation) ruled that the complaint did not satisfy the criteria of the new law for being deemed admissible.

<sup>202</sup> ECHR, *Fadeyeva v. Russia*, App. No. 55723/00, 30 November 2005.

<sup>203</sup> *Ibid.*, §89.

<sup>204</sup> *Ibid.*, §134.

<sup>205</sup> ECHR, *Hatton and others v. United Kingdom*, App. No. 36022/97, (2003) 37 EHRR 28, §96; ECHR, *Guerra and Others v. Italy*, App. No. 14967/89, (1998) 26 EHRR 357, §58-60; ECHR, *Tătar v. Romania*, App. No. 67021/01, (2009) §87; ECHR, *Leon and Agnieszka Kania v. Poland*, App. No. 12605/03, (2009) §98. See also: ECHR, *Bacila v. Romania*, App. No. 19234/04, (2010).



A petition was introduced to the ECHR in April 2009 claiming that the Burmese plaintiffs have suffered a violation of Article 6 §1 of the European Convention on Human Rights, which protects their right to a fair trial, and of discrimination in the right to a fair trial. The complaint was declared inadmissible based on the absence of an obvious violation of the Convention.

### ➔ **Complaint against Switzerland for failure to investigate the death of a Colombian trade unionist after statute-barred prosecution proceedings against Nestlé**

Luciano Romero, a trade unionist, human rights activist, and former Nestlé-Cicolac employee, was kidnapped, tortured and murdered by members of a paramilitary group on 10 September 2005 in Colombia. His murder came after a long labour dispute between the trade union Sinaltrainal and the Colombian Nestlé factory Cicolac. During this period the trade union had reported all death threats against its members to the Nestlé subsidiary, as well as to the parent company in Switzerland. Rather than taking precautionary measures, the local Nestlé managers spread libellous rumours that Romero and his colleagues were members of the guerrilla, which put these individuals in even greater danger.

The criminal proceedings in Colombia resulted in the conviction of the direct perpetrators of Romero's murder, and the judgement stated that Nestlé's role in the crime was of particular interest. The judge ordered an investigation to look further into the matter, but Colombian prosecution authorities have, as of December 2014, failed to follow up the order.

After the Swiss Federal Supreme Court confirmed (on 21 July 2014) the lower courts' refusal to investigate the role of the Swiss conglomerate Nestlé in Romero's murder, Sinaltrainal and European Center for Constitutional and Human Rights (ECCHR) brought, in December 2014, a case against Switzerland before the ECHR on the basis of violations of Articles 2 (right to life; obligation to investigate), 11 (freedom to form and join trade unions), and 13 (right to effective remedy) of the Convention. In May 2015, the Court dismissed the complaint with no chance of appeal and no justification.

\* \* \*

In cases involving corporate human rights abuses occurring outside of the territory of the 47 Member States, the primary difficulty with filing a complaint before the ECHR is the question of jurisdiction. The Court may only hear cases of violations by Member States within their jurisdiction, which usually means within their territory or within a territory under their control. Applications regarding the failure

of a European state to control the actions of a corporation abroad are likely to fail because the Court would most probably be reluctant to find the actions of the corporation abroad to have been within the jurisdiction of the State. However, corporate human rights abuses no longer constitute “exceptional circumstances” and, on the international level, the obligation of States to regulate the extra-territorial activities of multinational enterprises based in their territory is increasingly recognized.

The Court has also been struggling with an excessive workload, with its stock of allocated cases increasing every year since 1998. It was only in 2012 that the Court managed to dispose of more applications than it received, a trend that continued in 2013 and 2014. At the end of 2013, there were 99,900 cases pending before the Court, which represents a 22% decrease from 2012.<sup>206</sup> It can take up to 6 years for a case to be examined, which is clearly an impediment to the effectiveness of this legal recourse mechanism.

## B. European Social Charter

The European Social Charter (ESC) is a Council of Europe treaty adopted in 1961.<sup>207</sup> A revised Charter was adopted in 1996 and came into force in 1999. While the European Convention on Human Rights mainly guarantees civil and political human rights, the ESC protects economic and social rights. As of October 2015, 43 Council of Europe Members States have ratified the European Social Charter, and 33 of these have ratified the revised Charter.<sup>208</sup>

The European Committee of Social Rights (ECSR) is composed of fifteen independent and impartial experts, elected by the Council of Europe Committee of Ministers for a period of six years, renewable once. The Committee determines whether State Parties’ national situations are in conformity in law and in practice with the Charter through a monitoring procedure based on national reports and collective complaints, adopting *conclusions* and *decisions*, respectively.

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<sup>206</sup> ECHR, “Analysis of Statistics 2013”, January 2014

<sup>207</sup> CoE, *European Social Charter*, adopted on 18 October 1961, revised on 3 May 1996, entered into force on 1 July 1999, [www.coe.int](http://www.coe.int)

<sup>208</sup> Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Republic of Moldova, Montenegro, Netherlands, Norway, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Sweden, Macedonia, Turkey and Ukraine have ratified the 1996 revised Charter. Croatia, Czech Republic, Denmark, Germany, Greece, Iceland, Luxembourg, Poland, Spain and United Kingdom have only ratified the 1961 Charter. Our Council of Europe Member States have not ratified the 1961 Charter or the 1996 revised version. These are Liechtenstein, Monaco, San Marino and Switzerland.

## Collective complaints

The collective complaints procedure was introduced by the 1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, with a view to increase the effectiveness, speed and impact of the Charter's implementation.<sup>209</sup> The procedure allows “social partners”, notably, on European level, the European Trade Union Confederation (ETUC), for employees, and Business Europe and International Organisation for Employers (OIE), for employers, and corresponding social partners at national level, and other non-governmental organisations to lodge “collective complaints” with the ECSR, upon which the Committee issues a decision on potential non-implementation of the Charter in the State concerned.<sup>210</sup>

## State reporting

The reporting procedure, which has been significantly simplified since April 2014, varies according to whether the State has accepted the collective complaints procedure or not.<sup>211</sup>

States having accepted the collective complaint mechanism must submit a simplified national report every second year, outlining what measures have been taken in response to the ECSR decisions on collective complaints. States Parties not having accepted the collective complaints procedure must submit a yearly report detailing their implementation of the Charter in one of four thematic groups.<sup>212</sup> These are: 1) Employment, training and equal opportunities; 2) Health, social security and social protection; 3) Labour rights; and 4) Children, family, migrants. Each provision of the Charter is included in one of the four thematic groups. Consequently, each provision is reported on once every four years.<sup>213</sup> At the last stage of the supervisory process intervenes the Committee of Ministers, the decision-making body of the Council of Europe, composed of the Member States' Ministers of Foreign Affairs. At the end of each supervision cycle it adopts *resolutions*, and may issue *recommendations* to Member States in cases of non-compliance, as a part of its role in the implementation of the European Social Charter.<sup>214</sup> State reporting may have a potential impact on the development in the field. For example, the Committee's activity report of 2013 noted in particular the strong link between Article 3 on the right to health and safety at work, and Article 2 of the ECHR, securing the right

209 CoE, *Protocol to the European Social Charter Providing for a System of Collective Complaints*, adopted on 9 November 1995, entered into force on 1 July 1998,

210 For a list of complains, see CoE website, “European Social Charter”, “Collective Complain”, “List of Complaints and State of Procedure”, [www.coe.int](http://www.coe.int)

211 As of October 2014, 15 Member States have accepted the collective complaint procedure. These are Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Slovenia and Sweden. The new rules adopted are available at [www.coe.int](http://www.coe.int)

212 See *The Reporting Procedure*, European Social Charter, on [www.coe.int](http://www.coe.int)

213 The calendar for the reporting system can be found on [www.coe.int](http://www.coe.int)

214 See CoE, Committee of Ministers, About the CM, [www.coe.int](http://www.coe.int)

to life. The Committee found several states in breach of the charter in relation to fatal accidents at work.<sup>215</sup> The Committee held that, in certain countries,<sup>216</sup> “a fatal accident rate which is more than twice as high as the European average constitutes evidence that measures taken to reduce such accidents are inadequate”. In some countries, the Committee “found fault with the systems for reporting accidents and occupational injuries in certain countries”,<sup>217</sup> with indications of widespread under-reporting and even concealment of workplace accidents and injuries. In some countries,<sup>218</sup> the Committee found “the entire labour inspection system to be inefficient, including due to insufficient resources, low numbers of inspection visits or ineffective fines and sanctions.”

## Scope

The European Social Charter **applies only to the “metropolitan territory of each party”**.<sup>219</sup> Another limitation of the European Social Charter lies in the fact that foreigners are protected only insofar as they are originating from other States Parties and are lawfully resident or working regularly in the territory of the State Party. This limitation was somewhat relaxed by the 2003 landmark decision of *FIDH v. France*.<sup>220</sup>

This seriously limits the relevance of the European Social Charter with regard to corporate-related human rights abuses occurring in non-State Parties. However, this mechanism might be useful to address violations of economic and social rights involving corporations in the territory of States Parties.

## 🕒 What rights are protected?

The ESC guarantees the following rights:

- The right to work (art. 1), and to just, safe and healthy conditions of work (art. 2, 3)
- The right to a fair remuneration (art. 4)
- The right to organise (art. 5), to bargain collectively (art. 6)
- The right of children and young persons to protection (art. 7)
- The right of employed women to protection (art. 8)

<sup>215</sup> *European Committee of Social Rights, Activity report 2013*, p 18-19, <http://www.coe.int>

<sup>216</sup> Bulgaria, Lithuania, Republic of Moldova, Romania, the Russian Federation, Turkey and Ukraine

<sup>217</sup> Albania and Republic of Moldova

<sup>218</sup> Albania, Republic of Moldova, and Ukraine

<sup>219</sup> CoE, *Revised European Social Charter*, adopted on 3 May 1996, entered into force on 1 July 1999, Part VI, art. L.

<sup>220</sup> ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, No. 14/2003, §29 & 31. The European Committee on Social Rights considered that “the Charter must be interpreted so as to give life and meaning to fundamental social rights”, that “health care is a prerequisite for the preservation of human dignity” and “that restrictions on rights are to be read restrictively, i. e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter”. As a consequence it ruled that, by denying urgent medical care to children with an irregular migrant status, France had violated the rights of children to social protection.

- The right to vocational guidance (art. 9) and training (art. 10)
- The right to protection of health (art. 11), which includes policy preventing illness and, in particular, the guarantee of a healthy environment
- The right to social security (art. 12), to social and medical assistance (art. 13), to benefit from social welfare services (art. 14)
- The right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement (art. 15)
- The right of the family to social, legal and economic protection (art. 16), the right of mothers and children to social and economic protection (art. 17)
- The right to engage in a gainful occupation in the territory of other Contracting Parties (art. 18)
- The right of migrant workers and their families to protection and assistance (art. 19)

The Revised European Social Charter further protects a number of rights including:

- The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (art. 20)
- The right to information and consultation (art. 21)
- The right of elderly persons to social protection (art. 23)
- The right to dignity at work (art. 26)
- The right of workers with family responsibilities to equal opportunities and treatment (art. 27)
- The right to protection against poverty and social exclusion (art. 30)
- The right to housing (art. 31)

### ② Who can file a collective complaint?<sup>221</sup>

In the case of all states that have accepted the Collective Complaint procedure, the following organisations are entitled to lodge complaints to the Committee:

- European Trade Union Confederation (ETUC), BUSINESSEUROPE (formerly UNICE) and International Organisation of Employers (IOE);
- A number of International Non-Governmental Organisations (INGOs) which enjoy participatory status with the Council of Europe, and are on a list drawn up for this purpose by the Governmental Committee for a renewable 4-year period;<sup>222</sup>
- Employers' organisations and trade unions in the country concerned.

In the case of states which have also made a special declaration according to Article 2 of the Collective Complaints Protocol the following are eligible to file complaints:

- National NGOs

<sup>221</sup> CoE, *Organisations entitled to lodge complaints with the Committee*, [www.coe.int](http://www.coe.int)

<sup>222</sup> For the list on INGOs entitled to submit collective complaints as of 1 July 2014, see [www.coe.int](http://www.coe.int)

## ② Under what conditions?

Collective complaints alleging violations of the Charter may only be lodged against states which have ratified the Protocol.

Admissibility criteria are more flexible than those before the European Court of Human Rights:

- Domestic remedies do not need to be exhausted.
- A similar case can be pending before national or international bodies while being examined by the ECSR.

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## HOW TO FILE A COLLECTIVE COMPLAINT?

- The complaint must be in writing:
  - in English or French if submitted by the ETUC, UNICE, IOE or INGOs with participative status, or;
  - in the official language, or one of the official languages, of the state concerned, if submitted by employers' organisations trade unions and national NGOs.
- The complaint must include:
  - the name and contact details of the organisation submitting the complaint;
  - proof that the person submitting and signing the complaint is entitled to represent the organisation lodging the complaint;
  - the state against which the complaint is directed;
  - an indication of the provisions of the Charter that have allegedly been violated;
  - the subject matter of the complaint, i.e. the point(s) in respect of which the state in question has allegedly failed to comply with the Charter, along with the relevant arguments, with supporting documents.
- All complaints shall be addressed to the Executive Secretary, acting on behalf of the Secretary General of the Council of Europe.

**Executive Secretary**  
**European Committee of Social Rights**  
**Council of Europe**  
**F-65075 Strasbourg Cedex**  
**[social.charter@coe.int](mailto:social.charter@coe.int)**

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## ② Process and outcome

The Committee first examines the complaint to determine its admissibility. Once declared admissible a written procedure is set in motion, with an exchange of memorials between the parties.

The Committee may decide to hold a public hearing. “The Committee then takes a decision on the merits of the complaint, which it forwards to the parties concerned and the Committee of Ministers in a report. The report is made public within four months of it being forwarded. Finally, the Committee of Ministers adopts a resolution. If appropriate, it may recommend that the state concerned take specific measures to bring the situation into line with the Charter”.<sup>223</sup> These recommendations are available on the Committee of Ministers website.<sup>224</sup>

### The Committee in action in corporate-related human rights abuses

#### ➔ Marangopoulos Foundation for Human Rights (MFHR) v. Greece (2006)

On 4 April 2005, the MFHR, a Greek NGO with consultative status before the Council of Europe, submitted a complaint against Greece for non-compliance or unsatisfactory compliance with Articles 2 (4), 3 (1) and (2) and 11 of the European Social Charter:

The complaint concerned the negative effects of heavy environmental pollution on the health of people working or living in communities near to areas where lignite is being extracted, transported, stockpiled and consumed for the generation of electricity in Greece. The complaint also dealt with concerns regarding the lack of measures adopted by the Greek State to eliminate or reduce these negative effects, and to ensure the full enjoyment of the right to the protection of health, and of the right to safe and healthy working conditions. It was found that the Greek State failed in its duty to fully implement or to enforce the relevant rules and regulations found in domestic, European and International Law.<sup>225</sup>

The Public Power Corporation (DEH) of Greece is responsible for the vast majority of the mining and use of lignite for energy-production purposes. Even though DEH was partially privatized in 2001, the Greek state remained the largest shareholder (with 51.5% of shares in 2003) and exercised direct control over it.

In its judgement on 6 December 2006, the ECSR found a violation of Article 11§1-3 (the right to protection of health) and Article 3§2 (the right to safe and healthy working conditions). In relation to Article 3§2, the ECSR stated that Greece failed to provide for the enforcement of safety and health regulations through adequate measures of supervision). In its finding

<sup>223</sup> CoE, *Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* – Summary of the treaty, <http://www.coe.int>

<sup>224</sup> CoE, *Committee of Ministers Adopted Texts*, [www.coe.int/t/cm/adoptedTexts\\_en.asp](http://www.coe.int/t/cm/adoptedTexts_en.asp)

<sup>225</sup> ECSR, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Collective Complaint No. 30/2005, Case Document No. 1, 26 April 2005, §1.

of another violation of Article 2§4 (the right to just conditions of work) the ECSR declared that Greece failed to provide for additional paid holidays or reduced working hours for workers engaged in dangerous or unhealthy occupations. The ECSR transmitted its report to the Committee of Ministers that adopted a resolution on 16 January, 2008, in which it declared that:

- The Greek government “does not provide sufficiently precise information to amount to a valid education policy aimed at persons living in lignite mining areas” and that “little has so far been done to organise systematic epidemiological monitoring of those concerned and no morbidity studies have been carried out.”<sup>226</sup>
- Greece “is in breach of its obligation to monitor the enforcement of regulations on health and safety at work properly.”<sup>227</sup>
- The Greek government “has taken no subsequent steps to enforce the right embodied in Article 2§4.”<sup>228</sup>

#### ➔ FIDH v. Greece (2013)<sup>229</sup>

On 8 July 2011, FIDH and the Hellenic League for Human Rights lodged a complaint to the European Committee of Social Rights against Greece, claiming that Greece failed to eliminate or reduce the harmful impact of the substantial industrial pollution of River Asopos on the health of residents.<sup>230</sup>

Industrial liquid waste had been dumped into the River Asopos over decades, and, despite having recognized in 2010 “the serious and complex problem of pollution in the Asopos valley and the groundwater in this area”, the Greek authorities have taken few practical measures to address the issue and regulate the industrial emissions of corporate actors.

