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Corporate Accountability for Human Rights Abuses :

A Guide for Victims and NGOs
on Recourse Mechanisms

Rights in Action

On 26 June 2014, the Human Rights Council adopted a resolution calling for the establishment of an Intergovernmental Working Group (IGWG) “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”. This new edition of the guide prepared by FIDH comes therefore at the most opportune time: while it identifies a range of solutions to accountability gaps in corporate violations of human rights, it also serves to identify the sources of impunity, thus guiding governments in improving the remedial framework which victims may rely on.

The guide is also unique in its ambition. It presents a complete synthesis of the various possibilities open to victims of human rights violations by transnational corporations. It offers a comparison between these various possibilities, and it evaluates their effectiveness. But the guide is also more than that. It bears testimony to how the international law of human rights is transforming itself, from imposing obligations only on States – still the primary duty-bearers – to gradually taking into account that non-State actors – particularly corporations operating across borders, on which State control is sometimes weak –. This is the background against which the guide should be read: in the name of combating impunity for human rights violations, international law is being quietly revolutionized, to become more responsive to the challenges of economic globalization and to the weakening of the regulatory capacity of States.

The insistence on an improved control of the activities of transnational corporations initially formed part of the vindication of a “new international economic order” in the early 1970s. The context then was relatively favorable to an improved regulation of the activities of transnational corporations: while developed States feared that certain abuses by transnational corporations, or their interference with local political processes, might lead to hostile reactions by developing States, and possibly to the imposition of restrictions on the rights of foreign investors, the “Group of 77” non-aligned (developing) countries insisted on their permanent sovereignty over natural resources and on the need to improve the supervision of the activities of transnational corporations. A draft Code of Conduct on Transnational Corporations was even prepared until 1992 within the UN Commission on Transnational Corporations. It failed to be adopted, however, because of major disagreements between industrialized and developing countries, in particular, on the inclusion in the Code of standards of treatment for TNCs: while the industrialized

countries were in favor of a Code protecting TNCs from discriminatory treatment of other behavior of host States which would be in violation of certain minimum standards, the developing States primarily sought to ensure that TNCs would be better regulated, and in particular would be prohibited from interfering either with political independence of the investment-receiving States or with their nationally defined economic objectives.

It is also during the 1970s that the organisation for economic Cooperation and development (OECD) adopted the Guidelines for Multinational enterprises (21 June 1976). These Guidelines were revised on a number of occasions since their initial adoption, and most recently in 2000, when the supervisory mechanism was revitalized and when a general obligation on multinational enterprises to “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments” was stipulated.

Almost simultaneously, the International Labor organisation adopted the Tripartite Declaration of Principles concerning Multinational enterprises and Social Policy (adopted by the Governing Body of the International Labour organisation at its 204th Session (November 1977), and revised at the 279th Session (November 2000)).

Yet, although of high moral significance because of its adoption by consensus by the ILO Governing Body at which governments, employers and workers are represented, the Tripartite declaration remains, like the OECD Guidelines, a non-binding instrument. Both these instruments impose on States certain obligations of a procedural nature: in particular, States must set up national contact points under the OECD Guidelines in order to promote the Guidelines and to receive “specific instances”, or complaints by interested parties in cases of non-compliance by companies; they must report on a quadrennial basis under the ILO Tripartite Declaration on the implementation of the principles listed therein. However, both the ILO Tripartite Declaration and the OECD Guidelines instruments are explicitly presented as purely voluntary, with respect to the multinational enterprises whose practices they ultimately seek to address, and their effectiveness in bringing about change in the conduct of companies is questionable. The debate on how to improve the human rights accountability of transnational corporations was relaunched as concerns grew, in the late 1990s, about the impacts of unbridled economic globalization on values such as the environment, human rights, and the rights of workers. At the 1999 Davos world economic Forum, the United Nations Secretary General K. Annan proposed a Global Compact based on shared values in the areas of human rights, labour, and the environment, and to which anti-corruption has been added in 2004. The ten principles to which participants in the Global Compact adhere are derived from the Universal declaration of Human Rights, the International Labour organisation’s declaration on Fundamental Principles and Rights at work, the Rio declaration on environment and development, and the United Nations Convention Against Corruption. The process is voluntary. It is based on the idea that good practices should be rewarded by being publicized, and that they should be shared

in order to promote a mutual learning among businesses. The companies acceding to the Global Compact are to “embrace, support and enact, within their sphere of influence”, the principles on which it is based, and they are to report annually on the initiatives they have taken to make those principles part of their operations. Developments occurred also within the UN Commission on Human Rights. On 14 August 2003, the UN Sub-Commission for the Promotion and Protection of Human Rights approved in Resolution 2003/16 a set of “Norms on the Human Rights Responsibilities of Transnational Corporations and other Business enterprises”.

