



fidh

Corporate Accountability for Human Rights Abuses

**A Guide for Victims and NGOs
on Recourse Mechanisms**

3rd edition

➤ Worker at a bauxite storage site in Bukit Goh situated in Malaysia's rural state of Pahang.
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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.

Olivier De Schutter

UN Special Rapporteur on the right to food

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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?

② 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.



SECTION I

* * *

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

* * *

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.¹

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.

¹ 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 Charter² 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 Rights³ (ICESCR) contain similar

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

³ 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” framework⁴. 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-

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.

porations and other business enterprises, consisting of five independent experts, of balanced geographical representation, for a period of three years⁵. In June 2014, the Human Rights Council decided to extend the Working Group's mandate for a period of three years⁶. 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 RIGHTS⁷

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 diligence⁸ to identify, prevent, mitigate and account for how they address adverse impacts on human rights.

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

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

⁷ Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁸ 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.

TOWARDS AN INTERNATIONAL BINDING INSTRUMENT

On 26th June 2014, the Human Rights Council adopted a resolution⁹ 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,¹⁰ most of which continue to actively advocate for a binding treaty through the Treaty Alliance. 20 States voted in favour¹¹, 14 States voted against¹² and 13 States abstained¹³. 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 2015¹⁴. FIDH hopes this intergovernmental process can contribute to further clarifying and codifying existing obligations and ensure redress for corporate-related abuses¹⁵.

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.

10 Bangkok Joint Statement, 2013, available at 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.

15 *Business and Human Rights: Enhancing Standards and Ensuring Redress*, FIDH, March 2014, 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 Assembly¹⁶

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."¹⁷

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,

¹⁶ 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.

¹⁷ 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.**"¹⁸

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.**"¹⁹

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**

18 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.

19 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.²⁰ Recommendations issued by bodies such as the OECD national contact points should be given adequate effect."²¹

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 concerned²².

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*²³

- 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

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

²¹ 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"

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

²³ 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.

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

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.²⁴ 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 years²⁵).
- 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.²⁶

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

²⁵ 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.

²⁶ 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)”²⁷ 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.”²⁸

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.”²⁹

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).

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

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

²⁹ 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.**³⁰

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.**³¹

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).³²

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).

³⁰ CCPR, *Concluding observations: Germany*, 12 November 2012

³¹ CCPR, *Concluding observations: Canada*, July 2015

³² 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.**"³³

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.**"³⁴

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.**"³⁵

³³ CESCR, *Concluding Observations, Belgium*, 23 December 2013

³⁴ CESCR, *Concluding observations: China*, 13 June 2014

³⁵ 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**³⁶ 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 10th 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.³⁷

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.”³⁸

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.³⁹
- The state that is alleged to have violated the rights in question has accepted the competence of the Committee to accept individual complaints.⁴⁰

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.⁴¹ However, except in special cases, when a complaint is brought on behalf of a third party, **written consent** must be obtained beforehand.⁴²

② Under what conditions?

With some variations, all the Committees operate in accordance with the following principles:⁴³

- 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

³⁹ 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/>

⁴⁰ 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.

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

⁴² 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”

⁴³ 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 settlement⁴⁴, or if the legal arguments put forward are different.⁴⁵
- 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.**⁴⁶ 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

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

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

⁴⁶ 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.⁴⁷

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.⁴⁸

HOW TO FILE COMPLAINT?

Although “model” complaint forms for communications are available online,⁴⁹ 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).

⁴⁷ 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).

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

⁴⁹ 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

② Process and outcome

*Process*⁵⁰

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,⁵¹ 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).⁵²

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

⁵¹ For example the CAT, CERD and CEDAW. See table in appendix.

⁵² 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.⁵³

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".⁵⁴

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 Rights⁵⁵. 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

⁵³ 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.

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

⁵⁵ OHCHR, *Human rights Bodies – Complaints procedures*, 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.”⁵⁶

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.”

⁵⁶ 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.”⁵⁷

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.⁵⁸ 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.

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

⁵⁸ 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.⁵⁹

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.⁶⁰



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⁵⁹ 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.

⁶⁰ 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**.⁶¹ 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:⁶²

- 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.⁶³ 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.

⁶¹ 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.

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

⁶³ For more information, see: Universal Periodic Review, www.upr-info.org/

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:⁶⁴

- 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. 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.
 - 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’.
-

⁶⁴ 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).⁶⁵

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).⁶⁶

"(...)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 (...)" .