On 23 January 2013 the Committee unanimously concluded in its decision that Greece had violated Article 11§1 and 11§3 by **failing to take appropriate measures to remove as far as possible the causes of ill-health and prevent the diseases**, and Article 11§2, for **failing to provide advisory and educational facilities for the promotion of health**.

\* \* \*

<sup>226</sup> CoE Committee of Ministers, Complaint No. 30/2005 by the Marangopoulos Foundation for Human Rights (MFHR) against Greece, (i), adopted on 16<sup>th</sup> January 2008, Resolution CM/ResChS(2008)1.

<sup>227</sup> *Ibid.*, (iii).

<sup>228</sup> *Ibid.*, (iv).

<sup>229</sup> *International Federation for Human Rights (FIDH) v. Greece*, Complaint No. 72/2011, [www.coe.int](http://www.coe.int)

<sup>230</sup> Réclamation collective, *Fédération Internationale des Ligues des droits de l'Homme (Ligue Hellénique des droits de l'Homme) c. Grèce*, 8 juillet 2011, [www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC72CaseDoc1\\_fr.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC72CaseDoc1_fr.pdf). See also [www.fidh.org](http://www.fidh.org)



The Social Charter mechanism has an interesting potential, in particular as it relates to collective complaints. However, it is still used very little by trade unions, INGOs and national NGOs entitled to present complaints. The scope of this mechanism therefore remains limited and would gain from being further exploited.

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## ADDITIONAL RESOURCES

### On the European Court of Human Rights:

- Information about the Court, relevant treaties, statistics, case-law, and the application procedure can be found on ECHR’s website: [www.echr.coe.int/](http://www.echr.coe.int/)
- For application procedures, see ECHR’s website, [www.echr.coe.int](http://www.echr.coe.int), follow “Applicants” and “Apply to the Court”. Among other official documents, you will find:
  - The mandatory Application form required by Rule 47
  - Notes for filling in the Application Form (2014)
  - How to apply to the Court
  - Institutional Proceedings Case-processing: the life of an application (flowchart): [www.echr.coe.int/Documents/Case\\_processing\\_ENG.pdf](http://www.echr.coe.int/Documents/Case_processing_ENG.pdf)
  - Admissibility Guide (2014), extensive, particularly useful for lawyers
  - Link to the Admissibility Checklist: <http://appform.echr.coe.int/echrappchecklist>
- Information notes and thematic hand guides (under “Publications”) [www.echr.coe.int/](http://www.echr.coe.int/)
- Online tutorial for applicants explaining how to correctly fill in the application form: [www.youtube.com/user/EuropeanCourt](http://www.youtube.com/user/EuropeanCourt)

### On the European Social Charter:

- CoE, Rules of the European Committee of Social Rights, adopted on 29<sup>th</sup> March 2004, most recently amended by the Committee on 6 December 2013: [www.coe.int/t/dghl/monitoring/socialcharter/escrrules/Rules\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/escrrules/Rules_en.pdf)
  - CoE, “How to register as an INGO entitled to lodge a collective complaint alleging violation of the European Social Charter?”: [www.coe.int/t/dghl/monitoring/socialcharter/organisationsentitled/instructions\\_EN.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/organisationsentitled/instructions_EN.asp)
  - CoE, “List of complaints and state of procedure” [www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp)
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## CHAPTER II

### The African System of Human Rights Protection and the Courts of Justice of the African Regional Economic Communities

#### A. The African Commission on Human and Peoples' Rights

#### B. The African Court on Human and Peoples' Rights

#### C. The Courts of Justice of the African Regional Economic Communities

\* \* \*

**The African Charter on Human and Peoples' Rights**,<sup>231</sup> also known as the Banjul Charter, entered into force on 21 October 1986, after its adoption in Nairobi (Kenya) five years earlier by the African Union (AU) (then Organisation of African Unity). The Charter has been ratified by all State Parties to the African Union except South Sudan. Its advent signalled a new era for the protection of human rights in Africa.

The African Charter has provided for the creation of the **African Commission on Human and Peoples' Rights** (Article 30), whose task is to oversee and interpret the Charter. A Protocol on the Establishment of the African Court on Human and Peoples' Rights was later added to the Charter, creating the **African Court on Human and Peoples' Rights**. The Protocol came into effect on 25 January 2004, and as of September 2015, has been signed and ratified by 29 African states.

The African Court was partly created in response to the weak enforcement capacity of the African Commission, whose decisions are not legally binding on the state. Today both institutions operate for upholding the African Charter, although with different procedures, requirements for submitting application and implementation force. The relationship is governed by the Protocol establishing the Court and the two institutions' Rules of Procedure.<sup>232</sup> They can both request an opinion of the other institution, the Court may transfer a matter for which it is seized to the Commission, and the Commission may on its own accord submit a communication to the Court in particular in case of massive human rights violations or in case of non-compliance to its recommendations by a State party to the Protocol.

<sup>231</sup> AU, *African Charter on Human and Peoples' Rights*, adopted on 27 June 1981, entered into force on 21 October 1986.

<sup>232</sup> *The Protocol on the Establishment of the African Court on Human and Peoples' Rights*, Rule 29 of the Court's Interim Rules of Procedure (2010) and Part IV of the Rules of Procedure of the Commission (2010).

In addition to the African Charter, other human rights instruments have been established:

- **The protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.**<sup>233</sup> Where its provisions have been violated and local remedies have failed to guarantee them, it is possible to ask the African Commission and Court to consider the case.<sup>234</sup>
- **The Charter on the Rights and Welfare of the Child.**<sup>235</sup> Where its provisions have been violated and local remedies have failed to guarantee them, it is possible to ask the African Committee of Experts on the Rights and Welfare of the Child<sup>236</sup> and the African Court to consider the case.

There are also different rapporteurs and working groups within the African system that individuals and communities can reach out to.

Finally, five **Regional Economic Communities’ (REC) tribunals** have also been established to hear cases regarding the interpretation and application of the different Regional Economic Community treaties, including their Constitutive Acts, which oblige State Parties to respect human rights.

## A. The African Commission on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights (ACHPR) is a quasi-judicial treaty body whose creation and mandate are defined under the African Charter (Art. 30 and 45).<sup>237</sup> The Commission has its seat in Banjul, The Gambia, and holds a mandate to ensure the promotion and protection of human rights on the African continent (Art. 45). The Commission is mandated “to collect documents, undertake studies and researches on African problems in the field of human and peoples’ rights, organize seminars and conferences, disseminate information, encourage national and local institutions concerned with human and peoples’ rights and, should the case arise, give its views or make recommendations to Governments”, as well as to formulate principles and rules “aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms” and interpret the provisions of the Charter (Article 45). The Commission officially meets in session twice a year to adopt country specific resolutions on serious human rights violations and/or thematic

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<sup>233</sup> AU, *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, adopted 10-12 July 2003.

<sup>234</sup> ACHPR, *Special Rapporteur on the Rights of Women in Africa - Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, [www.achpr.org/english/\\_info/women\\_prot.htm](http://www.achpr.org/english/_info/women_prot.htm)

<sup>235</sup> AU, *The African Charter on the Rights and Welfare of the Child*, adopted in July 1990, entered into force in November 1999.

<sup>236</sup> AU, “African Committee of Experts on the Rights and Welfare of the Child”, [www.africa-union.org/child](http://www.africa-union.org/child)

<sup>237</sup> UA, *African Charter on Human and Peoples’ Rights*, *op. cit.*, art. 30.

resolutions,<sup>238</sup> and to examine state reports and communications on human rights violations submitted for its attention. It can also hold extraordinary sessions, in particular to deal with pending communications.

## ② What rights are protected?

The Commission protects a large set of rights enshrined in the African Charter, which encompasses civil and political rights, economic, social and cultural rights as well as those protected by the Protocol on the Rights of Women in Africa. At the time of its adoption, the African Charter was particularly innovative for its comprehensive approach to human rights, granting the same status to economic, social and cultural rights as to civil and political rights, and recognising collective rights<sup>239</sup>.

### *Individual Rights enshrined in the African Charter (art. 2 to 18)*

Civil and Political Rights:

- Right to non-discrimination (art. 2)
- Right to equality before the law (art. 3)
- Rights to life and physical and moral integrity (art. 4)
- Right to the respect of the dignity inherent in a human being, the prohibition of all forms of slavery, slave trade, physical or moral torture and cruel, inhuman and degrading punishment or treatment (art. 5)
- Right to liberty and to security of the person and the prohibition of arbitrary arrests or detention (art. 6)
- Right to a fair trial (art. 7)
- Freedom of conscience and religion (art. 8)
- Right to receive information and freedom of expression (art. 9)
- Freedom of association (art. 10)
- Freedom of assembly (art. 11)
- Freedom of movement, including the right to leave and enter one's country and the right to seek and obtain asylum when persecuted (art. 12)
- Right to participate in the government of one's country and the right of equal access to public service (art. 13)
- Right to own property (art. 14)

Economic, Social and Cultural Rights:

- Right to work under equitable and satisfactory conditions and receive equal pay for equal work (art. 15)
- Right to physical and mental health (art. 16)
- Right to education and the freedom to take part in cultural activities (art. 17)

<sup>238</sup> ACHPR, *Resolution On Economic, Social and Cultural Rights in Africa*, 7 December 2004, ACHPR/Res.73(XXXVI)04.

<sup>239</sup> This could be particularly relevant when looking at violations involving transnational corporations.

- Right of family, women, aged or disabled to specific measures of protection (art. 18)

The African Commission has set up a Working Group on Economic, Social and Cultural Rights, and in 2011 adopted a set of guidelines aimed at detailing states' obligations under the Charter. The guidelines<sup>240</sup> refer to the role of states in protecting human rights from harm by other actors, including private actors. These guidelines may assist the Commission and the Court in examining future communications relating to corporate involvement in violations of economic, social and cultural rights.

### ***Peoples' Rights enshrined in the African Charter (art. 19 to 24)***

Also called collective or solidarity rights, peoples' rights refer to the rights of a community (ethnic or national) to determine their governance structures and the development of their economies and cultures. They also include rights such as the right to national and international peace and security, the right of peoples to freely dispose their wealth and natural resources and **the right to a satisfactory environment favourable to their development.**

#### **➔ Centre for minority Rights Development and MRG on behalf of Endorois Community v. the Republic of Kenya<sup>241</sup>**

The Endorois are semi-nomadic pastoralists who were evicted from their ancestral land in and around Lake Bogoria in Kenya's Rift Valley in the 1970s, in order to pave way for the creation of a national park.<sup>242</sup> The Endorois, with the assistance of Minority Rights Group International (MRG), took the case to the ACHPR. In 2010, the Commission ruled that the Kenyan government had violated the Endorois' rights to religious practice, to property, to culture, to the free disposition of natural resources, and to development, under the African Charter (Articles 8, 14, 17, 21 and 22, respectively). The Commission also established that the government should reconstitute the Endorois ancestral lands, ensure unrestricted access to Lake Bogoria, pay adequate compensation for all losses suffered, pay royalties regarding existing economic activities, and engage in dialogue with the complainants<sup>243</sup>. For the first time, an African indigenous peoples' rights over traditionally owned land have been legally recognised (in a context where the very concept of indigeneity is being questioned). "The Commission's decision has not only awarded a full remedy to the Endorois community

<sup>240</sup> ACHPR, *Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and People's Rights*, 2011, <http://www.achpr.org>

<sup>241</sup> ACHPR, *Centre for Minority Rights Development and MRG on behalf of Endorois Community v. the Republic of Kenya*, Communication No. 176/2003, 4<sup>th</sup> February 2010. See also: Center for Minority Rights Development, *A call to re-evaluate the status of minority and indigenous rights in Kenya: decision on the Endorois communication before the African Commission on Human and Peoples' Rights (ACHPR)*, [www.minorityrights.org](http://www.minorityrights.org)

<sup>242</sup> Minority Rights Group International, Endorois case, <http://minorityrights.org>

<sup>243</sup> See case description ESCR-Net, [www.escr-net.org/node/365690](http://www.escr-net.org/node/365690)

but has also significantly contributed to a better understanding and greater acceptance of indigenous rights in Africa.”<sup>244</sup>

In September 2014 and after numerous attempts by civil society organisations to call for the implementation of the decision, the Kenya government formed a high-level task force to oversee the implementation of the Commission’s ruling. The task force was to remain in office for at least a year, and is mandated to submit a report to the president every three months, to propose interim measures after six months, and to prepare a final report with recommendations to the President.<sup>245</sup> It is chaired by the Solicitor-general. NGOs – including FIDH member organisation the Kenyan Human Rights Commission – have expressed concerns regarding the task force, as it has not been required to consult with the Endorois Welfare Council or any Endorois representative, and lacks Endorois representation on the task force itself. NGOs call for an inclusive and participatory process asking the Kenyan government to engage in dialogue with the Endorois community and to adopt concrete implementation measures, beyond the registration of the Endorois people. At its 54<sup>th</sup> session, the ACHPR issued a new resolution<sup>246</sup> affirming the need for Kenya to demonstrate tangible implementation progress.<sup>247</sup> This case demonstrates challenges surrounding the implementation of the Commission’s decisions. Five years later, the decision still remains to be implemented by the Kenyan government.

### *Rights enshrined in the Protocol on the Rights of Women in Africa*

The African Commission also deals with alleged violations of the rights protected by the **Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa**.<sup>248</sup> This Protocol, adopted by the African Union on 11 July 2003 (entered into force on 25 November 2005) as a supplementary protocol to the African Charter on Human and Peoples’ Rights, is particularly innovative regarding the protection of women’s rights. In the context of business activities, the following rights are of particular relevance:

- Right to economic and social welfare (art. 13)
- Right to food security (art. 15)
- Right to adequate housing (art. 16)
- Right to positive cultural context (art. 17)
- Right to a healthy and sustainable environment (art. 18)

<sup>244</sup> Minority Rights Group International, Endorois case, <http://minorityrights.org>

<sup>245</sup> President notice, Gazette Notice No. 6708, *Task force on the implementation of the decision of the African Commission on Human and Peoples’ Rights contained in Communication No. 276/2003* (Centre for Minority Rights Development on Behalf of Endorois Welfare Council vs. Republic of Kenya), accessible at [www.escr-net.org](http://www.escr-net.org)

<sup>246</sup> ACHPR/Res.257 (LIV)

<sup>247</sup> ESCR-Net, *Implementing the ACHPR’s ruling on the Endorois case*, 2 October 2014, accessible on ESCR-Net’s website [www.escr-net.org](http://www.escr-net.org)

<sup>248</sup> AU, *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, *op. cit.*



- Right to sustainable development (art. 19)
- Right to inheritance (art. 21)

As provided by Article 27 of this Protocol “The African Court on Human and Peoples’ Rights shall be seized with matters of interpretation arising from the application or implementation of this Protocol”.

### ➤ Against whom may a communication be lodged?<sup>249</sup>

According to the African Commission’s Guidelines for the Submission of Communications, a communication must be lodged against a State Party that has ratified the African Charter, and it must relate to violations of a right guaranteed by the Charter and committed after the State party’s ratification. The Commission has asserted that the obligations of States under the Charter include the duty to “respect, protect, promote and fulfil these rights”. The duty on states to protect those on their territory from harm by non-state actors is well established.<sup>250</sup> States have primary responsibility for ensuring the implementation of the rights protected under the Charter. The issue of whether the African Charter also provides for direct accountability of non-state actors is currently a matter of debate.

However, unlike other human rights instruments, the African Charter explicitly refers to the duties of individuals.<sup>251</sup> It is not yet clear whether such duties may be enforced against individuals under the Charter, nor whether complaints against a non-state actor, as opposed to a state, would be admissible before the African Commission.<sup>252</sup> Notably, the Charter refers to *individuals* and not persons, the latter term often-including individuals and companies (that is, physical *and* legal persons), whereas the former is usually exclusively used to refer to natural persons.

## Extraterritorial application: any possibilities within the African Charter?

The African Charter does not explicitly state that, to be admissible, a communication must relate to a violation which occurred “within the jurisdiction” of the state against whom the communication is being lodged. So far, there is only one case of extraterritorial application of the African Charter, which concerns the single inter-State communication decided so far, lodged by the Democratic Republic of

<sup>249</sup> ACHPR, *Guidelines for submission of communications*, <http://www.achpr.org>. See also FIDH and others, *Filing a communication before the African Commission on Human and Peoples’ Rights, A complainant’s manual*, 2013, accessible at [www.fidh.org](http://www.fidh.org)

<sup>250</sup> For further analysis of the duty to protect under the African Charter, see: SAIFAC, *The State Duty to Protect, Corporate Obligations and Extra-Territorial Application in the African Regional Human Rights System*, Johannesburg, February 2010, p.13-31.

<sup>251</sup> Chapter II of Part I develops on the duties of individuals. See Articles 27, 28 and 29 of the African Charter.  
<sup>252</sup> *Ibid.*, pp 31-35.