The “Norms” proposed by the Sub-Commission on Human Rights essentially presented themselves as a restatement of the human rights obligations imposed on companies under international law. They were based on the idea that “even though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal declaration of Human Rights”, and therefore “transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments” (Preamble, 3rd and 4th Recitals).

Although the initiative of the UN Sub-Commission on Human Rights was received with suspicion, and sometimes overt hostility, both by the business community and by a number of governments, it did serve to put the issue on the agenda of the UN Commission on Human Rights. In July 2005, at the request of the Commission on Human Rights, the UN Secretary General appointed John Ruggie as his Special Representative on the issue of human rights and transnational corporations. The Special Representative set aside the Norms, which he considered could “undermine the capacity of developing countries to generate independent and democratically controlled institutions capable of acting in the public interest”. Instead, following almost three years of consultations and studies, he proposed a framework resting on the “differentiated but complementary responsibilities” of the States and corporations, including three principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies. Hence, while restating that human rights are primarily for the State to protect as required under international human rights law, the framework does not exclude that private companies may have human rights responsibilities; although companies essentially should comply with a “do no harm” principle, this also entails certain positive duties, including the due diligence obligation of the company to become aware of, prevent and address adverse human rights impacts. In addition, the report discusses the problem of “policy misalignment”, noting that investment policies, for instance – in the conclusion of investment treaties or in the role of export credit agencies – should facilitate the ability of the State to discharge its obligation to protect human rights, rather than make it more costly or more difficult.

Whether they rely on international mechanisms, on domestic courts, on voluntary commitments, or on incentives such as conditions imposed by export credit agencies or shareholder activism, none of the tools that have evolved over the years in order to strengthen the protection of victims of human rights violations by companies would be effective without the victims or their representatives making use of them.

It is by mobilizing rights into action that we are provided with opportunities to improve our understanding both of the companies' obligation to respect human rights, and of the States' duty to protect them.

Indeed, perhaps the most spectacular example of the role of victims in bringing life into the mechanisms that would otherwise only exist as paper rules is the revival since 1980 of the Alien Tort Claims Act (ATCA) in the United States. The Alien Tort Claims Act, a part of the First Judiciary Act 1789, provides that the U.S. federal courts shall be competent to adjudicate civil actions filed by any alien for torts committed "in violation of the law of nations or a treaty of the United States" (28 U.S.C. §1350). For almost two centuries, this clause remained confined to relatively marginal situations. It was first revived in 1980, in the case of *Filartiga v. Peña-Irala*. The ATCA has since been relied upon in a large number of cases related to human rights claims, including over the past couple of decades some cases concerning corporations having sufficiently close links to the U.S. This is by all means a spectacular development.

In two successive judgments, the U.S. Supreme Court significantly reduced the potential reliance on the ATCA to file civil claims against companies for human rights violations. First, in 2004, when it was provided a first opportunity to influence this development and to examine the exact scope of the powers conferred upon US federal courts by the Alien Tort Claims Act, the Supreme Court took the view that, when confronted with such suits, federal courts should "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [violation of safe conducts, infringement of the rights of ambassadors, and piracy]" which Congress had in mind when adopting the First Judiciary Act 1789 (*Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)). This was a first significant narrowing down of the potential of the ATCA, which, as a result of *Sosa*, could only provide a potential remedy to victims of the most serious violations of human rights.

A second limitation resulted from the *Kiobel* litigation. Residents of the Ogoni Region of Nigeria alleged that the defendant companies – the Royal Dutch Petroleum Company and Shell Transport and Trading Company plc, incorporated respectively in the Netherlands and in the United Kingdom, and acting through a Nigerian subsidiary named Shell Petroleum Development Company of Nigeria, Ltd. – aided and abetted the Nigerian government in committing various human rights abuses in 1993-1994. The Supreme Court however took the view that, in the absence of any clear indi-

cation to the contrary, a statute does not apply to situations outside the territory of the United States, and that there was nothing in the ATCA to rebut that presumption (Kiobel, et al. v. Royal Dutch Petroleum Co., et al., 133 S.Ct. 1659 (2013)).