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

⁶⁶ 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

Outcome

The UPR aims at dealing with all states equally, in an “objective, transparent, non-selective, constructive, non-confrontational and non-politicized”⁶⁷ 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.⁶⁸

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.

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

⁶⁸ 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**.⁶⁹
- 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)

⁶⁹ 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.⁷⁰

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.⁷¹

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

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

⁷¹ 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:⁷²

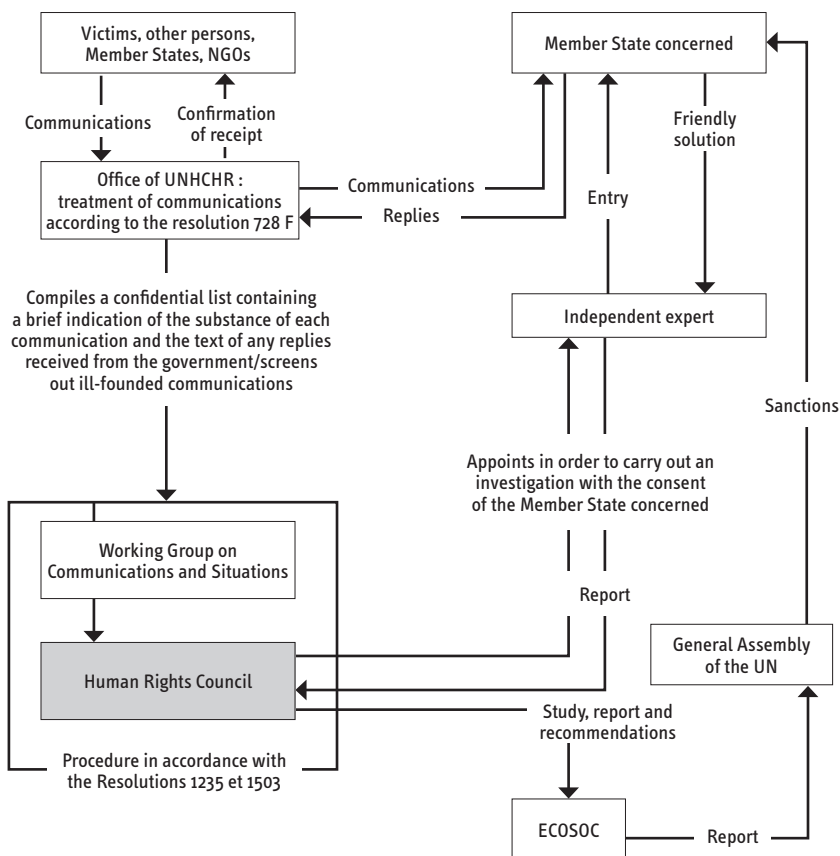
- **Cease considering the situation** when further consideration or action is not warranted.
- Keep the situation under review and request the state concerned to provide **further information** within a reasonable period of time.
- End the review of the matter under the confidential complaint procedure 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.

⁷² *Ibid.*, § 109.

The “revised 1503” procedure: summary scheme⁷³



⁷³ 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

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 Rights⁷⁴. 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.

⁷⁴ 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.

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,⁷⁵ 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.⁷⁶ In June 2014, the Human Rights Council decided to extend the Working Group's mandate for another three years.⁷⁷

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;

⁷⁵ See Chapter I on United Nations Treaty Based Mechanisms

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

⁷⁷ 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.⁷⁸ 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.⁷⁹

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*,⁸⁰ 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.⁸¹

⁷⁸ The Working Group's Communications procedure is described at www.ohchr.org

⁷⁹ See the Working Group's country visit reports at www.ohchr.org

⁸⁰ UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, December 2014, www.ohchr.org

⁸¹ For more information and to access states' NAPs, visit 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

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.)

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.⁸²

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.

⁸² 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.⁸³

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**.

⁸³ OHCHR, *UN Special Procedures - Facts and Figures 2008*, 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**.⁸⁴ 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.

⁸⁴ 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.⁸⁵

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 (for complains and individual cases)

For any other information: spinfo@ohchr.org

⁸⁵ 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 waste⁸⁶ 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.”⁸⁷

➔ **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.

⁸⁶ 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*.

⁸⁷ 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.”⁸⁸

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.⁸⁹

STATISTICS⁹⁰

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.