Congo against Rwanda, Burundi and Uganda. The DRC presented a communication alleging massive human rights violations in Congolese provinces, committed by the armed forces of Rwanda, Burundi and Uganda. Upon examination of the communication, the Commission found the respondent states responsible for different violations of the African Charter, saying “that the violations complained of are allegedly being perpetrated by the Respondent States in the territory of the Complainant State”<sup>253</sup> and urging them to abide by their obligations. It should also be noted that none of the states involved raised the issue of the territory as reason for the communication to be deemed inadmissible.<sup>254</sup>

Another possible scenario could be to bring a communication against an African state for violations committed in another African state, by or with the complicity of companies headquartered in the former State (eg. a case where a South African mining company is involved in violations of human rights in Ghana). Chances of a favourable decision would most probably increase if it involves the participation of a State-owned enterprise, or another State agent such as an export-credit agency. So far no communication has been brought directly against a corporation. However, one case examined by the Commission has dealt with a non-state actor as a defendant. Considering that the Charter specifically addresses individuals’ rights and duties, it is argued that the African system may offer interesting possibilities to submit cases directly against companies.<sup>255</sup>

## ② Who can file a communication?

**Ordinary citizens, a group of individuals, NGOs and States Parties to the Charter** are all able to submit a communication to the Commission.

Individuals can complain on behalf of others. **The complainant need not be related to the victim of the violation** (but the victim must be mentioned – see below).

## ② Under what conditions?

A communication may only be presented:

- If local remedies have been exhausted (art. 56(5)). There can be exceptions to this rule however, including where remedies are not available, effective or sufficient.<sup>256</sup>
- If the matter has not already been settled by another international human rights body (art. 56(7)).

<sup>253</sup> ACHPR, Democratic Republic of Congo (DRC) against Rwanda, Burundi and Uganda, Communication 227/99 in ACHPR, *Report of the African Commission on human and Peoples’ Rights*, 9<sup>th</sup> ordinary session, Banjul, 25-29 June, § 63.

<sup>254</sup> *Ibid.*

<sup>255</sup> SAIFAC, *op. cit.*

<sup>256</sup> For more information see: FIDH and others, *Filing a communication before the African Commission on Human and Peoples’ Rights, A complainant’s manual*, 2013, *op. cited.*

- If the matter is submitted within reasonable delay from the date of exhaustion of all domestic remedies (art. 56(6)), including all the possibilities for appeal. The Commission will evaluate each matter on a case-by-case basis and consider the circumstances of the matter needed to base its decision. A communication could also be accepted if it appears that the condition of reasonable delay has not been met, due to the fact that the individual did not have the necessary means to seize the Commission.

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## HOW TO FILE A COMMUNICATION?

FIDH and partner organisations produced a manual to file communications before the Commission.<sup>257</sup>

All communications must be in writing, and addressed to the secretary or chairman of the African Commission on Human and Peoples' Rights. Each communication should:

- Include the author's name, even if they request to remain anonymous (art. 56);
- Be compatible with the Charter of the OAU and with the present Charter;
- Not be written in insulting language directed against the State or the OAU;
- Not be based exclusively on news from the media;
- Include a description of the violation of human and/or peoples' rights that took place;
- Include the date, time (if possible), and place where it occurred;
- Specify the State concerned;
- Include the victims' names (even if the latter wants to remain anonymous, in which case, this should be stated). Victims' names are not required if they are too numerous, in case for example of massive crimes;
- Include the names of any authority familiar with the facts of the case (if possible);
- Include information indicating that all domestic legal remedies have been exhausted. Plaintiffs are advised to attach copies of the decisions of national jurisdictions to their petition.<sup>258</sup> If domestic remedies have not been exhausted, the communication should indicate the reasons why it was not possible to do so. Ideally, this would mean providing a copy of a judgement of a local court or tribunal, or a letter of refusal of an authority stating that the judicial system does not provide for a judicial alternative;
- Indicate whether the communication has been, or is being considered before any other international human rights body, for instance, the UN Human Rights Committee.

Communications can be sent at:

**The African Commission on Human and Peoples' Rights**  
**P O Box 673, Banjul, The Gambia**  
**Tel: 220 392962**  
**Fax: 220 390764**

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<sup>257</sup> *Ibid*

<sup>258</sup> FIDH, *The African Court on Human and Peoples' Rights; towards the African Court of Justice and Human Rights, Practical guide*, May 2010, [www.fidh.org](http://www.fidh.org)

For additional information on how to submit a communication, see: [www.achpr.org](http://www.achpr.org)  
 See also: ACHPR, “Guidelines on the Submission of Communications”, Information Sheet No. & FIDH and others, Filing a communication before the African Commission on Human and Peoples’ Rights, A complainant’s manual, 2013, accessible from: [www.fidh.org](http://www.fidh.org)

## ① Process and outcome<sup>259</sup>

### *Process*

If a person or an organisation, person (natural or legal, private or public, African or international) submits a communication, the Commission will consider it at the request of the majority of its members.

The Commission will first ensure that the conditions of admissibility of the communication have been met.

A complainant can act on his or her own without the need for professional assistance. However, it is always useful to seek the help of a lawyer. It should be noted that the **Commission does not offer legal assistance to complainants**.

Most of the procedure is handled in writing through correspondence with the Secretariat of the Commission. However, the complainant may be requested to present his views on the admissibility and the merits of the case at one ACHPR’s session.

The Commission’s final decisions are made in the form of recommendations to states. They constitute incentives for the states to take all necessary measures to cease and redress violations of the Charter. Decisions on communications of the Commission provide clear guidance to states on how to achieve implementation of the Charter and its related instruments.

### *Provisional measures*

Before submitting its views on a communication, it is possible for the Commission to recommend the state concerned to take provisional measures to avoid irreparable damage being caused to the victim of an alleged violation.<sup>260</sup> Communications sent to the Commission should therefore indicate if the victim’s life, personal integrity or health are in imminent danger.

<sup>259</sup> ACHPR, *Communications procedure*, [www.achpr.org](http://www.achpr.org)

<sup>260</sup> ACHPR, *Rules of procedure*, Rule 98, 2010, [www.achpr.org](http://www.achpr.org)

## Outcome

### Strengths:

The communication procedure before the ACHPR:

- Gives the possibility for victims, group of individuals and NGOs to directly refer a case before the Commission without prior acceptance by the State concerned;
- Can be a channel for individuals and NGOs to access the African Court. The Commission can petition the African Court after having received communications presented by individuals or NGOs on serious and massive human rights violations or when a State Party did not implement the decisions of the Commission;
- Puts political pressure on the State concerned.

### Weaknesses:

- The procedure takes a long time (2 years minimum in theory and between 4 to 8 years on average).
- The decisions are recommendations and their implementation depends on the will of States. The Commission is nevertheless taking measures to ensure compliance with its recommendations, especially with regard to the seizure of the African Court.

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## RAPPORTEURS & WORKING GROUPS WITHIN THE COMMISSION

There are currently Special Rapporteurs on the thematic issues of prisons and conditions of detention; **the rights of women; freedom of expression and access to information; human rights defenders;** and refugees, asylum seekers, migrants and internally displaced persons. There are also thematic working groups on economic, social and cultural rights; indigenous populations/communities in Africa; the death penalty; the prevention of torture; the protection of people living with HIV (PLHIV) and those at risk, vulnerable to and affected by HIV; and extra-judicial, summary or arbitrary killings in Africa; as well as working groups on the rights of older persons and people with disabilities; **and extractive industries, the environment and human rights violations.**

Special Rapporteurs can undertake investigative and country visits with the consent of the concerned state. These are normally followed by the publication of a report providing recommendations to governmental authorities, but also to other sectors of society such as civil society, donors and the international community.

It is the Commission that formally receives and considers individual communications. However, each Rapporteur can seek and receive information from States Parties to the African Charter, and from individuals and other bodies.<sup>261</sup> They may then decide to take action, for example by sending a diplomatic letter to a Member State or by transmitting urgent appeals.<sup>262</sup> In 2011 the Commission

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<sup>261</sup> ACHPR, *Communications procedure*, Information Sheet No.3, [www.achpr.org](http://www.achpr.org)

<sup>262</sup> Although it may not be specifically indicated in their mandate, all Rapporteurs can transmit urgent appeals.

also established a Working Group on Communications to consider questions of seizure, admissibility and the merits of communications, and to make recommendations to the Commission.<sup>263</sup>

## The Commission in action in corporate-related human rights abuses

### ➔ The case of Shell in Nigeria<sup>264</sup>

*The Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria, Communication No. 155/96, African Commission on Human and Peoples' Rights*

In March 1996, two NGOs, the Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) submitted a communication to the ACHPR. The communication noted that the government of Nigeria had been directly involved in oil production through the state owned oil company, the Nigerian National Petroleum Company (NNPC), which encompasses the majority of shareholders in a consortium with Shell Petroleum Development Corporation (SPDC). It was alleged that this involvement had caused severe damage to the environment, and consequently led to health problems among the indigenous Ogoni population. The communication also alleged that the Nigerian Government had condoned and facilitated these violations by placing the legal and military powers of the state at the disposal of the oil companies.

The communication therefore alleged violations of Articles 2, 4, 14, 16, 18, 21, and 24 of the African Charter. In October, 1996, the communication was deemed admissible by the African Commission, which determined in 2001 that the government of Nigeria had violated these articles.

The Commission appealed to the Nigerian government stop all attacks on the Ogoni people, investigate and prosecute those responsible for the attacks, provide compensation to victims, to prepare environmental and social impact assessments in future and to provide information on health and environmental risks.

The Commission based its decision on the African Charter and the other treaties to which Nigeria is a signatory, as well as on international resolutions and declarations. These include: ICESCR, ICERD, CRC, CEDAW, UDHR, the Vancouver Declaration on Human Settlements, the Declaration on the right to development, the Draft Declaration on the Rights of Indigenous Peoples,<sup>265</sup> the UN Sub-Commission on prevention and discrimination of Minorities resolution 1994/8 and the Universal Declaration on the Eradication of Hunger and Malnutrition.

<sup>263</sup> ACHPR, *Working Group on Communications*, [www.achpr.org](http://www.achpr.org)

<sup>264</sup> ACHPR, Re: Communication 155/96, 27 May 2002, ACHPR/COMM/A044/1, [www.cesr.org](http://www.cesr.org)

<sup>265</sup> The Draft Declaration was ratified on 13 September 2007 and is now the Declaration on the Rights of Indigenous Peoples.

The government of Nigeria has an obligation to **protect** the rights enshrined in these various instruments and must take all appropriate measures to protect individuals from rights violations perpetrated by third parties, including transnational corporations. In this case, it was also possible to establish direct government involvement in the rights violations, because the government itself was the majority partner in the oil consortium and the owner of the private company.

It seems that little has been done following the Commission's decision to clean the environmental pollution of the Ogoni land, or to compensate the communities affected. Besides, the unilateral decision of Nigeria, made on 4 June 2008, to replace the Shell Petroleum Development Company of Nigeria (SPDC) with the Nigerian Petroleum Development Company (upstream subsidiary of the NNPC) has been seen by the Ogoni populations as "a further attempt to deny their stakeholders rights".<sup>266</sup>

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The ACHPR has a well-established jurisprudence relating to economic, social and cultural rights and the decisions of the Commission regarding the international recognition of economic, social and cultural rights as well as governments' responsibility concerning transnational corporations' activities within their territory are encouraging. However, it is at the moment not possible to directly accuse a transnational corporation. Complaints can only be brought before the Commission if it can be shown that the violation is due to the state's failure to protect. Yet the question of the responsibilities of states and businesses for the impact of corporate activities on human rights still remains insufficiently explored, and victims should not hesitate to use the system for matters involving companies. As revealed by the Ogoni case in Nigeria, the Commission has the potential to reassert the responsibility of African States to protect human rights from harm by foreign transnational corporations.

The inability of the African Commission to enforce its decisions remains a serious weakness.

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<sup>266</sup> International Crisis Group, *Nigeria: Ogoni Land after Shell, Africa Briefing n°54*, 18 September 2008, [www.crisisgroup.org](http://www.crisisgroup.org)

## B. The African Court on Human and Peoples' Rights

The creation of the African Court on Human and Peoples' Rights was an important step in complementing the role of the African Commission with an enforceable mechanism that the African system for human rights protection had thus far been lacking. The Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights<sup>267</sup> was adopted on 10 June 1998. It entered into force on 25 January 2004. The Court is located in Arusha, Tanzania, and rendered its first judgement on admissibility, on 15 December 2009. Its first judgement on the merits was issued on 14 June 2013.<sup>268</sup>

As of March 2016, 24 States have ratified the Protocol,<sup>269</sup> and 7 States have made a declaration accepting the Court's competence to receive applications from individuals or NGOs.<sup>270</sup> At the 2004 AU Summit, it was decided that the new Court would merge with the yet-to-come African Court of Justice to form the African Court of Justice and Human Rights. This will take place when 15 states have ratified the Protocol on the Statute of the African Court of Justice and Human Rights.<sup>271</sup>

### The African Court on Human and Peoples' Rights in Action

#### ➔ **Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v. The Republic of Burkina Faso, Application no. 013/2011.**

On 28 March 2014, the Court found that Burkina Faso had not taken appropriate measures to investigate the murder of journalist, Norbert Zongo, thereby failing to **meet its obligation to protect journalists**.<sup>272</sup>

The body of journalist Norbert Zongo had been one of four bodies found in a burned-out car in Sapouy, about 100 kilometres from Ougadougou in Burkina Faso on 13 December

<sup>267</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, adopted on 10 June 1998, entered into force on 25 January 2004.

<sup>268</sup> Tanganyika Law Society and The Legal and Human Rights Centre and Reverend *Christopher Mtikila v. The United Republic of Tanzania*, consolidated Applications No 009/2011 & 011/2011.

<sup>269</sup> Algeria, Benin, Burkina Faso, Burundi, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia, Uganda and Cameroon. See African Court on Human and Peoples' Rights, *African Court in Brief*, available at [www.african-court.org](http://www.african-court.org)

<sup>270</sup> As of 2015, seven countries had made such a declaration, namely Benin, Burkina Faso, Cote d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania.

<sup>271</sup> AU, *Protocol on the Statute of the African Court of Justice and Human Rights*. As of February 2014, five countries had ratified the Protocol, see AU, *List of Countries which have signed, ratified/acceded to the Protocol On The Statute Of The African Court Of Justice And Human Rights*. Until the merger the Court will continue to operate as the African Court on Human and Peoples' Rights.

<sup>272</sup> Chidi Odinkalu & Ibrahim Kane, *The Killing of Norbert Zongo: African Court Stresses State Obligation to Protect Journalists*, 31 March 2014, available at: [www.opensocietyfoundations.org](http://www.opensocietyfoundations.org)

1998. The Court concluded that Burkina Faso had failed in its obligation to take measures, **other than legislative**, to ensure that the Applicants' rights for their cause to be heard by competent national Courts are respected:

"The Respondent State therefore violated Article 7 as well as Article 9 (2) of the Charter, read jointly with Article 66 (2) c) of the revised ECOWAS Treaty, because it **failed to act with due diligence in seeking, trying and judging the assassins of Norbert Zongo and his companions**. Hence, Burkina Faso simultaneously violated Article 1 of the Charter by failing to take appropriate legal measures to guarantee the respect of the rights of the Applicants pursuant to Article 7 of the Charter."<sup>273</sup>

This judgement is significant because it emphasises the state duty to protect individuals from violations by third parties. One of the complainant organisations was MBDHP, a FIDH member organisation.

## **Legal Aid Scheme**

The Court adopted a Legal Aid Policy<sup>274</sup> and set up a Legal Aid Fund. The Legal Aid Policy notably specifies criteria for determining eligibility for qualification for legal aid as well as the categories of expenses that will be supported. **An application form is available** on the Court's website.<sup>275</sup> Tanzania is the first AU Member State to contribute towards the Scheme, with a 100 000\$ pledge in September 2015.

## **⌚ What rights are protected?**

Article 3 of the Protocol provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning **the interpretation and application of the Charter, this protocol and any other relevant human rights instrument ratified by the States concerned. In the event of a dispute as to whether the court has jurisdiction, the court shall decide.**"<sup>276</sup>

In other words, the rights protected under the Charter, as well any other relevant human rights instrument that the state concerned has ratified are protected by the Court's jurisdiction. Compared with other regional human rights institutions the potential rights protected are numerous. Moreover, the Court has made it clear that the rights enshrined in the Charter should not be interpreted narrowly.

<sup>273</sup> Press release, *Judgement in the matter of late Norbert Zongo and others v. Burkina Faso*, available at [www.african-court.org](http://www.african-court.org)

<sup>274</sup> African Court on Human and Peoples' Rights (ACtHPR), *Legal Aid Policy for the African Court on Human and Peoples' Rights*, [www.african-court.org](http://www.african-court.org).