The potential of the Alien Tort Claims Act for future transnational human rights litigation against companies is thus uncertain. Yet, once we consider the broader picture, the lesson is clear: it only by exercising them that rights can be effectively brought to life. None of the developments around the Alien Tort Claims Act would have been possible without the inventive invocation of the ATCA by Peter Weiss, for the Centre for Constitutional Rights, assisting the Filartiga family in its quest for justice, and without his persistence in seeking compensation for torture.

This is a lesson for all human rights defenders, and it teaches us how to use this guide to victims. For this guide is more than just a practical tool, and it is more than a stock-taking exercise of what has been achieved so far to improve the protection of the victims of human rights violations by corporations: it is also an invitation to use the existing remedies, and thus to improve them. Rights are like a natural language: unless they are practiced and constantly improved, they risk falling into oblivion. It is the great merit of FIDH to remind us that only by invoking our rights shall future violations be prevented.

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Why a guide on corporate-related abuses?

Twenty years ago, the expressions “human rights” and “business” very rarely formed part of the same sentence. Human rights were the business of States, whereas companies just had to mind their own business.

Today, the expression “corporate social responsibility” (CSR) is on everyone’s lips. There is not a single week without regional or international conferences on CSR. In some countries, consumers are becoming more aware of these issues. More generally, the global financial crisis –apart from aggravating social disparities- has accentuated the flaws of the current financial and economic system and recalled the urgent need for accountability on the part of economic players. More and more, CSR is rightly understood as encompassing respect for internationally recognized human rights. Hundreds of multinational corporations have publicly recognized the need to respect human rights at all times and wherever they operate. Tools are being developed to help businesses understand what human rights mean in their daily operations as they recognize the need to assess potential risks stemming from human rights abuses, in order to ensure the viability of their businesses. Major corporations have recognised that profit is closely linked to the respect of human rights.

Yet, the discourse, strategies and practices put forward by companies have to be matched with concrete changes in practice. On every continent, victims of human rights violations and serious environmental damage, directly linked to the economic activities of multinational corporations, confront major obstacles when seeking justice.

At the time of writing, due to insufficient precautionary measures and regulatory enforcement by the relevant authorities, the consequences of the explosion of the tailing dam operated by Samarco, a joint venture between Vale and Anglo-Australian BHP Billiton in Brazil, are immeasurable. The toxic mine waste moved down the 800 kilometer-long Doce river towards the Atlantic ocean, destroying life and biodiversity and wiping out entire towns. Experts estimate that it could take over 50 years for the region to recover, if it ever does. In Latin America, union leaders and human rights defenders are being shot for publicly claiming their rights, in Mexico, Colombia, Guatemala and Honduras. From the Philippines to Peru, indigenous peoples’ right to be consulted in relation to investment projects in the extractive industry continues to be ignored and is becoming an important factor

of political and social destabilization. In Africa, land purchasing by sovereign wealth funds in particular from the Gulf region threatens the capacity of small-scale farmers to ensure sustainable food production and realise their right to food. Information technology (IT) companies have recently been under the spotlight for their questionable acquiescence in requests made by certain authoritarian regimes to restrict access to information or for selling surveillance technologies being used by repressive regimes as tools for repression.

Thirty years after the Bhopal tragedy, in which toxic gases leaked from a pesticide plant owned by the Union Carbide Corporation, thousands of surviving victims are still waiting for fair compensation, adequate medical treatment and rehabilitation and the plant site has still not been cleaned up. In Ecuador, despite the favourable decision on the historic class-action lawsuit against the oil company Chevron due to the refusal of US jurisdictions to execute the Ecuadorian decision, victims are still awaiting compensation for the damages suffered from water contamination, while the Ecuadorian state is now being sued before an arbitral tribunal. The list goes on. In all parts of the world, human rights and environmental abuses are taking place as a result of the direct or indirect action of corporations.

Various reasons can explain such denial of justice to victims. The “governance gaps” identified by former UN Special Representative on business and human rights, John Ruggie, remains blatant realities: corruption, lack of judicial independence, the unwillingness or inability of host States to ensure foreign companies operating on their territory respect environmental and social standards while at the same time hastily concluding trade and investment agreements largely protecting investors’ rights, to name only a few examples of the gaps which impede access to justice. Other gaps include the absence of adequate judicial systems allowing victims to seek justice in home States (i.e. where the parent company is based), legal obstacles due to the complex structure of multinational corporations and the inconsistency between what is permissible under corporate law and what is required under human rights law. In addition to States’ failing to take measures to ensure the fulfilment of their international human rights obligations, the scope of the responsibility directly imposed on businesses (although slowly being recognised) has yet to be clearly defined. In the face of these structural obstacles at the national level, there is no forum available at the international level for victims to directly address the responsibility of corporations.