⁸⁸ 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.

⁸⁹ See OHCHR, *Country visits*, www2.ohchr.org.

⁹⁰ See OHCHR, *Publications on Special Procedures*, 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.⁹¹

ADDITIONAL RESOURCES

- Charter of the United Nations
www.un.org/en/documents/charter/index.shtml
- United Nations Treaties and their Protocols
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
- Human Rights Committee
www2.ohchr.org/english/bodies/hrc
- Committee on Economic, Social and Cultural Rights
www2.ohchr.org/english/bodies/cescr
- Human Rights Council
www2.ohchr.org/english/bodies/hrcouncil
- Universal Periodic Review
www.ohchr.org/EN/HRBodies/UPR
- Review of the “1503” procedure
www2.ohchr.org/english/bodies/chr/complaints.htm
- Special Procedures
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
- Working Group on the issue of human rights and transnational corporations and other business enterprises
www.ohchr.org

⁹¹ 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
 - OHCHR, *Manual of Operations of the Special Procedures of the Human Rights Council*, August 2008
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
 - FIDH, *The Universal Periodic Review Handbook*, August 2009
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	
Instruments monitored by the Committees	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)	
Inter-State Communications	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 CESC Committee	Art. 11-13 CERD Possibility of appointing an <i>ad hoc</i> Conciliation Commission This procedure applies to all CERD State parties		
Individual complaints	Yes The State concerned must have ratified the 1 st Optional ICCPR Protocol	Yes The State concerned must have ratified the CESC Optional Protocol to the ICESCR	Yes The State concerned must have made the Declaration specified in CERD Article 14	Yes The State concerned must have ratified the CEDAW Optional Protocol	
Urgent interim measures in connection with individual complaints	Article 92 Rules of Procedure of ICCPR	Art. 5 CESC Protocol	Article 94 Rules of Procedure of CERD Committee	Article 63 Rules of Procedure of CEDAW Committee	
Inquiries and visits	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	
	Yes The State concerned must have made the Declaration specified in CAT Article 22	No* This committee cannot consider complaints from individuals	Yes The State concerned must have ratified the CRPD Optional Protocol	Yes (on entry into force) For this committee to be able to consider individual complaints, 10 State parties must have accepted the procedure (CMW Article 77)	Yes 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 housing 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 extrajudicial, summary or arbitrary executions	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 extreme poverty	Mr. Philip Alston, Australia, (since 2014)	Not specifically mentioned	Yes	Yes A/HRC/RES/8/11 , §6.	E-mail: ieextremepoverty@ohchr.org	
Special Rapporteur on the right to food	Ms. Hilal, Elver, Turkey, (since 2013)	- Urgent appeals - Allegation Letters	Yes	Yes A/HRC/7/L.6/Rev.1 , § 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>A/HRC/4/18 Annex 1 Basic principles and guidelines on development-based evictions and displacement.</p> <p>A/69/274 (Report to GA 2014) § 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 regulate businesses to ensure that their actions are consistent with this right.</p>	<p>http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx</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 : Congress should adopt legislation that comprehensively provides criminal jurisdiction over all private contractors and civilian employees, including those working for intelligence agencies.</p> <p>A/65/321 (Report 2010) § 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>http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx</p>
	<p>A/63/274 (Report 2008) “§ 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>http://www.ohchr.org/EN/Issues/Poverty/Pages/SRExtremePovertyIndex.aspx</p>
	<p>A/HRC/RES/7/14 (2008) § 13. <i>Requests</i> all States and private actors, as well as international organisations within their respective mandates, to take fully into account the need to promote the effective realization of the right to food for all.</p> <p>A/HRC/10/5 Add. 2 – Mission to WTO (2009) § 46. In the medium to long term, a multilateral framework may have to be established to ensure a more adequate control of transnational corporations.</p> <p>A/HRC/13/33 (report 2009) Agribusiness and the right to food - the role of commodity buyers, food processors and retailers in the realization of the right to food. Contains recommendations towards private sector.</p> <p>A/65/223 (Report 2010) §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>http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx</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 health	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 human rights defenders	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 indigenous people	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>A/63/263 (in report to GA 2008) Human rights guidelines to pharmaceutical companies in relation to access to medicines, former Special Rapporteur Paul Hunt.</p> <p>A/69/299 69(b) (Report to GA 2014) 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>http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx</p>