<sup>275</sup> ACtHPR, Legal Aid Policy, [www.african-court.org/en/index.php/54-legal-aid/579-legal-aid-policy](http://www.african-court.org/en/index.php/54-legal-aid/579-legal-aid-policy)

<sup>276</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and peoples' right *op. cit.*



## ② Against whom may a complaint be lodged?

A petition must be addressed to a state party to the Protocol. The most obvious state to address in a case of corporate human rights abuse would be the state on whose territory the violations occur. It may also be possible that the State owner of a company, or the State where a company is head quartered (the “home state”) can have a complaint lodged against them. For the moment, no such cases have been brought. (See the discussion on extra-territoriality above)

## ② Who can file a complaint?

In accordance with Article 5 of the Protocol, the Court is competent to receive applications from:

- the African Commission;
- a State Party who has lodged an application with the Commission;
- a State Party against whom an application has been lodged with the Commission
- a State Party whose citizen is a victim of human rights violations.

However, one of the unique aspects of the African Court compared to other regional courts is that African intergovernmental organisations can also lodge applications with the Court under Article 5. Moreover, any individual or NGO with observer status before the Commission can likewise lodge an application, though the Court may only receive petitions directly from individuals or NGOs when the State Party concerned has made a prior declaration granting such a right.<sup>277</sup> As of 2015, seven states have made such a declaration.<sup>278</sup>

The Court may under its Protocol permit a State Party to join a proceeding if it has an interest in the case.

## ② Under what conditions can a complaint be lodged?

- The petition must deal with facts that are specified under the jurisdiction of the Protocol as provided by Article 3 (see above).
- If the complainant is a State Party, the Commission or an NGO in a country that has made the 34(6) declaration, and has observer status before the Commission, then all other specific conditions of admissibility of an individual or an NGO are identical before the Commission and the Court (see section above and see Article 40 of the Interim Rules of the Court).

<sup>277</sup> Individuals and NGOs with Observer Status before the African Commission may present communications before the African Commission, and this cannot be opposed by a State Party. After receiving a case, the Commission may decide to bring it before the African Court, as previously explained.

<sup>278</sup> Namely Burkina Faso, Ghana, Malawi, Mali, Rwanda, Tanzania and Côte d'Ivoire.

**This declaration requirement is one of the main limits of the African system of protection of human rights.** Yet as of today, among the 29 States having ratified the Protocol of 1988, only **Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania** have made a declaration under Article 34(6). It is therefore important that NGOs without the observer status before the Commission apply to obtain the status for future submissions to the Court, as this could represent a potential obstacle to access the Court. Obtaining the observer status can take up to a year or two.<sup>279</sup>

An alternative strategy, which may be considered in case the state has not given individuals the possibility to petition the Court, is to submit a communication to the Commission, who has the capacity to refer to the Court for serious or massive human rights abuses.

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## HOW TO FILE A COMPLAINT?

All communications must be in writing, and addressed to the Registry of the Court. Applications must be written in one of the official languages of the African Union (Arabic, English, French and Portuguese).

Each communication should:

- Include the author's name, even if they request to remain anonymous (the name will be kept confidential if anonymity is requested), and the names and addresses of the persons designated as the applicant's representative, if applicable);
- Be compatible with the Charter of the OAU and with the African Charter;
- Not be written in insulting language;
- Not be based exclusively on news from the media;
- Include a description of the violation of human and/or peoples' rights that took place;
- Indicate the clauses of the African Charter or another human rights instrument ratified by the State concerned that have, supposedly, been violated;
- Include the date, time (if possible), and place where it occurred;
- Specify the State(s) concerned;
- Specify if there are any witnesses;
- Provide all evidence of the alleged violations (not the originals, copies only);
- If the plaintiff is an individual, the document has to be signed by the plaintiff himself or his legal representative;
- If the plaintiff is an NGO, the document has to be signed by one person with the legal capacity to represent the organisation or its legal representative;

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<sup>279</sup> For more information about the procedure to follow to apply for the observer status: ACHPR, *Resolution for the criteria for granting an enjoying observer status to non-governmental organisations working on the field of human rights with the African Commission on Human and Peoples' Rights*, [www.achpr.org/sessions/25th/resolutions/33/](http://www.achpr.org/sessions/25th/resolutions/33/)

- Include information indicating that all domestic legal remedies have been exhausted. If domestic remedies have not been exhausted, the communication should indicate the reasons why it was not possible to do so. Ideally, this would mean providing a copy of a judgement of a local court or tribunal, or a letter of refusal of an authority stating that the judicial system does not provide for a judicial alternative;
- The orders or injunctions sought;
- Request for reparation if desired.

Applications must be sent to the Registry of the Court:

**African Court on Human and Peoples' Rights**  
**P.O Box 6274 Arusha,**  
**Tanzania**  
**Tel: +255 27 2050111**  
**Fax: +255 27 2050112**

- An application format is available online [www.african-court.org/en/court/mandate/lodging-complaints](http://www.african-court.org/en/court/mandate/lodging-complaints)
- See also: African Court, “Lodging Complaints” [www.african-court.org/en/court/mandate/lodging-complaints](http://www.african-court.org/en/court/mandate/lodging-complaints)
- See also FIDH, Practical Guide on the African Court on Human and Peoples’ Rights, available at: <https://www.fidh.org/en/international-advocacy/african-union/African-Court-on-Human-and-Peoples-Rights/FIDH-Practical-Guide-on-the-African-Court-on-Human-and-Peoples-Rights-2067>

## ② Process and outcome

### *Process*

The procedure before the Court shall consist of written, and if necessary, oral proceedings. The Court may decide to hold a hearing with representatives of parties, witnesses, experts or such other persons.<sup>280</sup>

In order to petition the Court, the application of an individual, or an NGO with observer status before the African Commission, must contain elements required in accordance with Articles 5.3 and 34.6 of the Protocol.

The Court makes different types of decisions:

- Advisory opinion (art. 4 of the Protocol);
- Litigation decisions;
- Attempt to settle a dispute amicably (art. 9 of the Protocol);
- Judgement<sup>281</sup> (art. 3, 5, 6, and 7 of the Protocol)

<sup>280</sup> Phases of proceedings, Rule 27.

<sup>281</sup> Term used for legal decisions of Appeal Courts and Supreme Courts that are binding.

## Provisional measures

In case of extreme gravity and urgency, and to prevent harm to persons in danger, the Court may take **provisional measures** (art. 27.2 of the Protocol) during its inquiry or render a judgement (art. 28.2 of the Protocol) when the inquiry is finished. Those judgements are binding on the states and must be taken into account by national courts as being a reference for jurisprudence.

### ➔ The Ogiek case (Kenya)

The Ogiek case was referred to the African Court by the African Commission on the grounds that it evinced serious and mass human rights violations. In a historic ruling in March 2013, the African Court on Human and Peoples' Rights issued a provisional measures order in favour of the Ogiek community – the first time that the Court has issued such an order in favour of an indigenous people. The Court ordered the government of Kenya to stop parcelling out land in a disputed forest area until the Court reaches a decision in the matter and to refrain “from any act or thing that would or might irreparably prejudice the main application, until the Court gives its final decision in the case”.<sup>282</sup>

## Outcome

The Court's judgement:

- Must be rendered in the 90 days after its deliberations and pronounced in front of a public audience (art. 28.1 and 28.5 of the Protocol);
- Must be well reasoned and definitive (art. 28.6 and 28.2 of the Protocol);
- May be reviewed and interpreted (art. 28.3 and 28.4 of the Protocol);
- May allocate compensation (art. 27.1 of the Protocol).

The judgements issued by the Court are **binding**, contrary to the communications of the Commission.

State Parties commit themselves to the implementation of judgements rendered within the delays fixed by the Court (art. 30 of the Protocol). In practice, the implementation of its decisions depends very often on the will of the States. Nevertheless, the fact that the Court makes its decisions public, and sends them to Member States of the AU and the Executive Council, means that it plays an important role in putting pressure on condemned States.

Moreover, the Executive Council of the African Union monitors the implementation of judgements (art. 29.2 of the Protocol). It can pass directives or rulings that have binding force on reluctant States. However, this process also depends on the

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<sup>282</sup> Order of Provisional Measures, Application no.006/2012, available at [www.refworld.org](http://www.refworld.org). Extract taken from ESCR-Net, *The Ogiek case - the first case on indigenous people's rights to be considered by the African Court*, [www.escr-net.org](http://www.escr-net.org)

political will of the Executive Council to exercise a thorough monitoring of the decisions of the Court.

The Court addresses the Conference of the Heads of State and Government in an annual report, which must include coverage of the non-implementation of its decisions (art. 31 of the Protocol).

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The African system for the protection of human rights remains largely under-resourced. However, there are different ways for victims and NGOs to access the system, through the Commission, or its Rapporteurs, and the Court. Keeping in mind the very young history of the Court, and considering that only seven States have so far granted individuals access to it, the Commission still remains the main channel for NGOs and individuals to access the African system. Opportunities to further analyse the responsibilities of States and businesses for the impact of corporate activities on human rights should be explored.

## C. The Courts of Justice of the African Regional Economic Communities

There are at present eight Regional Economic Communities (REC) recognised by the African Union (AU):

- The Economic Community of West African States (ECOWAS)
- The Common Market for Eastern and Southern Africa (COMESA)
- The Economic Community of Central African States (ECCAS)
- The Southern African Development Community (SADC)
- The Intergovernmental Authority on Development (IGAD)
- The Arab Maghreb Union (AMU)
- The Community of Sahel-Saharan States (CEN-SAD)
- The East African Community (EAC)

Several of these RECs have set up tribunals for settling disputes relating to violations by a State Party of REC Treaties and texts, mainly of an economic and monetary nature.

### The jurisdiction of the tribunals in the field of human rights

The jurisdiction of some of the tribunals contains an explicit reference to the respect for human rights; in other cases the jurisdiction is implicit, in that it does not derive from the texts establishing the court, but rather from the obligation incumbent on the States Parties to respect the human rights specified in the REC treaties. Such implicit jurisdiction is in fact born out by the case law of certain courts.

## The ECOWAS Community Court of Justice

Article 9(4) of the Additional Protocol (2005) gives the Court jurisdiction over cases of human rights violations in all Member States and enables it to receive individual applications.

### ***Exhaustion of effective domestic remedies is not required:***

The ECOWAS Court of Justice is an exception among international tribunals, in that there is no mention of a requirement that effective domestic remedies be exhausted for an application to be receivable. The Court can therefore hear a case even if domestic remedies have not been exhausted, including cases still pending before the national courts.

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### HOW TO FILE A COMPLAINT?<sup>283</sup>

Cases may be brought before the Court by an application addressed to the Court Registry. Every application shall state:

- the name and address of the applicant;
- the designation of the party against whom the application is made;
- the subject matter of the proceedings and a summary of the pleas in law on which the application is based;
- the form of order sought by the applicant;
- where appropriate, the nature of any evidence offered in support;
- an address for service in the place where the Court has its seat and the name of the person who is authorized and has expressed willingness to accept service;
- in addition or instead of specifying an address for service, the application may state that the lawyer or agent agrees that service is to be effected on him by telefax or other technical means of communication.

The applications must be sent to the following address:

**Community Court of Justice, ECOWAS**  
**No. 10., Dar es Salaam Crescent**  
**Off Aminu Kano Crescent Wuse II, Abuja - NIGERIA**  
**Fax: + 234 09 5240780 (particularly for urgent matters)**

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<sup>283</sup> This information is entirely taken from The ECOWAS Court of Justice' in UNESCO, Claiming Human Rights: Guide to International Procedures Available in Cases of Human Rights Violations in Africa", African Regional Economic Communities, Deutsche UNESCO-Kommission e.V., Bonn, and Commission française pour l'UNESCO, Paris, <http://www.claiminghumanrights.org/ecowas.html?L=0>

In its ruling in the case of *Mrs. Hadijatou Mani Koraou v. Republic of Niger*, handed down on October 27, 2008, the Court confirmed that Article 4(g) of the revised Treaty, which specifies that the Member States adhere to the fundamental principles of the African Charter on Human and Peoples' Rights, reflects the Community legislator's intent that the instrument be integrated into the law applicable in the Court's proceedings.

#### ➔ **Mrs. Hadijatou mani Koraou v. Republic of Niger**

In this case, the applicant was sold when she was 12 years old by a tribe chief to Mr. Naroua, according to the *Wahiya* custom. She thus became a *Sadaka*, i.e. a slave in the service of her master, with the duties of a house servant. Her master sexually abused her from the age of 13 onwards. In August 2005, Mr. Naroua gave Hadijatou a liberation certificate from slavery, but refused to let her leave his home, on the grounds that she remained his wife. The applicant based her action before the ECOWAS Court on the violation of the provisions of the African Charter relating to discrimination (breach of art. 2, 3 and 18(3)), slavery (art. 5), arrest and arbitrary detention (art. 6). In its ruling, the Court considered that the discrimination against the applicant could not be attributed to Niger, but to Mr. Naroua, that the arrest and the detention were pursuant to a court decision, and were therefore not arbitrary. **On the other hand, the Court considered that Niger was responsible owing to its tolerance, passivity and inaction, and the absence of action on the part of the national authorities regarding the practice of slavery. It granted an all-inclusive compensation of 10 million CFA francs and ruled that the sum has to be paid to Hadijatou Mani Koraou by the Republic of Niger.**

#### ➔ **Chief Ebrimah manneh v. Republic of Gambia**

This case concerns the arrest, on July 11, 2006, and the detention since that date of a Gambian correspondent of the Daily Observer newspaper by the secret police. The applicant's lawyers based their application on the arbitrary nature of the arrest and detention of their client (art. 6 and 7 of the African Charter). **The Court ruled that Gambia was responsible for the arrest and arbitrary detention of the applicant, detained incommunicado without trial.**

### ➔ **SERAP (Socio-Economic Rights & Accountability Project) vs. Nigeria**<sup>284</sup>

In 2012, the Court of Justice of the Economic Community of West African States (ECOWAS) ruled against Nigeria and found the government responsible for failing to regulate oil companies whose oil extraction activities have degraded the Niger Delta.<sup>285</sup> The Court found Nigeria to be in violation of its obligations under the Charter (article 1) and of the right to a general satisfactory environment (article 24). The Court called on Nigeria to “[t]ake all effective measures, within the shortest possible time, to ensure restoration of the environment of the Niger delta; [t]ake all measures that are necessary to prevent the occurrence of damage to the environment; [and to] take all measures to hold the perpetrators of the environmental damage accountable”.<sup>286</sup>

Although the actions brought in the above-mentioned cases concern violations by the state or its agents, the fact remains that the use of the Charter in such situations represents real progress for the protection of human rights; one could well imagine such action being taken concerning violations committed by multinational corporations involving the active or passive responsibility of states towards them.

### **The (now limited) role of the SADC Tribunal**

The Tribunal was established by Article 9 of the Treaty of the Southern African Development Community (SADC). It is now a recognised institution. The Summit of Heads of State and Government, the political governing body of the Community, appointed the members of the Tribunal on August 18, 2005. The Tribunal was inaugurated on November 18, 2005. It was on that occasion that the members of the Tribunal were sworn in.

The Treaty establishing the SADC makes no reference to the African Charter on Human and Peoples’ Rights. Under Article 4 of the Treaty, however, all parties undertake to respect the fundamental principles of human rights, democracy, the rule of law and non-discrimination.

Although the jurisdiction of the Tribunal does not explicitly include human rights, an individual could presumably base an application on the SADC Treaty’s requirement that State Parties should respect the fundamental principles of human rights.

<sup>284</sup> *Serap vs. Federal Republic of Nigeria*, Case, Ecowas, ECW/CCJ/JUD/18/12, available at [www.courte-cowas.org](http://www.courte-cowas.org)

<sup>285</sup> *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Case No. ECW/CCJ/APP/08/09, Judgment, (Dec. 14, 2012)

<sup>286</sup> *Serap vs. Federal Republic of Nigeria*, Case, Ecowas, ECW/CCJ/JUD/18/12, available at [www.courte-cowas.org](http://www.courte-cowas.org). See also, Amnesty International, *Nigeria: Ground-breaking ECOWAS Court judgement orders government to punish oil companies over pollution*, 6 December 2012, [www.amnesty.ca](http://www.amnesty.ca)



**The Tribunal’s jurisdiction in the field of human rights was therefore implicit,** and this appears to be born out by the first case heard by the Tribunal in October 2007:

➔ **Michael Campbell I v. Zimbabwe**<sup>287</sup>

Following a land redistribution reform undertaken by the Government of Zimbabwe, 78 white farmers lodged a complaint with the SADC Tribunal on the grounds of an infringement of their property rights, of the principle of non-discrimination on the ground of race and of the right to a fair trial before an impartial and independent court and to an effective right of appeal. Three of them claimed compensation for forced eviction.

On December 13, 2007, the Tribunal granted the interim measures requested by the applicants, in order to stop the infringement of their property rights through expropriation and the restriction on the use of their domicile. On November 28, after having judged that it had jurisdiction, under Article 4 c) of the Treaty, as the case concerned human rights, democracy and the rule of law<sup>288</sup>, the Tribunal recognised the validity of all the arguments put forward by the applicants: violation of property rights, racial discrimination, the right to a fair trial and an effective right of appeal. It then ruled that appropriate compensation be awarded before June 30, 2009 to the three evicted victims. The Tribunal called on the Government to take all necessary steps to bring the violations to an end and to protect the property rights of the 75 other applicants.