As a result, impunity prevails.

Objective and scope of the guide

With this guide, FIDH seeks to provide a practical tool for victims, and their (legal) representatives, NGOs and other civil society groups (unions, peasant associations, social movements, activists) to seek justice and obtain reparation for victims of human rights abuses involving multinational corporations. To do so, the guide explores the different judicial and non-judicial recourse mechanisms available to victims.

In practice, strategies for seeking justice are not limited to the use of recourse mechanisms, and various other strategies have been used in the past. Civil society organisations have for instance set up innovative campaigns on various issues such as baby-milk marketing in Global South countries, sweatshops in the textile industry profiting multinationals or illicit diamond trafficking fuelling conflicts in Africa. Such actions have yielded results and can turn out to be equally (or even more) effective than using formal channels. While this guide will not focus on such strategies, they are often used alongside and reinforce the use of recourse mechanisms.

The main focus of this guide is violations committed in third countries by or with the support of a multinational company, its subsidiary or its commercial partner. Hence, the guide focuses in particular on the use of extraterritorial jurisdiction to strengthen corporate accountability.

This guide does not address challenges specifically faced by small and medium-size enterprises. While all types of enterprise play a crucial role in ensuring respect for human rights, we **focus on multinational groups**. At the top of the chain, it is considered that they have the power to change practices and behaviours, that their behaviour conditions the rest of the chain and that they are in a position to influence their commercial partners, including small and medium-size enterprises.

The guide is comprised of five sections. Each examines a different type of instrument.

The **first section** looks at mechanisms to **address the responsibility of States** to ensure the protection of human rights. International and regional intergovernmental mechanisms of quasi-judicial nature are explored, namely the United Nations system for the protection of human rights (Treaty Bodies and Special Procedures), the International Labour Organisation complaint mechanisms and regional systems for the protection of human rights at the European, Inter-American and African levels, including possibilities provided by African economic community tribunals.

The **second section** explores legal options for victims **to hold a company liable for violations committed abroad**. The first part analyses opportunities for victims to engage States' extraterritorial obligations, e.g. to seek redress from parent companies both for civil and criminal liability. The section then goes on to explore the promising yet still very limited windows of opportunity within international

tribunals and the International Criminal Court. The guide sets out the conditions under which courts of home States of parent companies may have jurisdiction over human rights violations committed by or with the complicity of multinationals. The obstacles that victims tend to face when dealing with transnational litigation- which are numerous and important- are highlighted. While this section does not pretend to provide an exhaustive overview of all existing legal possibilities, it emphasizes different legal systems, mostly those of the European Union and the United States. In addition to practical considerations, this choice is also justified by the fact that parent companies of multinational corporations are often located in the US and the EU (although many are now based in emerging countries); the volume of legal proceedings against multinationals head-quartered in these countries has increased; and, these legal systems present interesting procedures to hold companies (or their directors) accountable for abuses committed abroad.

The **third section** looks at **mediation mechanisms** that have the potential to address **directly** the responsibility of companies. With a particular focus on the OECD Guidelines for Multinational Enterprises and the National Contact Points countries set up to ensure respect of the guidelines, the section looks at the process, advantages and disadvantages of this procedure. The section also briefly highlights developments within National Human Rights Institutions and other innovative ombudsman initiatives.

The **fourth section** touches upon one of the driving forces of corporate activities: the **financial support** companies receive. The first part reviews complaints mechanisms available within International Financial Institutions as well as regional development banks that are available to people affected by projects financed by these institutions. Largely criticized by civil society organisations in the last decades, these institutions have faced increased pressure to adapt their functioning for greater coherence between their mandate and the projects they finance. Most of the regional banks addressed in this guide have gone through recent consultation processes and subsequent changes of their policies, standards and structure of their complaint mechanisms. Their use presents interesting potential for victims. The second part looks at available mechanisms within export-credit agencies, as public actors are being increasingly scrutinized for their involvement in financing projects with high risks of human rights abuses. Not forgetting the role private banks can play in fuelling human rights violations, the third part of this section addresses one initiative of the private sector, namely the Equator Principles for private banks. The fourth and last part of this section discusses ways to engage with the shareholders of a company. Shareholder activism is an emerging trend that may represent a viable way to raise awareness of shareholders on violations that may be occurring with their financial support. Even more important, the increasing attention paid by investors (in particular institutional investors) to environmental, social and governance criteria can be a powerful lever.