	<p>A/68/262 (Report to GA 2013) 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>www2.ohchr.org/english/issues/defenders</p>
	<p>A/HRC/24/41 (Report to HRC 2013) 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>A/HCR/15/37 (Report 2010) 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>http://www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/SRIPeoplesIndex.aspx</p>
	<p>A/63/325 (Report 2010) 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>A/68/339 (Report to GA 2013) 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>A/HRC/27/50 (Report to HRC 2014) The SR reiterates the need for effective regulation of the activities of private military and/or security companies.</p>	<p>http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/WGMercenariesIndex.aspx</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, E/CN/4/RES/2005/47, §16	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, A/HRC/RES/9/1, §5B	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>A/HRC/20/24 (Report to HRC 2012) 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>A/HRC/26/35/Add.1 (Report 2014, Add.1 Mission to Qatar) § 75-77 are devoted to the responsibilities of the private sector.</p>	<p>www.ohchr.org/english/issues/torture/rapporteur/index.htm</p>
<p>A/HRC/12/21 (report 2009) 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>A/HRC/30/35 (Report to HRC 2015) The reports looks at states and business' responsibilities for preventing, mitigating and redressing contemporary forms of slavery in supply chains.</p>	<p>www.ohchr.org/english/issues/slavery/rapporteur/index.htm</p>
<p>Preliminary findings on the Mission to Papua New Guinea (25 mai 2010).</p> <p>A/HRC/28/68 (Report to HRC 2015) 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>www.ohchr.org/english/issues/torture/rapporteur/index.htm</p>
<p>A/HRC/RES/21/17 (2012) 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>A/HRC/24/39/Add.1 (Report 2013, Mission to Hungary) The report touches on the liability of private actors for environmental damage.</p> <p>A/HRC/21/48 (Report to HRC 2012) 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>www.ohchr.org/english/issues/trans_corporations/index.htm and www.business-humanrights.org/SpecialRepPortal/Home (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 trafficking in persons , 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 safe drinking water and sanitation	Mr. Léo Heller, Brazil, (since 2014)	Not specifically mentioned	Yes	Yes A/HRC/17/L.17/Rev.1	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 violence against women , 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>A/70/260, (Report to GA 2015) http://www.un.org The SR looks at the role of non-State actors in due diligence on trafficking in persons.</p> <p>A/67/261 (Report to GA 2012) http://daccess-dds-ny.un.org This report looks at the corporate responsibilities to prevent and combat human trafficking in supply chains.</p>	<p>http://www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx</p>
<p>See the Working Group's reports http://www.ohchr.org</p>	<p>http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx</p>
<p>A/HRC/27/55 (Report to HRC 2014) http://daccess-dds-ny.un.org 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>A/HRC/15/31 (Report to HRC 2010) http://daccess-dds-ny.un.org This report focuses on human rights obligations related to non-state service provision in water and sanitation.</p>	<p>http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx</p>
<p>A/HRC/11/6 (report 2009) “§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>A/HRC/14/L.9/Rev.1 (Report 2010) §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>A/ HRC/17/26 (Report 2011) §§ 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>A/ HRC/17/26/Add.5 (Report 2011) 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>http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx</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>A/HRC/29/25 (Report to HRC 2015) http://www.ohchr.org 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>A/70/266 (Report to GA 2015) http://freeassembly.net 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>http://www.ohchr.org/EN/Issues/AssemblyAssociation/Pages/SRFreedomAssemblyAssociationIndex.aspx</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 to submit an individual complaint; for other purposes, use the other ones as referred to in the table below (for instance, 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

PART II

ILO Mechanisms

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.⁹² 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