Zimbabwe has since denounced the legitimacy of the Tribunal. Under the Constitution of Zimbabwe a ruling by a supranational court cannot take precedence over a higher national court (the Supreme Court had already ruled against the applicants in the Campbell case on January 22, 2008). In order to be enforced at national level, the decision of the SADC Tribunal would have to be registered and recognised by the Supreme Court of Zimbabwe, in accordance with the Tribunal’s rules and Zimbabwean law. On January 26, 2010, the Supreme Court of Zimbabwe refused to register the decision of the SADC Tribunal. After having recognised the jurisdiction and the legitimacy of the Tribunal, the judge considered that such an operation would be contrary to the principle of *res judicata* before national courts, and would therefore be contrary to the “public policy” of Zimbabwe.

In the period of actual existence, from 2005 until 2012, the court had jurisdiction over disputes between SADC member states – as well as on disputes between legal or natural persons and member states. However, in order for a person to bring a case before the court, all internal legal remedies of the member state concerned had to be exhausted. Only a month after a similar ruling in 2010 (*Louis Karel Fick &*

<sup>287</sup> SADC, *Mike Campbell (Pvt) Ltd. v. Zimbabwe*, November 28, 2008, n° 2/2007 [2008] SADC (T) 2, SADC (T) n° 8/2008, [www.safiii.org](http://www.safiii.org)

<sup>288</sup> *Ibid.*, p. 25: “It is clear to us that the tribunal has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which are the very issues raised in the present application”.

*Others v Republic of Zimbabwe*) a SADC summit was held, which then ordered to “review of the role, responsibilities and terms of reference of the SADC Tribunal”.

**Since 2012, the Tribunal’s role has been reduced to jurisdiction over disputes between SADC member states, which deprives the Tribunals powers to a great extent and makes complaints by citizens against their governments impossible. This is the first time globally that an international instrument for individual complaints against human rights violations has been abolished.”**<sup>289</sup>

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## HOW TO FILE A COMPLAINT?<sup>290</sup>

**Note: This section will only be relevant if the role of the Tribunal to hear complaints brought by individuals is once again reinstated.**

- The application shall state:
  - the name and address of the applicant
  - the name, designation and address of the respondent
  - the precise nature of the claim together with a succinct statement of the facts
  - the form of relief or order sought by the applicant
- The application shall state the name and address of the applicant’s agent to whom communications on the case, including service of pleadings and other documents should be directed.
- The original of the application shall be signed by the agent of the party submitting it.
- The original of the application accompanied by all annexes referred to therein shall be filed with the Registrar together with five copies for the Tribunal and a copy for every other party to the proceedings. All copies shall be certified by the party filing them.
- Where the applications seeks the annulment of a decision, it shall be accompanied by documentary evidence of the decision for which the annulment is sought.
- Where the application seeks the annulment of a decision, it shall be accompanied by documentary evidence of the decision for which the annulment is sought.
- An application made by a legal person shall be accompanied by:
  - the instrument regulating the legal person or recent extract from the register of companies, firms or associations or any other proof of its existence in law;
  - proof that the authority granted to the applicant’s agent has been properly conferred on him or her by someone authorised for the purpose.

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<sup>289</sup> OHCHR, *Claiming Human Rights: Guide to International Procedures Available in Cases of Human Rights Violations in Africa, The (today limited) role of SADC Tribunal*, [www.claiminghumanrights.org/sadc.html](http://www.claiminghumanrights.org/sadc.html)

<sup>290</sup> Based on SADC, Protocol of Tribunal and the Rules of Procedures Thereof, <http://www.sadc.int>

- If an application does not comply with requirements sent out in sub-rules 4 to 7, the Registrar shall prescribe a reasonable period within which the applicant is to comply with them whether by putting the application itself in order or by producing any of the documents.
- If the applicant fails to put the application in order within the time prescribed, the Tribunal shall, after hearing the agents decide whether the non-compliance renders the application formally inadmissible.

Applications shall be sent to:

**The Registrar**  
**SADC Tribunal**  
**P.O. Box 40624 Ausspannplatz**  
**Windhoek, Namibia**

## **The East African Court of Justice**

The Court is the judicial body of the East African Community (EAC). It has jurisdiction for the interpretation and application of the East African Community Treaty.

Article 6 (d) of the Treaty requires the States party to respect 6 fundamental principles:

- Good governance
- Democracy
- The Rule of Law
- Transparency and fight against impunity
- Social justice
- Gender equality and the recognition, promotion and protection of the rights guaranteed by the African Charter on Human and Peoples' Rights.

**The jurisdiction of the Court in the field of human rights is therefore based on the principles enshrined in the Treaty.** Article 27(2) however specifies that a protocol could be adopted by the Council to extend the jurisdiction of the Court, in particular in the area of human rights.

In 2005 a draft Protocol was drawn up by the Secretariat of the Community, providing for explicit jurisdiction in the field of human rights. At the time of writing, it was still under discussion.

Since 2005, the Court can receive individual applications. So far the Court's rulings have shown a progressive attitude towards human rights.

### ➔ **Katabazi and others v. Uganda**<sup>291</sup>

The applicants, who were under trial for treason against Uganda and were held on remand, applied to the Court, accusing Uganda of having acted illegally and having disregarded the decision by the Supreme Court, which had considered that their imprisonment was arbitrary.

The Court declared that although it would “not assume jurisdiction on human rights disputes”, it also would “not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the Reference includes allegations of human rights violation”.<sup>292</sup> It is therefore possible to lodge a complaint with the Court for human rights violations when it can be shown that the violation concerned is also a violation of the Treaty.<sup>293</sup>

## **The COMESA Court of Justice**

**The Court’s jurisdiction in the field of human rights is implicit.** It could be based on one of the fundamental principles the parties to the Treaty are bound to observe, i.e.: the recognition, promotion and protection of the Human and Peoples’ Rights guaranteed by the African Charter (Article 6(e) of the Treaty).

## **The AMU Court of Justice**

The Court bases its decisions not only on the Treaty and the other AMU documents, but also on the general principles of international law and international case law and doctrine. **The mandate of the Court in the field of human rights is therefore implicit.**

<sup>291</sup> S. T. Ebobrah, “Litigating Human Rights before Sub-regional Courts in Africa: Prospects and Challenges”, *African Journal of International and Comparative Law*, vol. 17, 2009, p. 79-101.

<sup>292</sup> EACJ, *Katabazi and 21 Others v. Secretary General of the East African Community and Another*, 1 November 2007, Ref. No. 1 of 2007 [2007] EACJ 3, available at <http://www.chr.up.ac.za>. The Court declared it would “not assume jurisdiction on human rights disputes”, it also would “not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the Reference includes allegations of human rights violation.”

<sup>293</sup> S. T. Ebobrah, *op. cit.*, p.83.

## Complementarity between the REC Courts of Justice and the African Court on Human and Peoples' Rights

The various REC Courts of Justice have explicit or implicit jurisdiction for violations of rights guaranteed by the African Charter on Human and Peoples' Rights. Such competence is complementary to that of the African Court on Human and Peoples' Rights, which is empowered to hear all cases and disputes referred to it regarding the interpretation and application of the Charter.

\* \* \*

### ADDITIONAL RESOURCES

#### On the African system of human rights protection:

- African Union  
[www.africa-union.org](http://www.africa-union.org)
- African Commission on Human and Peoples' Rights  
[www.achpr.org](http://www.achpr.org)
- Case law on the African Commission (ESCR-NET)  
[www.escr-net.org/caselaw](http://www.escr-net.org/caselaw)
- African Court on Human and Peoples' Rights  
[www.african-court.org](http://www.african-court.org)
- Coalition for an Effective African Court on Human and Peoples' Rights  
[www.africancourtcoalition.org](http://www.africancourtcoalition.org)
- Information on the mechanisms in Africa for the protection of human rights:  
[www.droitshumains.org/Biblio/Txt\\_Afr/HP\\_Afr.htm](http://www.droitshumains.org/Biblio/Txt_Afr/HP_Afr.htm)
- FIDH, A Practical Guide: The African Court of Human and Peoples' Rights towards the African Court of Justice and Human Rights, May 2010
- T. Braun, L. Muvagh, *The African System: A Guide for Indigenous Peoples, Forest Peoples Programme*, October 2008 [www.forestpeoples.org/documents/law\\_hr/african\\_hr\\_system\\_guide\\_oct08\\_eng.pdf](http://www.forestpeoples.org/documents/law_hr/african_hr_system_guide_oct08_eng.pdf)
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System, available at: [http://www.achpr.org/files/pages/about/african-hr-system-guide/human\\_rights\\_guide\\_en.pdf](http://www.achpr.org/files/pages/about/african-hr-system-guide/human_rights_guide_en.pdf)

### **On the courts of justice of the African regional economic Communities:**

– ECOWAS

[www.comm.ecowas.int](http://www.comm.ecowas.int)

– Tribunal of SADC

[www.sadc.int/tribunal/index.php](http://www.sadc.int/tribunal/index.php)

– EACJ Court of Justice

[www.eac.int/eacj](http://www.eac.int/eacj)

– COMESA Court of Justice

<http://about.comesa.int/lang-fr/Institutions-du-comesa/cour-de-justice>

– AMU Court of Justice

[www.maghrebarabe.org/fr/institutions.cfm](http://www.maghrebarabe.org/fr/institutions.cfm)

– AICT (African International Courts and Tribunals)

[www.aict-ctia.org](http://www.aict-ctia.org)

– SAFLII (Southern African Legal Information Institute), Regional Courts of Justice

[www.saflii.org](http://www.saflii.org)

– UNESCO, *Claiming Human Rights: Guide to International Procedures Available in Cases of Human Rights Violations in Africa, Regional Economic Communities in Africa*, Deutsche UNESCO-Kommission e.V., Bonn, et Commission française pour l'UNESCO, Paris, [www.claiminghumanrights.org/african\\_recs.html](http://www.claiminghumanrights.org/african_recs.html)

– S. T. Ebobrah, "Litigating Human Rights before Sub-regional Courts in Africa: Prospects and Challenges", *African Journal of International and Comparative Law*, vol. 17, 2009

– OHCHR, *Claiming Human Rights, Guide to International Procedures Available in Cases of Human Rights Violations in Africa*, available at: [http://www.claiminghumanrights.org/african\\_recs.html](http://www.claiminghumanrights.org/african_recs.html)

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➤ Syama mining site, Mali  
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# CHAPTER III

## The Inter-American System of Human Rights

### A. The Inter-American Commission

### B. The Inter-American Court

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The Organisation of American States (OAS), established in 1948, brings together the nations of North, Central and South America and the Caribbean, with the objectives of strengthening cooperation on democratic values and defending common interests. It is made up of 35 Member States.

The Inter-American system for the promotion and protection of human rights is part of the OAS structure and is composed of two bodies:

- The Inter-American Commission on Human Rights (IACHR), based in Washington, D.C., USA.
- The Inter-American Court of Human Rights, located in San José, Costa Rica

**The Inter-American system for the promotion and protection of human rights therefore provides recourse to people in the Americas who have suffered violations of their rights by states which are members of the OAS. Under their obligation to protect individuals' rights, Member states of the OAS have a responsibility to ensure that third parties, such as transnational corporations, do not violate those rights and therefore can be held accountable if they fail to do so.** The Inter-American Court identified this responsibility in the first case that was submitted to it by stating that “an illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention”<sup>294</sup>.

As the following part will demonstrate, the Inter-American System of human rights is most probably the regional system that has so far shown the greatest potential to address corporate-related human rights violations. It has developed innovative jurisprudence, notably in relation to the interpretation of concepts often referred to in the context of corporate activities, such as the notion of “due diligence”.

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294 I/A Court H.R., *Velazquez Rodriguez v. Honduras*, judgment on its merits, 29 July 1988, Series C No. 4.



Furthermore in urgent cases, it is possible for victims to request precautionary (or provisional) measures before the Inter American Commission on Human Rights. Contrary to Court cases, this mechanism represents an innovative and fast way for victims, who need protection from serious and irreparable harm imminently, to obtain help. However, the Inter-American system is under-staffed and under-resourced, which causes severe delays in the consideration of complaints.

## A. The Inter-American Commission on Human Rights (IACHR)

The IACHR is an autonomous and permanent organ of the OAS, created in 1959. Its mandate is established by the OAS Charter and the American Convention on Human Rights<sup>295</sup>. **The main function of the IACHR is to promote and defend human rights in the Americas.** In carrying out its mandate, the Commission may in particular<sup>296</sup>:

- Receive, analyse and investigate individual petitions which allege human rights violations (Title II, Chapter II of the Rules of Procedure, see sections below: Jurisdiction and Standing; Process and Outcome);
- Observe the general human rights situation in the OAS Member States, and publish special reports regarding the situation in a specific state, when it considers it appropriate (Article 58 of the Rules of Procedure). Such reports can address violations committed by businesses<sup>297</sup>;
- Carry out on-site visits to countries to investigate a specific situation with the consent of the respective state. These visits usually result in the preparation of a report regarding the human rights situation observed, which is published and sent to the General Assembly (Article 3940 of the Rules of Procedure);
- Hold hearings or working groups on individual cases and petitions, or general and thematic hearings;
- Stimulate public consciousness regarding human rights in the Americas. To that end, the Commission carries out and publishes studies on specific subjects (Article 15 of the Rules of Procedure); and,
- Organize and carry out conferences, seminars and meetings with representatives of Governments, academic institutions, non-governmental groups, etc.

The IACHR meets in ordinary and special sessions several times a year to examine allegations of human rights violations in the hemisphere. It submits an annual report to the General Assembly of the OAS. The Commission can also prepare additional

<sup>295</sup> OAS, *Charter of the Organisation of American States*, adopted on 1948, lastly revised on 25 September 1997, [www.oas.org](http://www.oas.org), Chapter XV, Article 106

<sup>296</sup> IACHR, *Rules of Procedure of the Inter-American Commission on Human Rights*, adopted at the 137<sup>th</sup> regular period of sessions from 28 October to 13 November 2009, and lastly revised at the 147<sup>th</sup> regular period of sessions from 8 to 22 March 2013, <http://www.oas.org>

<sup>297</sup> See for instance IACHR, *Report on the situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 April 1997, Chapter VIII.

reports as it deems appropriate in order to perform its functions, and publish them as it sees fit (Article 586 of the Rules of Procedure).

While not specifically stated in the Rules of Procedure of the IACHR, NGOs may draw the attention of the Commission by submitting a report on a specific situation in a Member State that involves human rights violations.<sup>298</sup> Civil society organisations and victims may also raise awareness about specific issues by requesting thematic hearings (see “Hearings at the Commission” below).

## 🕒 What rights are protected?

The IACHR receives complaints for violations of the rights protected in:

### **The American Convention on Human Rights**

- Civil and political rights (Article 3 to 25)
  - Right to judicial personality (Article 3)
  - Right to life (Article 4)
  - Right to humane treatment (Article 5)
  - Freedom from slavery (Article 6)
  - Right to personal liberty (Article 7)
  - Right to a fair trial (Article 8)
  - Freedom from ex post facto laws (Article 9)
  - Right to compensation (Article 10)
  - Right to privacy (Article 11)
  - Freedom from conscience and religion (Article 12)
  - Freedom from thought and expression (Article 13)
  - Right of reply (Article 14)
  - Right of assembly (Article 15)
  - Freedom of association (Article 16)
  - Rights of the family (Article 17)
  - Right to a name (Article 18)
  - Rights of the child (Article 19)
  - Right to nationality (Article 20)
  - Right to property (Article 21)
  - Freedom of movement and residence (Article 22)
  - Right to participate in a government (Article 23)
  - Right to equal protection (Article 26)
  - Right to judicial protection (Article 25)

– Economic, Social and Cultural Rights:

- Progressive development (Article 26)

According to article 19(6) of the Additional Protocol to the American Convention

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<sup>298</sup> See for example CDES, CEDHU, DECOIN and Acción Ecológica, *Report on the consequences on local populations of mining and oil activities in Ecuador*, submitted to the IACHR during its 127<sup>th</sup> Ordinary Session, 2 March 2007.

on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), the Commission and the Court can also consider individual communications for violations of the **right of workers to organize** and to join a union (Article 8a) and the **right to education** (Article 13).

### **The American Declaration on the rights and Duties of Man**<sup>299</sup>

- Chapter I sets forth Civil and Political Rights as well as Economic Social and Cultural Rights
- Chapter II sets forth a list of corresponding Duties

Not all Member States have ratified the American Convention on Human Rights. Those who have not<sup>300</sup> are therefore only bound by the American Declaration on the Rights and Duties of Man. Although the Declaration was not drafted to be a binding document, its incorporation into the statute of the Inter-American Commission, and the subsequent incorporation of this statute into the OAS Charter has seen the content of the declaration achieve hard-law status.<sup>301</sup> The binding value of the Declaration was confirmed by the Court in finding this instrument to be “a source of international obligations for the Member States of the OAS”.<sup>302</sup> It should be noted though that some states, such as the United States, continue to reject the Inter-American system’s view that the American Declaration has binding force.