Last but not least, the **fifth section** explores **voluntary initiatives** set up through multistakeholder, sectoral or company-based CSR initiatives. As mentioned above, various companies have publicly committed to respect human rights principles and environmental standards. As far as implementation is concerned, a number of grievance mechanisms have been put in place and can, depending on the context, contribute to solve situations of conflict. Interestingly, such commitments may also be used, including through legal processes by victims and other interested groups such as consumers to ensure that companies live up to their commitments. This section provides an overview of such avenues.

How to use this guide?

Before turning to a specific mechanism, there are various questions to be asked and elements to be considered:

① **Step one** – Who is causing the harm and what are its causes?

First of all, information on the company which is causing the harm is needed. In many cases, companies change their legal names which creates confusion amongst local affected groups. Groups such as NGOs can offer assistance in identifying the company structure. Once obtained, it is easier to determine the legal structure of the company.

Is the company owned by the State? Is the concerned company a subsidiary of a multinational corporation based abroad? Where is the parent company located? What link does the company have with the parent company and the subsidiary/commercial partner?

What is the cause of the harm? Is the company the one breaching the law or is it due to the lack of proper regulation in the country? Or else, is it due to the unwillingness or inability of the government to apply the law? Can the acts of the local concerned corporate entity be attributed to the parent company?

② **Step two** – Who is responsible for the commission of the violation? Who are the duty-bearers?

In addition to identifying the identity of the **company**, and the role it played, in order to be able to determine which mechanism can be seized it is important to identify which State has failed to fulfil its obligations. The **host State** holds the primary responsibility to ensure the protection of everyone's human rights, thus if a violation occurs within its jurisdiction, the state's responsibility is at stake, be it for its actions or omissions. However, **home States** (i.e. where the parent company is based) also have their share of responsibility (although more difficult to establish) to control "their" companies.

🔗 **Step three** – Assessing the context

Sometimes, a particular context may favour the choice of one type of mechanism over another. Various questions might in turn be helpful here:

Parallel proceedings

- Are there other ongoing proceedings in relation to the same situation, in particular legal proceedings?
- Are there other groups affected that have denounced the behaviour of the company?
- Are there ongoing social campaigns? Who could be your allies?

– The corporate context

- Who is funding the project or the concerned company?
- Is it a company listed on stock exchanges? If yes, who are the shareholders of the company?
- Has the company received funds from public institutions such as a regional development bank or an export-credit agency? If yes, what stage is the project at?
- Has the project started? Has the project received full financing?
- What are the CSR commitments of the company?
- Has it already engaged in a dialogue process with other stakeholders? If yes, was the process deemed satisfactory?

🔗 **Step four** – What can be expected from a mechanism? What are its inherent limitations?

- What is the objective of seizing a mechanism?
- Are victims conscious of the pros and cons of choosing one mechanism over another?
- Is the objective to prevent future violations or to obtain reparation for violations that have occurred?
- What do victims want to obtain from such a mechanism? What do mechanisms offer?
- Are all affected individuals in agreement over the objectives sought? If not, does the strategy envisaged ensure the respect of the different positions?
- Can the project be stopped?
- Can victims obtain immediate protection in case of eminent danger such as by seeking precautionary measures?
- Can the project modalities (such as resettlement plans) be altered? Do victims want to obtain better compensation packages?
- Are the victims, for example workers, seeking reinstatement?

⑤ Step five – Identifying the risks for victims

What are the risks that victims or their representatives face? Are there risks of reprisals?

If desirable, and to ensure protection, is it possible when seizing a mechanism to ensure the confidentiality of the victims' identity throughout the process? What types of guarantees are available?

Are victims aware that the process can sometimes take years? Can they take on the risk of eventual costs and fees related to judicial proceedings?

Finally, victims and their representatives should evaluate whom they can obtain assistance from to file a case. Globally, civil society networks are expanding and are being strengthened. Groups in home and host States may share similar interests and objectives and can collaborate with each others in order to obtain justice for victims.

The answers to these questions will help to ensure that affected individuals and their representatives opt for the most appropriate mechanism(s).

This guide does not claim to be exhaustive. Rather, it is meant to be a dynamic tool that is accessible and can be updated and improved. It is intended to help rights-holders claim their rights and to encourage civil society actors involved to share and exchange strategies on the outcomes using these mechanisms with one overarching objective: to ensure that victims of human rights violations can obtain justice, regardless of who committed the violation.