⁹² 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.⁹³

⁹³ ILO, Table of ratifications of the fundamental conventions, 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"> - Right for workers and employers to establish and join organisations of their own choosing without previous authorization - Right to organize freely and not liable to be dissolved or suspended by administrative authority - Right to establish and join federation and confederation
	Right to Organize and Collective bargaining Convention, 1949 (n°98)	<ul style="list-style-type: none"> - Right to adequate protection against acts of anti-union discrimination - 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 - Right to collective bargaining
Elimination of forced labour and compulsory labour	Forced Labour Convention, 1930 (n°29)	<ul style="list-style-type: none"> - 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 - Protocol to the Forced Labour Convention, 2014
	Abolition of Forced Labour Convention, 1957 (n°105)	<ul style="list-style-type: none"> - Prohibition of forced or compulsory labour as a means of political coercion or education
Abolition of child labour	Minimum Age Convention, 1973 (n°138)	<ul style="list-style-type: none"> - Minimum age for admission to employment or work at 15 years - Minimum age for hazardous work at 18
	Worst Forms of Child Labour Convention, 1999 (n°182)	<ul style="list-style-type: none"> - Elimination of the worst forms of child labour, including all forms of slavery or practices similar to slavery
Elimination of discrimination in respect of employment and occupation	Equal Remuneration Convention, 1951 (n°100)	<ul style="list-style-type: none"> - Right to equal remuneration for men and women workers for work of equal value
	Discrimination (Employment and Occupation) Convention, 1958 (n°111)	<ul style="list-style-type: none"> - Equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in these fields - Elimination of discrimination in relation to access to vocational training, access to employment and to particular occupations, and terms and conditions of employment

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.⁹⁴

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”.⁹⁵

No article 26 complaints (see section on Article 26 below) have been filed with the ILO under Conventions Nos. 107 or 169.⁹⁶ However, the Convention has been the subject of several representations.⁹⁷

➔ 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,

⁹⁴ ILO, *Subjects covered by International Labour Standards*, www.ilo.org

⁹⁵ ILO, *Indigenous and tribal peoples*, www.ilo.org

⁹⁶ ILO, *ILO Website on Indigenous and tribal peoples: standards and supervision*, www.ilo.org

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

political organisation and internal forms of exerting authority.⁹⁸ 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.⁹⁹

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.¹⁰⁰ The Declaration sets out principles that governments, employers' and workers' organisations and multinational enterprises are recommended to observe on a **voluntary basis**.¹⁰¹

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**.¹⁰² 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

⁹⁸ 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.

⁹⁹ *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

¹⁰⁰ 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*, 4th edition, 2006.

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

¹⁰² 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.¹⁰³

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”.¹⁰⁴

¹⁰³ *Special procedures for the examination in the International Labour Organisation of complaints alleging violations of freedom of association - Annex 1*, § 35, <http://www.ilo.org>

¹⁰⁴ *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”.¹⁰⁵ 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

¹⁰⁵ *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.¹⁰⁶

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”.¹⁰⁷ 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,¹⁰⁸ complaints can also be filed with the United Nations, which will forward to the Economic and Social Council to the ILO.¹⁰⁹ 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;

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

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

¹⁰⁸ 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/realm/country.htm. UN, “United Nations Member States”, www.un.org/members/list.shtml

¹⁰⁹ 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.¹¹⁰

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.¹¹¹

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 website¹¹². 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.¹¹³ 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.¹¹⁴

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

¹¹¹ B. Vacotto, *op. cit.*

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

¹¹³ 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

¹¹⁴ ILO, "Mission to Fiji aborted", Press release, 12 September 2009, 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.¹¹⁵

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 1950.¹¹⁶ 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.

¹¹⁵ 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.

¹¹⁶ ILO, *Reports of the Fact-Finding and Conciliation Commissions on Freedom of Association*, 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.¹¹⁷

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",¹¹⁸ 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.¹¹⁹

➔ 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)¹²⁰

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."¹²¹

¹¹⁷ Informe definitivo - Informe núm. 337, Junio 2005. Caso núm. 2389 (Perú), 8 September 2004, www.ilo.org.

¹¹⁸ 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).

¹¹⁹ *Ibid.*

¹²⁰ 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)

¹²¹ For more information about other cases see, International Labour Office, 333rd Report of the Committee on Freedom of Association, 289th 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.

* * *

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

* * *

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".¹²² Overall, 170 representations have been submitted to date.¹²³

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.¹²⁴

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;

¹²² ILO, *Representations*, www.ilo.org/global/standards

¹²³ ILO, Normlex, *Representations* (Art 24), www.ilo.org/dyn/normlex

¹²⁴ 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.¹²⁵

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".¹²⁶

➔ 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".

¹²⁵ *Ibid.*

¹²⁶ *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.¹²⁷

➔ **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.