### **Ⓢ Against whom may a petition be lodged?**

A petition can only be presented where it is alleged that **the State responsible for the human rights violation is an OAS member**. If the case brought to the Commission is against a State Party to the American Convention on Human Rights, the Commission applies the Convention to process it. Otherwise, the Commission applies the American Declaration on the Rights and Duties of Man. These are not the only legal documents which the Commission can apply in its decisions. If the State party has ratified other conventions, then the relevant conventions or protocols may also be used to examine and consider the petition brought before the Commission<sup>303</sup>.

<sup>299</sup> IACHR, *American Declaration on the Rights and Duties of Man*, adopted in 1948, <http://www.cidh.org>

<sup>300</sup> Antigua y Barbuda, Bahamas, Belize, Canada, Guyana, St Kitts & Nevis, St Lucie, St Vincent & Grenadines, USA.

<sup>301</sup> Globalex, *The Inter-American System of Human Rights: A research Guide*, by Cecilia Cristina Naddeo, September 2010, [www.nyulawglobal.org](http://www.nyulawglobal.org)

<sup>302</sup> I/A Court H.R., *Interpretation of the American Declaration of the Rights and Duties of Man within the framework of article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, 14 July 1989, Series A No. 10, § 42.

<sup>303</sup> For the full list of Conventions and their status of ratification: I/A Court H.R., *Basic Documents in the Inter-American System*, [www.oas.org](http://www.oas.org)

The Commission may study petitions alleging that:

- Human rights violations were committed by state agents,
- A state failed to act to prevent a violation of human rights or,
- A state failed to carry out proper follow-up after a violation of human rights.

## Extraterritorial application

The American Declaration on the Rights and Duties of Man, as opposed to the American Convention on Human Rights, does not explicitly limit its jurisdictional scope. Besides, although no cases have so far looked at the issue of extraterritorial jurisdiction, the American Convention on Human Rights, which states in its Article 1 that “States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction [...]” does not close the door on hearing cases concerning extraterritorial jurisdiction.

The Commission will normally find competence if “the acts occurred within the territory of a State party to the Convention”.<sup>304</sup> The Inter American system has considered that jurisdiction can be exercised when “[...] agents of a Member State of the OAS exercise effective ‘authority and control’ over persons outside the national territory, but within the Americas region, [therefore] the obligations of the Member State(s) for the violations of the rights set forth in the American Declaration are engaged.”<sup>305</sup> The Commission did issue precautionary measures to the detainees in Guantanamo Bay, hence implying that the US had effective control over this territory and had extraterritorial obligations beyond those within other Member States to the IACHR.<sup>306</sup>

Nevertheless, the Commission has not gone as far as engaging a Member State’s responsibility for violations occurring in a non-Member State. Conversely, the Commission has already commented on human rights violations occurring abroad **concerning citizens of OAS members**. For instance, after on-sites visits to Suriname and Holland, the Commission “commented on the attacks of Suriname citizens living in Holland and harassment of these individuals [...]”<sup>307</sup>.

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<sup>304</sup> C. M. Cerna, *Out of Bounds? The approach of the Inter-American system for the promotion and protection of human rights to the extraterritorial application of human rights law*, Center for Human Rights and Global Justice Working Paper, No. 6, 2006, p. 16.

<sup>305</sup> C. M. Cerna, *Extraterritorial application of the human rights instruments of the Inter-American system*, in F. Coomans and M. T. Kamminga (eds.), *Extraterritorial application of human rights treaties*, Intersentia, Antwerp-Oxford, 2004, p. 172-173.

<sup>306</sup> IACHR, *Guantanamo Bay Precautionary Measures*, 12 March 2002, 41 ILM (2002) 532.

<sup>307</sup> IACHR, *Second Report on the situation of human rights in Suriname*, OEA/Ser.L/V/II.66, doc. 21, rev. 1, 2 October 1985, §§ 14 & 40.

## Going further...exploring extraterritoriality

It would therefore be difficult to envisage for example a petition claiming for Brazil's responsibility for human rights violations committed by Brazilian companies in Africa. However, it may be possible for the Commission to issue recommendations to Brazil, in a report or a decision, for human rights violations committed by Brazilian companies operating in the Americas.

### ② Who can file a petition?

**Any person, group of persons or non-governmental organisation legally recognized in any of the OAS Member States** may present a petition to the Commission alleging violations of the rights protected in the American Convention and/or the American Declaration.<sup>308</sup> **The petition may be presented on behalf of the person filing the petition or on behalf of a third person.**

### ② Under what conditions?

The petitions presented to the Commission must:

- **Have exhausted all available domestic legal remedies**, or show the impossibility of doing so, as provided in Article 31 of the Rules of Procedure of the Commission (Article 46 of the Convention);
- Be presented **within six months after the final decision in the domestic proceedings**. If domestic remedies have not been exhausted, the petition must be presented within a reasonable time after the occurrence of the events complained about (Article 32 of the Rules of procedure).

## HOW TO FILE A PETITION ?

Petitions addressed to the Commission must contain the following information (Article 28 of the Rules of Procedure of the Commission):<sup>309</sup>

- the name of the person or persons making the denunciation, or in cases where the petitioner is a non-governmental entity, the name and signature of its legal representative(s);
- whether the petitioner wishes to remain anonymous, and why;
- an e-mail-address for receiving correspondence from the Commission, and if possible a telephone number and postal address;
- an account of the act or situation being denounced;
- if possible, the name of the victim and of any public authority who has taken cognizance of the facts or situation alleged;
- the State considered responsible for the alleged violations;

<sup>308</sup> IACHR, American Convention on Human Rights, *Op. cit.*, article 44

<sup>309</sup> IACHR, Individual Petition System Portal, <http://www.oas.org/en/iachr/portal/>

- compliance with the six-month time-limit running from the date on which the alleged victim was informed of the decision that exhausted domestic remedies (Article 32 of the Rules of Procedure);
  - any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of the Rules of Procedure of the IACHR; and
  - an indication of whether the complaint has been submitted to another international settlement proceeding, as provided in Article 33 of the Rules of Procedure.
- It is also possible to include information from experts to highlight and stress important points in support of the case.
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## ② Process and outcome

### *Process*

Once the Commission receives a complaint, petitioners are notified.

If the case is deemed admissible, the Commission issues an express decision to that effect (usually published). The parties are asked to comment on their respective responses.

In this process, the Commission may carry out its own on-site investigations, hold **a hearing** and explore the possibility of a “friendly settlement”.

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## HEARINGS AT THE COMMISSION

The Commission favours a participatory process during the research and analysis of a specific human rights situation. There are two different types of hearing:

- Hearings on specific cases,
- Thematic hearings.

On its own initiative, or at the request of a party, the Commission may hold a hearing to receive information from a party, with respect to a petition or a case being processed, as well as to follow up on recommendations or precautionary measures.<sup>310</sup> General hearings may also be held on the human rights situation in one or more States. To ask for a hearing, you need to possess reliable information on human rights violations occurring.

Hearings can lead to an acceleration of the resolution of a case. For instance, hearings may result in a “friendly settlement” or may be beneficial due to the simple raising of awareness about a specific human rights violation, and/or the exchange of information and documentation with governmental authorities and members of the Commission. The deadline for written requests for a hearing before the Commission is at least 50 days before its next session. Requests must indicate the purpose of the hearing and the identity of the participants.<sup>311</sup> Hearings are subsequently made available via

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<sup>310</sup> IACHR, *Rules of procedure of the Inter-American Commission on Human Rights*, op.cit., Chapter VI.

<sup>311</sup> *Ibid.* Article 64(2).

audio or video recordings on the press section of the Commission's website. A private hearing may be held at the request of the parties. Both government and petitioner representatives are normally allowed a 20 minute intervention each.

It should be noted that the Commission does not cover the costs of individuals or organisations participating in hearings during sessions of the Commission, which are held in Washington, USA.

There is an online system to request a hearing, which is activated twice a year. To find out about the calendar and to submit a request, visit: [http://www.oas.org/en/iachr/media\\_center/calendar.asp](http://www.oas.org/en/iachr/media_center/calendar.asp).

The contact person to obtain more information is currently: María Isabel Rivero – IACHR Press and Outreach Office Director, Office: 1 (202) 370-9001, Cell: 1 (202) 215-4142, [mrivero@oas.org](mailto:mrivero@oas.org)

### **Hearings related to corporate activities**

Thematic hearings related to human rights violations involving companies have taken place during sessions of the Commission. Examples of issues discussed include: the situation of workers in maquiladoras in Central America, the human rights impacts of environmental degradation caused by mining activity in Honduras, the right to water for indigenous peoples in the Andean region, the situation of independent union leaders in Cuba, and the impact of Canadian Mining Activities on human rights in Latin America (see box below).

A full list of topics addressed can be found on the database of the Commission: [www.oas.org/es/cidh/audiencias/topics.aspx?lang=en](http://www.oas.org/es/cidh/audiencias/topics.aspx?lang=en)

### **Going further...exploring extraterritorial application**

Where victims have suffered as a result of the intervention of foreign companies on the territory of their own country, they may have a case pending before the Commission against their own State (the company's "host State"). In such cases, and even in situations where no case is pending but victims nevertheless want to raise awareness of their specific situation, a hearing concerning human rights violations committed by businesses as a result of the failure of the "home State" (i.e. where the company is legally registered) to prevent the commission of such violations abroad can prove useful. Such a hearing can provoke discussion with the government of the home State (provided the country is a member of the OAS) regarding its extraterritorial responsibilities to ensure that companies operating abroad respect human rights standards. This issue was addressed by the Commission during a public hearing in October 2014. That hearing focused on Canada's failure to develop an effective and efficient legal framework to prevent human rights abuses related to the activities of its mining companies operating in Latin America and the Caribbean.<sup>312</sup> This hearing had been preceded by another hearing that had taken place in November 2013 on the "Human Rights of People Affected by Mining in the Americas and Mining Companies' Host and Home States' Responsibility". These hearings demonstrate the Commission's growing interest in looking into

<sup>312</sup> ETOs for Human Rights beyond Borders, *Hearing before the IACHR puts spotlight on Canada's ETOs in relation to its mining companies*, [www.etoconsortium.org](http://www.etoconsortium.org)

the legal foundations of States' extraterritorial human rights obligations with regard to corporate accountability.<sup>313</sup>

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In the proceedings of individual petitions, the Commission can also receive support from the Rapporteurs of the Inter-American system.

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## RAPORTEURS IN THE INTER-AMERICAN SYSTEM

Similarly to the UN system, the Inter-American System has created rapporteurs. At the moment, there are Special Rapporteurs on Freedom of Expression, the Rights of Women, the Rights of Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI) Persons, the Rights of Migrant Workers and Their Families, the Rights of the Child, the Rights of Afro-Descendants and Indigenous Peoples, the Rights of Persons Deprived of Liberty, and on Human Rights Defenders. There is also a Unit for Economic, Social and Cultural Rights.

The rapporteurs can undertake on-site visits either upon invitation by the state concerned, or a visit can be requested from the state. In both cases it is essential that the state give its consent. Furthermore, the rapporteurs prepare studies and country reports, and provide advice to the Commission in the proceedings of individual petitions and requests of provisional measures. Rapporteurs can also be called to participate in hearings held by the Commission or the Court.

Each rapporteur is in charge of handling the cases in their area of expertise. In this way they have a role as part of the petition mechanism. The rapporteur for human rights defenders can receive urgent appeals, whereas the other rapporteurs do this more informally.

### Rapporteurs in action in corporate-related human rights abuses

In March 2009, the rapporteur for Colombia, Victor Abramovich, addressed the collusion between the public and private spheres, and the responsibilities of states and transnational corporations in relation to human rights abuses of Afro-Colombian communities. The acknowledgement of these abuses sets an important precedent, as it directly addresses the problem of violations committed by transnational corporations, such as forced evictions.<sup>314</sup> The rapporteur formulated recommendations on the importance of the right to prior consultation when the community may be affected by both public and private activities.

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<sup>313</sup> See notably Earth Rights International, *Inter-American Commission on Human Rights to consider "Home Country Liability" for the Extraterritorial actions of Transnational Corporation*, Benjamin Hoffman, [www.earthrights.org](http://www.earthrights.org)

<sup>314</sup> IACHR, *Preliminary observations of the Inter-American Commission on Human Rights after the visit of the rapporteurship on the rights of afro-descendants and against racial discrimination to the republic of Colombia*, OEA/Ser.L/V/II.134 Doc. 66, 27 March 2009.



When the Commission decides it has enough information, it prepares a report which includes:

- Its conclusions, and
- Recommendations to the state concerning how to remedy the violation(s).

Due to a lack of resources, it may take several years for the Commission to respond to a complaint.

### ***Precautionary measures***

The Commission can also take precautionary measures “on its own initiative, or at the request of a party [...] to prevent irreparable harm to persons, or to the subject matter of the proceeding in connection with a pending petition or case”.<sup>315</sup> This means that any person, group or NGO legally recognized in any of the OAS Member State can ask for precautionary measures to the Commission, independently of any pending petition or case.<sup>316</sup> However, it is important for NGOs filing a request to first obtain the consent of the potential beneficiaries, as this is one of the elements the Commission will be looking for.<sup>317</sup> The rules of procedure of the Commission also state that the Commission can grant precautionary measures of a collective nature, and may establish mechanisms to ensure the follow-up of these measures.<sup>318</sup>

### ***Outcome***

When the Commission finds one or more violations, it prepares a preliminary report that it transmits to the state, with a deadline to respond detailing its progress on implementation of the Commission’s recommendations.<sup>319</sup>

The Commission then prepares a second report with a new period of time granted to the State concerned. Upon the expiration of this second period of time, the Commission will usually publish its report.

**In cases where the Commission considers that the state has not complied with its recommendations, and when a state has accepted the jurisdiction of the Inter-american court of human rights (Article 62 of the American Convention), the Commission may submit its merits report, i.e. file a case, to the Inter-American Court of Human Rights (Article 34 of the Rules of Procedure of the Court).**

<sup>315</sup> IACHR, *Rules of procedure of the Inter-American Commission on Human Rights*, op.cit., Article 25 (1).

<sup>316</sup> *Ibid.*, Article 25(2).

<sup>317</sup> *Ibid.*, Article 25(4c).

<sup>318</sup> *Ibid.*, Article 25(3), (8).

<sup>319</sup> *Ibid.*, Article 44(2).

Prior to doing so, the Commission will give one month to the petitioner to say if he or she agrees with submitting the case to the Court. If the petitioner agrees, he or she will have to give the position of the victim, or the victim's family members if different from that of the petitioner; personal data; reasons why the petitioner agrees, as well as claims for reparations and costs.<sup>320</sup>

## ➤ The IACHR in action in corporate-related human rights abuses

The Commission has, at various times, adopted decisions addressing states' duty to protect individuals from business activities. The vast majority have focused on cases threatening or violating indigenous peoples' right to land, (the most well known case being the Yanomami case (see below)). Most recently, the Commission has gone further and has delivered interesting decisions regarding corporate activities that address other economic, social and cultural rights, and which present interesting reparations measures.<sup>321</sup>

### Decisions

#### ➤ Yanomami indigenous people v. Brazil

The Yanomami case involved the construction of the trans-Amazonian highway, BR 210 (Rodovia Perimentral Norte), and its impact on the Yanomami indigenous peoples. This state run project allegedly violated their rights to land contained in article XXIII of the American Declaration,<sup>322</sup> as well as their right to cultural identity (Article XXVI).

The Commission ruled that the reported violations had "their origin in[.:]

- The failure to establish the Yanomami Park for the protection of the cultural heritage of this Indian [sic] group;
- In the authorization to exploit the resources of the subsoil of the Indian territories;
- In permitting the massive penetration of outsiders carrying various contagious diseases into the Indigenous peoples' territory, that has caused many victims within the Indian community, and in not providing the essential medical care to the persons affected; and finally,
- In proceeding to displace the Indians from their ancestral lands, with all the negative consequences for their culture, traditions, and costumes".<sup>323</sup>

The Commission recognized the violation of the following rights enshrined in the American Declaration of the Rights and Duties of Man: the right to life, liberty, and personal security (Article I), the right to residence and movement (Article VIII)) and the right to the preservation of health and to well-being (Article XI).

<sup>320</sup> *Ibid*, Article 44(3).

<sup>321</sup> See C. Anicama, *State Responsibilities to Regulate and Adjudicate Corporate Activities under the Inter-American Human Rights System*, Report on the American Convention on Human Rights to inform the mandate of UN Special Representative on Business & Human Rights John Ruggie, April 2008, <http://198.170.85.29/State-Responsibilities-under-Inter-American-System-Apr-2008.pdf>

<sup>322</sup> At the time this case was filed, Brazil was not a State Party to the American Convention.

<sup>323</sup> IACHR, *Yanomami Community v. Brazil*, Case No. 7615, Resolution 12/85, 5 March 1985, § 2.

The Commission issued recommendations to the Government of Brazil, including preventive and curative health measures to protect the lives and health of the Yanomani, as well as their right to be consulted in all matters of their interest.