¹²⁷ 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.¹²⁸

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.¹²⁹

¹²⁸ B. Vacotto, *op. cit.*

¹²⁹ *Representation (article 24) - QATAR - C029 - (Lodged: 2013 - Report: 2014)*, International Trade Union Confederation, Building and Wood Workers' International, 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”.¹³⁰ “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”.¹³¹

So far around 30 complaints have been filed and 13 complaints lodged have led to the establishment of Commissions.¹³² 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?¹³³

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 employers¹³⁴
- The Governing Body of the ILO

¹³⁰ ILO, “Complaints”, www.ilo.org/global/standards

¹³¹ ILO, “Complaints”, *op. cit.*

¹³² ILO, NormLex, Complaints/Commissions of Inquiry (Art 26), www.ilo.org/dyn/normlex

¹³³ ILO, “Complaints”, *op. cit.*

¹³⁴ 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

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.¹³⁵ Unions can also file a request as delegates to the International Labour Conference.

② Process and outcome¹³⁶

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.¹³⁷

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.¹³⁸ Article 33 has been used only once – in 2002, against Myanmar/Burma.¹³⁹

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.¹⁴⁰

¹³⁵ B. Vacotto, *op. cit.*

¹³⁶ ILO, *Constitution, op. cit.*, art. 26-34.

¹³⁷ ILO, *Constitution, op. cit.*, art. 29, 31.

¹³⁸ *Ibid.*, art. 33.

¹³⁹ ILO, “Complaints”, *op. cit.*

¹⁴⁰ B. Vacotto, *op. cit.*

Commissions of Inquiry in action

➔ Case of forced labour in Myanmar/Burma¹⁴¹

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".¹⁴² 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".¹⁴³

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

¹⁴¹ ILO, *Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 89th Session, Report I (B), 2001, p. 45, 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.

¹⁴² *Ibid.*, Part IV: Examination of the case by the Commission.

¹⁴³ *Ibid.*

against those who exact forced labour.¹⁴⁴ 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”.¹⁴⁵

In February 2007, the ILO concluded a supplementary understanding¹⁴⁶ 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”.¹⁴⁷

➔ Case of Violation of Freedom of Association in Zimbabwe

Through a statement addressed to the 97th Session of the International Labour Conference during its 16th 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.

¹⁴⁴ *Ibid.*, Part V, Conclusions and recommendations.

¹⁴⁵ Communication and Public Information, “ILO Governing Body Concludes 279th 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

¹⁴⁶ Supplementary Understanding between the Government of the Union of Myanmar and the International Labour Office (2007), www.ilo.org.

¹⁴⁷ ILO, “Office of the ILO Liaison Officer: Yangon”, 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.”¹⁴⁸

¹⁴⁸ 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.

* * *

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.¹⁴⁹ 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?¹⁵⁰

- 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.

¹⁴⁹ B. Vacotto, *op. cited.*

¹⁵⁰ B. Vacotto, *op. cited.*

– Address:

4 route des Morillons
CH-1211 Genève 22
Switzerland
Email: 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
-

* * *

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.

ADDITIONAL RESOURCES

Useful websites

- **List of ratifications of ILO conventions:** www.ilo.org/dyn/normlex/en
- **Table of ratifications of the fundamental conventions:** 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
- **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
- **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

- **International Trade Union Confederation (ITUC), “ILO complaints”**: 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
 - **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
-

➤ 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

CHAPTER I

The European System of Human Rights

A. European Court of Human Rights

B. European Social Charter

* * *

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).¹⁵¹ 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

¹⁵¹ 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.¹⁵² 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).¹⁵³ 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,"¹⁵⁴ 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 Europe¹⁵⁵, whose own jurisdiction is principally limited to their own territory.¹⁵⁶ The Court cannot initiate cases on its own motion, and only hear cases upon receipt of individual or inter-State applications.¹⁵⁷ The European Union is to become the 48th contracting party to the Convention, but this is not expected to happen anytime soon

¹⁵² 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>

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

¹⁵⁴ 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.

¹⁵⁵ 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.

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

¹⁵⁷ CoE, *The ECHR in 50 Questions*, question 18, www.echr.coe.int

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

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 website¹⁵⁹ 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.¹⁶⁰

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

¹⁵⁸ 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>.

¹⁵⁹ European Court of Human Rights, www.echr.coe.int

¹⁶⁰ 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:¹⁶¹

- 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?¹⁶²

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”.¹⁶³ 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.