### ➔ **Mercedes Julia Huenteao beroiza et al v. Chile**

On December 5, 1993, the state-owned company Empresa Nacional de Electricidad S.A. (ENDESA) received approval for a project to build a hydroelectric plant in Ralco, where the members of the Mapuche Pehuenche people of the Upper Bio-Bio sector in Chile live. The community opposed the project but the construction of the dam started in 1993.

In 2002, the Mapuche submitted a petition before the Commission alleging violations of their rights to life (Article 4 of the American Convention), personal integrity (Article 5), judicial guarantees (Article 8), freedom of religion (Article 12), protection of their family (Article 17), property (Article 21) and right to judicial protection (Article 25) by the implementation of the state run plant project by ENDESA. The petitioners also made a request for precautionary measures “to prevent the company from flooding the lands of the alleged victims”.<sup>324</sup>

The Mapuche and representatives of Chile agreed to a friendly settlement agreement and transmitted the final document to the Commission on October 17, 2003, which included:<sup>325</sup>

- Measures to improve the legal institutions protecting the rights of indigenous peoples and their communities: constitutional recognition of the indigenous peoples that exist in Chile and ratification by Chile of ILO Convention 169;
- Measures to foster development and environmental conservation in the Upper Bio Bio Sector;
- Measures to satisfy the private demands of the Mapuche Pehuenche families concerned with respect to lands, financial compensation, and educational need.

### ***Precautionary measures***

As mentioned before, any person, group or NGO legally recognized in any of the OAS Member States can ask the Commission for precautionary measures, which normally tends to grant them in cases threatening the right to life and to personal integrity, indigenous peoples’ rights, land rights, child rights and the right to health.<sup>326</sup> Unfortunately, as illustrated by three of the four cases below, countries do not always comply with measures directed by the Commission, which further highlights the need to pursue lobby and advocacy activities around measures taken to ask for state’ compliance. Upon non-compliance by the state, the

<sup>324</sup> IACHR, *Mercedes Julia Huenteao Beroiza et al. v. Chile*, Case No. 4617/02, Report 30/04, March 2004, § 1-2.

<sup>325</sup> *Ibid.*, Chapter III.

<sup>326</sup> See C. Anicama, *op. cit.*

Commission can turn to the Court to ask for provisional measures (see the Sarayaku case below).

### ➔ **Ngöbe Indigenous Communities et al., v. Panama**

On June 18, 2009, the Commission granted precautionary measures for members of the indigenous communities of the Ngöbe people, who live along the Changuinola River in the province of Bocas del Toro, Panama.

The request for precautionary measures details how, in May 2007, a 20-year concession was approved for a company to build hydroelectric dams along the Teribe-Changuinola River, in a 6,215-hectare area within the Palo Seco protected forest. It adds that one of the dams has authorization to be built is the Chan-75, which has been under construction since January 2008, and is set to flood the area in which four Ngöbe indigenous communities have been established – Charco la Pava, Valle del Rey, Guayabal, and Changuinola Arriba. These four communities have a combined population of approximately 1,000 people. Another 4,000 Ngöbe people would also be affected by the construction of the dam. They allege that the lands affected by the dam are part of their ancestral territory, and are used to carry out their traditional hunting and fishing activities.<sup>327</sup>

The Commission called on the government of Panama to suspend construction until a final decision regarding the petition 286/08 has been adopted, as well as to guarantee the personal integrity and freedom of movement of the Ngöbe inhabitants in the area. On June 29, 2009, the government of Panama informed the Commission that it did not intend to comply with its request.<sup>328</sup>

### ➔ **Community of La Oroya v. Peru**

On August 31, 2007, the IACHR granted precautionary measures in favour of 65 residents of the city of La Oroya in Peru, for the impacts caused by the metallurgical complex operated by Doe Run Peru (DRP). DRP is a subsidiary of the American company Doe Run, owned by the Renco Group. Studies conducted have indicated that the communities suffer from a series of health problems stemming from high levels of air, soil and water pollution in the community of La Oroya, which are a result of metallic particles released by the Doe Run company established there. Despite improvements announced by the company, contamination problems continue. At the end of 2009, the Minister of Energy and Mines approved a new rule which extends to 30 months the delay under which the company has to comply with the “Plan for environmental management and adjustment” (PAMA), which includes the reduction of toxic emissions.<sup>329</sup>

<sup>327</sup> IACHR, *Ngöbe Indigenous Community et al. v. Panama*, Precautionary Measures 56/08, 2009.

<sup>328</sup> Cultural Survival, *Panama does not intend to suspend Dam construction in Ngöbe lands*, 21 July 2009, [www.culturalsurvival.org](http://www.culturalsurvival.org)

<sup>329</sup> Department of Mines and Energy (Peru), *Reglamentan ley que amplía el plazo de ejecución del PAMA de minera Doe Run*, NP 352-09, [www.minem.gob.pe](http://www.minem.gob.pe)

The case has been under consideration by the Inter-American Commission since August 2009. In March 2010, the Commission held a hearing on the implementation of precautionary measures. Here, NGOs reiterated the gravity of the situation and the failure to respect precautionary measures on the part of the state.

At the national level, the Peruvian Supreme Court rendered a decision in favour of the State against Doe Run on 2 August 2014. It ordered the payment of \$163 million by the company to the Peruvian Ministry of Energy and Mining. This sum reflected the financing needed by the government to build a facility able to reduce the contamination resulting from the operations of the metallurgical complex.<sup>330</sup>

NGOs, including FIDH and its member organisation in Peru,<sup>331</sup> continue to denounce delays in implementing precautionary measures for victims of Doe Run pollution. These measures form part of the States' obligation to provide medical attention to those affected, whose health continues to deteriorate.<sup>332</sup>

#### ➔ Indigenous communities of the Xingu River Basin v. Brazil

Precautionary measures were granted by the Commission on 1 April 2011 to protect the indigenous communities of the Xingu River Basin from the harmful impacts of the construction of the Belo Monte hydro-electric dam on their lives and the environment. The construction was being carried out by Norte Energia SA, a consortium state-owned and private companies. The implementation of this project would displace 20,000 people and flood of 500 square kilometres of rain forest and agricultural land.

The Brazilian government was asked by the Commission to suspend the construction project as long as certain minimum conditions were not fulfilled. These conditions included obtaining free, prior and informed consent from the indigenous peoples whose lives would be affected by the project, providing effective information about the project's consequences, and protecting the lives and physical integrity of indigenous people. On 29 July 2011, the Commission decided to give an other orientation to the precautionary measures, asking the Brazilian government to mitigate the impact of the hydro-electric dam construction on the lives of the indigenous communities, including the protection of their ancestral lands from intrusion and occupation by non-indigenous people.<sup>333</sup>

<sup>330</sup> Business and Human Rights Center, *Peru: Justicia ordena a Doe Run pagar multa por incumplir remediación a danos ambientales y sociales en La Oroya.*, <http://business-humanrights.org>

<sup>331</sup> FIDH, *Informe sobre la situación de La Oroya: cuando la protección de los inversores amenaza los derechos humanos*, May 2013, [www.fidh.org](http://www.fidh.org)

<sup>332</sup> Inter-American Association for Environmental Defense (AIDA) & Asociación Pro Derechos Humanos (APRODEH), *NGOs denounce delays in precautionary measures for victims of Doe Run pollution*, 31 August 2014, <http://business-humanrights.org>

<sup>333</sup> OAS, *Precautionary measures, Indigenous communities from the Xingu River Basin, Pará, Brasil*, 2012, <http://www.oas.org>

None of the precautionary measures taken by the Commission were taken into account by the Brazilian government. Instead, a loan of approximately US\$10.8 billion was approved on 26 November 2012 by the Brazilian National Development Bank (BNDB) for the construction of the Belo Monte hydro-electric dam.<sup>334</sup> The project continues to face strong opposition from those affected and civil society groups. NGOs, and even some national authorities, continue to accuse the consortium of breaching agreements for the construction of Belo Monte by occasioning the perpetration of human rights abuses against indigenous people and the population in general.<sup>335</sup>

In December 2015, the United Nations Working Group on Business and Human Rights visited Altamira, the city closest to the Belo Monte dam project where they met with affected groups. On December 16<sup>th</sup> 2015, they issued a statement urging the Brazilian government to respect human rights.<sup>336</sup> The Working Group is expected to present the final report of its visit to Brazil to the Human Rights Council in June 2016.<sup>337</sup>

On January 11<sup>th</sup> 2016 the federal Tribunal of Altamira ordered the suspension of the operation of the Belo Monte dam. In 2015, the Public Ministry had issued an injunction for the fulfilment of the obligation to restructure the Funai (National Indian Foundation) as stated in the 2010 licence agreement authorising the operation of Belo Monte dam. The non-respect of this injunction led in part to the judicial decision of 2016.<sup>338</sup>

Since the concession of the first licence in 2010, instead of being reinforced, Funai has been weakened. It continues working without having its own headquarters and the number of employees has recently been reduced from 60 employees in 2011 to 23 in 2016. Under these circumstances it is clearly impossible for the Funai to adequately respond to the demands of the indigenous peoples affected by the project.<sup>339</sup>

In its January 2016 decision, the judge suspended Belo Monte's license and ordered halting the filling of the reservoir within five days. He stated that activities shall remain suspended until the Belo Monte construction company Norte Energia and the government of Brazil complied with their obligation to protect the affected indigenous peoples, and facilitated the restructuring of Funai in Altamira and provided it with the necessary funding and personnel to support the demands of the community. In addition, the judge ordered fine of \$ 900,000 to Union and Norte Energia, for breach of the court order.

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334 AIDA, Environmental Law for the Americas, *Belo Monte hydro-electric dam*, [www.aida-americas.org](http://www.aida-americas.org)

335 See notably Brazil: Authorities and civil society accuse Consórcio Norte Energia of breaching agreements for construction of Belo Monte causing human rights abuses to indigenous people & the population in general, <http://business-humanrights.org/>

336 OHCHR, Statement at the end of visit to Brazil by the United Nations Working Group on Business and Human Rights, 16 December 2015, available at: [www.ohchr.org](http://www.ohchr.org)

337 AIDA, IACHR opens case against Brazil for human rights violations related to Belo Monte Dam, 7 January 2016, available at: [www.aida-americas.org](http://www.aida-americas.org)

338 Ministério Público Federal, Justiça suspende Licença de Operação de Belo Monte por desobediência a decisão judicial, 14 January 2016, available at: [www.mpf.mp.br](http://www.mpf.mp.br)

339 El País, Lo que Belo Monte delata sobre todos los lados, 12 abril 2016, available at: <http://internacional.elpais.com>

However, there have been complaints regarding the lack of compliance with these judicial decisions as well as allegations that despite these, operations are continuing at the dam.

➔ **Marco Arena, Mirtha Vasquez and others v. Peru**<sup>340</sup>

The Yanacocha mine is a gold mine located in the Peruvian region of Cajamarca. It is run by NewMont, the largest US-based mining company. Allegations against the company for environmental contamination and community fears have led to various protests, intimidation, violence and fatal confrontations between pro- and anti-mining groups.

On 23 April 2007, the Commission granted precautionary measures in favour of priest, Marco Arana; attorney, Mirtha Vásquez, and other members of the “Group of Integral Education for Sustainable Development” (GRUFIDES), an organisation assisting intimidated and threatened peasant communities in the region of Cajamarca.

The Commission asked the Peruvian State to “adopt the measures necessary to guarantee the life and personal integrity of the beneficiaries, verify the effective implementation of the measures of protection by the competent authorities, provide perimeter surveillance for the headquarters of the NGO GRUFIDES, provide police accompaniment to the GRUFIDES personnel, who must travel to the peasant communities, and report on the actions taken to investigate judicially the facts that gave rise to the precautionary measures”.<sup>341</sup> The Commission continues to monitor the beneficiaries’ situation.

In March 2009, the company released an independent report on community relationship management practices. Furthermore, following allegations of the implication of its security forces in confrontations and complaints by Oxfam America, the company agreed to review its policies and procedures on security and human rights. A mediation process was conducted under the auspices of the Voluntary Principles on Security and Human Rights. An independent review was published in June 2009. Oxfam America calls on the company to fully implement the recommendations made.<sup>342</sup> Protests from affected villages continue, notably to reclaim their right to access water.<sup>343</sup>

<sup>340</sup> IACHR, *Marco Arana, Mirtha Vasquez et al. v. Peru, Precautionary measures*, 2007 paragraph 44 [www.cidh.org](http://www.cidh.org)

<sup>341</sup> See C.Anima, *op. Cit.*

<sup>342</sup> Oxfam America, *Oxfam calls on mining company to respect human rights*, 1 July 2009, [www.oxfam-america.org](http://www.oxfam-america.org)

<sup>343</sup> *Pobladores de 11 caseríos de Cajamarca realizan movilización contra minera Yanacocha*, [www.conflictosmineros.net](http://www.conflictosmineros.net)

## B. The Inter-American Court of Human Rights

The Inter-American Court of Human Rights was created by the American Convention on Human Rights and started its operations in 1979. The Court, based in the city of San José in Costa Rica, is an autonomous judicial institution of the OAS, whose objective is the **application and interpretation of the American Convention on Human Rights and other relevant treaties. No case can be examined by the Court if a Commission decision has not already been rendered on the matter, or if the case has not been referred to the Court by the Commission. Nevertheless, the decisions of the Court are legally binding, unlike the recommendations of the Commission.**

The Court has two main functions:

- **Adjudicatory function:** mechanism through which the Court determines if a State failed its international responsibility, by violating any of the rights protected by the American Convention on Human Rights. The accused State must be Party to the Convention and have accepted its contentious jurisdiction.
- **Advisory function:** mechanism through which the Court responds to consultations submitted by the Member States of the OAS or its bodies regarding the interpretation of the Convention or other instruments governing human rights in the Americas. This advisory jurisdiction is available to all OAS Member States, not only those that have ratified the Convention and accepted the Court's adjudicatory function.

### 🕒 What rights are protected?

The Court's role is to enforce and interpret the provisions of the American Convention on Human Rights, which protects a large set of rights (see above).

### 🕒 Who can file a complaint?

**Any individual or organisation who wants to present an alleged situation of human rights violation must do so before the Inter-American Commission and not the court** (see procedure above). If a solution is not reached, the Commission may forward the case to the Court by submitting its merits report to the Inter-American Court of Human Rights (Article 35 of the Rules of Procedure of the Court and Article 61 of the American Convention on Human Rights).



## Legal aid

According to the new rules of procedure, the Court now appoints an attorney to assume the representation of victims that do not have legal representation,<sup>344</sup> therefore the Commission will no longer be in charge of this role. Victims can also request access to the Victims' Legal Assistance Fund (see process below).

## Amicus curiae

If NGOs or experts wish to submit amicus curiae to the Tribunal, then this is possible at any point during the proceedings, up to 15 days following the public hearing or within 15 days following the Order setting deadlines for the submission of final arguments.<sup>345</sup>

## ② Process and outcome

### Process

The cases before the Court may be filed by the Commission (Article 35 Rules of Procedure) or by a State (Article 36 Rules of Procedure).

If the application is deemed admissible, the alleged victims, or their representatives, have 2 months to present their pleadings, motions and evidence. This should include a description of the facts, the evidence, the identification of applicants and all claims made, including reparations and costs (Article 40 Rules of Procedure). It is during this stage that victims wishing to access the legal assistance fund should submit their request. Victims should, by way of sworn affidavit or other probative evidence, demonstrate that they do not have the economic resources to cover the cost of litigation. They should specify for which part of the proceedings they will need financial support.<sup>346</sup>

Then the State has 2 months to respond, stating whether it accepts or disputes the facts and claims (Article 41 Rules of Procedure). Once this answer has been submitted, any of the parties in the case may request the Court president's permission to lodge additional pleadings prior to the commencement of the oral phase. (Article 43 Rules of Procedure). During the oral phase, the Court hears witnesses and experts and analyses the evidence presented prior to issuing its judgement.

<sup>344</sup> Referred to as the "Inter-American Defender". I/A Court H.R., *Rules of Procedure of the Inter-American Court of Human Rights*, adopted at its 85<sup>th</sup> regular period of session from 16 to 28 November 2009, Article 37, [www.cidh.oas.org](http://www.cidh.oas.org)

<sup>345</sup> I/A Court H.R., *Rules of Procedure of the Inter-American Court of Human Rights*, op. cit., Article 44.

<sup>346</sup> I/A Court H.R., *Rules for the Operation of the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights*, 11 November 2009, Article 2, [www.corteidh.or.cr](http://www.corteidh.or.cr)

## Provisional measures

In addition to these two functions, the Court may take provisional measures in cases of “extreme gravity and urgency, and when necessary in order to avoid irreparable damages to persons” (Article 27 of the Rules of Procedure). If there is a case pending before the Court, victims or alleged victims, or their representatives, can submit a request provided that it is related to the subject matter of the case.<sup>347</sup>

## Outcome

Regarding its adjudicatory function, the Court renders judgements which are **binding, final and not subject to appeal**. However, there is a possibility for any of the parties to request an interpretation of the judgement after it has been delivered (article 68 of the Rules of Procedure).

The Court periodically informs the OAS General Assembly about the monitoring of compliance with its judgements. This task is mostly performed through the revision of periodic reports forwarded by the State and objected by the victims (article 69 of the Rules of Procedure).

## The Court in action in corporate-related human rights abuses

On several occasions, the Court has issued decisions in corporate-related cases, in particular granting provisional measures.<sup>348</sup>

## Judgements

### ➔ **Saramaka People v. Suriname**<sup>349</sup>

Between 1997 and 2004, the State of Suriname issued logging and mining concessions within territory traditionally owned by the Saramaka people, without properly involving its members or completing environmental and social impact assessments.

In 2006, the Inter-American Commission on Human Rights submitted an application to the Court against the State of Suriname, alleging violations committed against members of the Saramaka People regarding their rights to the use and enjoyment of their traditionally owned territory (Article 21) and their right to judicial protection.(Article 25).

The Court addressed eight issues including “[...] fifth, whether and to what extent the State may grant concessions for the exploitation and extraction of natural resources found on and within alleged Saramaka territory; sixth, whether the concessions already issued by

<sup>347</sup> I/A Court H.R., *Rules of Procedure of the Inter-American Court of Human Rights*, *op.cit.*, Article 27(3).

<sup>348</sup> See C. Anicama, *op. cit.*

<sup>349</sup> I /A Court H.R., *Saramaka People v. Suriname*, Preliminary objections, Merits, Reparations and Costs, 28 November 2007, Series C No. 172..

the State comply with the safeguards established under international law; [...] and finally, whether there are adequate and effective legal remedies available in Suriname to protect members of the Saramaka people against acts that violate their alleged right to the use and enjoyment of communal property.”<sup>350</sup>

The Court ruled that with regards to the exploitation activities within indigenous and tribal territories, “the state must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan [...] within Saramaka territory. Second, the State must guarantee that the Saramaka will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that non concession will be issued within Saramaka territory unless, and until, independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment.”<sup>351</sup>

With regard to logging concessions, the Court declared that the State of Suriname did violate Article 21 of the Convention: “the State failed to carry out or supervise environmental and social impact assessments, and failed to put in place adequate safeguards and mechanisms in order to ensure that these logging concession would not cause major damage to Saramaka territory and communities. Furthermore, the state did not allow the effective participation of the Saramakas in the decision-making process regarding those logging concessions, in conformity with their traditions and customs, nor did the members of the Saramaka people receive any benefit from the logging in their territory”.<sup>352</sup> The Court came to the same conclusions regarding the gold mining concessions.<sup>353</sup>

In 2007, the government ended logging and mining operations in 9000 square kilometres of Saramaka territory.<sup>354</sup>

This case is considered a ground breaking case, as it recognized land rights for all tribal and indigenous people in Suriname, and the need to obtain prior, free and informed consent from indigenous peoples before undertaking development projects that affect them. The judgement also highlights the State’s failure to exercise due diligence. It should also be noted that the Court did not only consider the environmental costs of the projects, but also social costs and requested reparations including measures of redress (measures of satisfaction and guarantees of non-repetition) and measures of compensation (pecuniary and non pecuniary).<sup>355</sup>

<sup>350</sup> *Ibid.*, § 77.

<sup>351</sup> *Ibid.*, § 129.

<sup>352</sup> *Ibid.*, § 154.

<sup>353</sup> *Ibid.*, §§ 156 & 158.

<sup>354</sup> The Goldman Environmental Prize, *Wanze Eduards and S. Hugo Jabini - Suriname Forests*, [www.goldmanprize.org/2009/southcentralamerica](http://www.goldmanprize.org/2009/southcentralamerica)

<sup>355</sup> I /A Court H.R., *Saramaka People v. Suriname*, Preliminary objections, Merits, Reparations and Costs, 28 November 2007, Series C No. 172..., Chapter VIII.

On March 17, 2008, the State filed an application seeking an interpretation of the judgement, requesting interpretation on several issues such as “with whom must the State consult to establish the mechanism that will guarantee the – effective participation’ of the Saramaka people; [...]; to whom shall a “just compensation” be given [...]; to whom and for which development and investment activities affecting the Saramaka territory may the State grant concessions;[...] under what circumstances may the State execute a development and investment plan in Saramaka territory, particularly in relation to environmental and social impact assessments”.<sup>356</sup> The Court delivered its interpretation on August 12, 2008.

This case illustrates the usefulness of the system, and its willingness to intervene over conflicts involving corporate activities. The interpretative judgement issued upon request of the State also shows how the Court can contribute to the practical implementation of the judgement, and to the prevention of similar dilemmas often observed in development projects affecting indigenous peoples.

### ➔ **Baena-Ricardo et al. v. Panama**

The case originated before the Commission in 1998, in a complaint against the State of Panama for having arbitrarily laid off 270 public officials and union leaders, who had protested against the administration's policies to defend their labour rights.

For its first case of violations of labour rights, the Court concluded in its judgement, of February 2001, that Panama had violated the rights of freedom of association, judicial guarantees and judicial protection. It stated that the guarantees provided by Article 8 of the Convention had to be observed in this situation, implying that the state must protect against unlawful dismissal in all type of enterprises, including public companies: “[...] There is no doubt that, in applying a sanction with such serious consequences, the State should have ensured to the workers a due process with the guarantees provided for in the American Convention.”<sup>357</sup>

The Court decided that the State had to reassign the workers to their previous positions and to pay them for unpaid salaries. As of November 7, 2005, the State of Panama had only partially complied with the Court's orders.<sup>358</sup>

In 2007, workers started a hunger strike to protest against the inaction of the State. In 2007 and 2008, in collaboration with its member organisation in Panama (Centro de Capacitacion Social), and many others in the region, FIDH signed open letters calling on the government of Panama to comply with the Court decisions.<sup>359</sup>

<sup>356</sup> IACHR, *Annual Report of the Inter-American Commission on Human Rights 2008*, 2008, Chapter III, § 1133.

<sup>357</sup> I/A Court H.R., *Baena-Ricardo et al. v. Panama*, 2 February 2001, Series C No. 72, § 134.

<sup>358</sup> ESCR-Net, *Baena Ricardo et al. (270 workers v. Panama)*, [www.escr-net.org](http://www.escr-net.org)

<sup>359</sup> FIDH, *Carta abierta al Presidente de Panama: Caso Beana Ricardo y otros vs. Panama*, 13 March 2008

### ➔ **Claude Reyes et al. v. Chile**<sup>360</sup>

This case refers to the State of Chile's alleged refusal to provide Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero with all the information they requested from the Foreign Investment Committee on the forestry company Trillium and the Río Condor Project, a deforestation project to be executed in Chile's Region XII.

In 2005, the Commission submitted an application for the Court to examine the allegation of a violation of the right to access information, as provided by Article 13 of the Convention, regarding a foreign investment project.

The Court ruled that Chile did violate this right, considering that when a company's activities affect public interest, the state-held information should be publicly accessible. The Court thus decided that Chile had six months to provide the information requested, or adopt a justified decision in this respect.

### ➔ **Kichwa indigenous community of Sarayaku v. Ecuador**

The case originated in a contract signed in 1996 between the State of Ecuador and ARCO oil company for the exploitation of 65% of Sarayaku's ancestral territory. Since then, the exploration activities have been carried out by ARCO (US), Burlington Resources (US) and now by a private company called Argentinean Oil General Company (Compania General de Combustible- CGC). The petitioners complained about health issues related to the company's activities, as well as harassment by military and police forces. There were also allegations regarding the use of explosive materials by the company to intimidate the Sarayaku people.<sup>361</sup>

On June 2004, and due to the failure of the State to comply with its precautionary measures, the Commission submitted to the Court a request seeking the adoption of provisional measures on behalf of the members of the Kichwa indigenous community of Sarayaku, to protect their lives, integrity of person, freedom of movement and the special relationship they have to their ancestral land.

On July 6, 2004, the Court ordered provisional measures asking the State of Ecuador to guarantee the life and personal integrity of the Sarayaku people, and renewed such an order for provisional measures in 2005.

On 26 April 2010, the case was referred from the Inter-American Commission to the Inter-American Court after the latter had examined Ecuador's compliance with provisional measures during an audience on 3 February 2010. On that occasion, the Court had urged

<sup>360</sup> I/A Court H.R., *Claude Reyes et al. v. Chile*, 19 September 2006, Series C, § 151.

<sup>361</sup> Cultural Survival, *Observations on the State of Indigenous Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, Ecuador, 20 November 2007.

Ecuador to comply with subsequent provisional measures. The Inter-American Commission founded its application for a referral of the case against Ecuador on the State's failure to engage in prior consultation with the Kichwa people of Sarayuku before authorising oil exploration and exploitation on their territory.

On 1 October 2014, the Inter-American Court ruled in favour of the Kichwa people of Sarayuku, underlining the significance of the principle of free, prior and informed consent (FPIC). The Court considered the fact for the Ecuadoran State to have allowed the exploitation of the Sarayuku peoples' ancestral land by oil companies without having effectively informed them and ensured a genuine consultation and participation process constituted a violation of this principle enshrined in several international human rights instruments.

### ➔ **Norín Catrimán et al. v. Chile**

This is the first time the Inter-American Court condemns a state for unduly criminalising indigenous leader for social protest in Latin American democratic regime.

The Mapuche case concerns the Araucanía and Bío Bío regions in Chile. Following Pinochet's military dictatorship, given the transitional government's failure to comply with its reform commitments for a new deal with indigenous communities, the Courts' repeated denials to recognise the property titles held by some Mapuche, and the impact of forest, hydroelectric, and road investment projects pursued by the transitional government without going through consultation procedures, the Mapuche responded by organising activities to defend their rights. These events included marches, roadblocks, demonstrations, hunger strikes, the occupation of lands claimed by indigenous communities, protests against forestry operators, and criticism of the authorities and of government policies. At some of these events, there were scenes of sporadic violence during which private property was damaged, in particular to that of large forestry operators.

Chilean criminal courts considered the protest actions of the Mapuche indigenous communities as terrorist acts, and applied anti-terrorist legislations against several members of the communities. Among them, two leaders of the Mapuche Peoples were condemned to long prison sentences for "terrorist threat" and 5 others for "terrorist arson" respectively in 2002 and 2003.<sup>362</sup>

The case was submitted by the Inter-American Commission to the Inter-American Court on 7 August 2011 for alleged violation of several provisions of the American Convention on Human Rights, such as the right to a fair trial (article 8), the principle of legality (article 9), the freedom of thought and expression (article 13), the right to participate in government (article 23), and the right to equal protection and non-discrimination (article 24).<sup>363</sup>

<sup>362</sup> FIDH, *Op. cit.*

<sup>363</sup> I/A Court H.R., *Caso Norín Catrimán y otros (Dirigentes, miembros y activista del pueblo indígena Mapuche) vs. Chile*, p. 4, § 1, *op. cit.*

The violation of all these rights was established by the Inter-American Court through a decision issued on 29 May 2014.<sup>364</sup>

The Court condemned the Chilean State because the sentences it issued against the Mapuche for the alleged crimes were based on an antiterrorism piece of legislation which violates the principle of legality and the right to the presumption of innocence. The court underlined that in defining terrorist crimes, the rule of law imposes a necessary distinction between those crimes and ordinary offenses.

The Inter-American Court also held that the sentences were based on stereotypes and prejudices, in violation of the principles of equality and non-discrimination and that they could constitute a violation of the freedom of expression and have an inhibiting impact on the whole Mapuche people. Additionally, the Court found that the trial in Chile violated due process requirements. All these combined elements demonstrate that these convictions were arbitrary and incompatible with the American Convention.

FIDH, who represented five of the eight claimants along with two other attorneys, welcomed this significant decision of the Inter-American Court of Human Rights, as a Landmark case that could bring legal support to the numerous indigenous and human rights defenders that are unduly criminalised in order to silence their claims.

## Provisional measures

### ➔ **Mayagna (Sumo) Awas Tingni Community v. Nicaragua**<sup>365</sup>

In this case the Court concluded that Nicaragua had violated the right to judicial protection and to property.<sup>366</sup> The case relates to the Mayagna Awas (Sumo) Tingni Community who lives in the Atlantic coast of Nicaragua. They had lodged a petition before the Commission alleging the State's failure to demarcate communal land, to protect the indigenous people's right to own their ancestral land and natural resources, and to guarantee access to effective remedy regarding the then imminent concession of 62,000 hectares of tropical forest to be exploited by Sol del Caribe, S.A. (SOLCARSA) on communal lands.

The Commission concluded that "the State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community."<sup>367</sup>

<sup>364</sup> *Idem*

<sup>365</sup> I/A Court H.R., *Mayagna (Sumo) Awas Tingni community v. Nicaragua*, 31 August 2001, Series C No. 70.

<sup>366</sup> See above section 'Commission in action' for the proceeding of the case before the Commission.

<sup>367</sup> IACHR, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Preliminary Objections, Report 27/98, 1 February 2000, § 142.

In addition, the Commission recommended the state “suspend as soon as possible, all activity related to the logging concession within the Awas Tingni communal lands granted to SOLCARSA by the State, until the matter of the ownership of the land, which affects the indigenous communities, [has been] resolved, or a specific agreement [has been] reached between the State and the Awas Tingni Community”.<sup>368</sup> The Commission subsequently decided to submit the case to the Court on May 28, 1998.

The Court noted that the right to property enshrined in the Convention protected the indigenous people’s property rights originated in indigenous tradition and, therefore, the State had no right to grant concessions to third parties on their land.

It should be noted that the Court decided that the State had to adopt the necessary measures to create an effective mechanism for demarcation and titling of the indigenous communities’ territory, in accordance with their customary law, values and customs. The Court also decided that, until such mechanism was created, the State had to guarantee the use and enjoyment of the lands where the members of the indigenous community live and carry out their activities.<sup>369</sup> Finally, the Court asked the State to report every six months on measures taken to ensure compliance with their judgement.<sup>370</sup>

In January 2003, the community filed an *amparo* action (protection of constitutional rights) against President Bolaños, and ten other high ranking government officials, because the decision had not been enforced. This action has not been resolved yet. In January 2003, the Nicaraguan National Assembly passed a new law aimed at demarcating indigenous land. Awas Tingni could be the first community to obtain land titles under the new law. On Sunday 14 December 2008, “the government of Nicaragua gave the Awas Tingni Community the property title to 73,000 hectares of its territory, located on the country’s Atlantic Coast.”<sup>371</sup>

In this case the Inter-American Court, for the first time, issued a judgement in favour of the rights of indigenous peoples to their ancestral land. It is a key precedent for defending indigenous rights in Latin America.

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<sup>368</sup> *Ibid.*, §142, b.

<sup>369</sup> I/A Court H.R., *The Mayagna (Sumo) Awas Tingni community v. Nicaragua*, *op.cit.*, § 153

<sup>370</sup> *Ibid.*, Chapter XII, § 8. 108

<sup>371</sup> IACHR, *IACHR hails titling of Awas Tingni community lands in Nicaragua*, Press release, no.62/08, [www.cidh.oas.org](http://www.cidh.oas.org)



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Although the inter-American system for the protection of human rights still face numerous challenges, and is under resourced and understaffed, it is recognized for its audacity as one of the regional mechanisms that has gone farther in addressing States' responsibilities regarding violations committed by corporations. Unfortunately, and although the Court's decisions are binding, too many judgements are not enforced. There is currently an urgent necessity for civil society and victims to widely disseminate the Court's decisions in order to ensure greater likelihood of their implementation. The Inter-American system offers numerous opportunities for victims to actively participate in the vindication of their rights, and in raising awareness around the impacts of corporate activities on human rights within the system. These opportunities should be seized.



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## ADDITIONAL RESOURCES

– **Inter-American Commission on Human Rights**

[www.cidh.oas.org](http://www.cidh.oas.org)

– **Inter-American Court on Human Rights**

<http://www.corteidh.or.cr/>

– **Organisation of American States**

[www.oas.org/en/default.asp](http://www.oas.org/en/default.asp)

– **Inter-American Human Rights Database**

[www.wcl.american.edu/pub/humright/digest/Inter-American/indexesp.html](http://www.wcl.american.edu/pub/humright/digest/Inter-American/indexesp.html)

– **Human Rights Library of the University of Minnesota**

<http://www1.umn.edu/humanrts/>

– **CELS (Centro de Estudios Legales y Sociales)**

[www.cels.org.ar](http://www.cels.org.ar)

– **Centre for Justice and International Law (CEJIL)**

<http://cejil.org/front>

(See notably the Pro Bono Guide providing a list, by country, of organisations, universities, and individual practitioners willing to provide assistance in Inter-American litigation free of charge: <http://cejil.org/guia-pro-bono>)

– **J. Pasqualucci, *The Practice and Procedure on the Inter-American Court of Human Rights*, Cambridge, Cambridge University Press, 2003**

– **Global Rights, *Using the Inter-American System for Human Rights*, March 2004**  
[www.globalrights.org](http://www.globalrights.org)

– **C. M. Cerna, *Extraterritorial application of the human rights instruments of the Inter-American system* in F. Coomans and M. T. Kamminga (eds.), *Extraterritorial application of human rights treaties*, Intersentia, Antwerp-Oxford, 2004**

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