¹⁶¹ CoE, “Human Rights” (Conventions and Protocols only), www.coe.int

¹⁶² CoE, Conventions, Full list, Chart of signatures and ratifications of Treaty, www.coe.int

¹⁶³ 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**”.¹⁶⁴ 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.¹⁶⁵ 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

¹⁶⁴ *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”.

¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷

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.¹⁶⁸

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.¹⁶⁹ After underscoring the importance of the **territorial principle**, meaning that “a State’s jurisdictional competence under Article 1 is primarily territorial”,¹⁷⁰ 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.¹⁷¹

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

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

¹⁶⁷ 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

¹⁶⁸ 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”.

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

¹⁷⁰ *Al-Skeini*, § 131

¹⁷¹ *Id.* § 132

¹⁷² *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”.¹⁷³ 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.”**¹⁷⁴ The Court does not have competence to examine questions of jurisdiction in cases where States are acting under a UN mandate.¹⁷⁵

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.¹⁷⁶ 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.”¹⁷⁷ 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.¹⁷⁸

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

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

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

¹⁷⁵ 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).

¹⁷⁶ *Al-Skeini*, § 133-137

¹⁷⁷ *Id.* § 134

¹⁷⁸ *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”.¹⁷⁹ “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)**¹⁸⁰

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.**¹⁸¹

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).

¹⁷⁹ *Al-Skeini, op. cit.* § 136

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

¹⁸¹ *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.¹⁸²

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.¹⁸³

🕒 Under what conditions?¹⁸⁴

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.¹⁸⁵

¹⁸² 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>

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

¹⁸⁴ ECHR, *Practical Guide on Admissibility Criteria*, 2014, www.echr.coe.int

¹⁸⁵ 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.¹⁸⁶ 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 complaints¹⁸⁷ and must offer reasonable prospects of success in order to be considered both effective and available.¹⁸⁸ 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.¹⁸⁹ 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

¹⁸⁶ 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).

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

¹⁸⁸ 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”.

¹⁸⁹ 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.¹⁹⁰

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:¹⁹¹ 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**¹⁹²”. 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”.¹⁹³

- 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.

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

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

¹⁹² 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.

¹⁹³ 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.¹⁹⁴ 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.**

¹⁹⁴ ECHR, “Apply to the Court”, “Application form”; www.echr.coe.int. For more information on applications see 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”.

Process and outcome

*Process*¹⁹⁵

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.

¹⁹⁵ ECHR, “How the Court Works”, “Case processing”, 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**¹⁹⁶.

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.

¹⁹⁶ 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

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**.¹⁹⁷ 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.¹⁹⁸

¹⁹⁷ 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.

¹⁹⁸ ECHR, “Applicants” and “Apply to the court”, 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.¹⁹⁹

➔ **Lopez Ostra v. Spain**²⁰⁰

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”.²⁰¹

¹⁹⁹ 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).

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

²⁰¹ *Ibid.*, § 51-58.

➔ **Fadeyeva v. Russia**²⁰²

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**”.²⁰³ 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.²⁰⁴

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”.²⁰⁵

➔ **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.

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

²⁰³ *Ibid.*, §89.

²⁰⁴ *Ibid.*, §134.

²⁰⁵ 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 2012.²⁰⁶ 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 1961.²⁰⁷ 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.²⁰⁸

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.

²⁰⁶ ECHR, “Analysis of Statistics 2013”, January 2014

²⁰⁷ CoE, *European Social Charter*, adopted on 18 October 1961, revised on 3 May 1996, entered into force on 1 July 1999, www.coe.int

²⁰⁸ 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.²⁰⁹ 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.²¹⁰

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.²¹¹

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.²¹² 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.²¹³ 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.²¹⁴ 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

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

212 See *The Reporting Procedure*, European Social Charter, on www.coe.int

213 The calendar for the reporting system can be found on www.coe.int

214 See CoE, Committee of Ministers, About the CM, www.coe.int

to life. The Committee found several states in breach of the charter in relation to fatal accidents at work.²¹⁵ The Committee held that, in certain countries,²¹⁶ “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”,²¹⁷ with indications of widespread under-reporting and even concealment of workplace accidents and injuries. In some countries,²¹⁸ 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”**.²¹⁹ 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*.²²⁰

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)

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

²¹⁶ Bulgaria, Lithuania, Republic of Moldova, Romania, the Russian Federation, Turkey and Ukraine

²¹⁷ Albania and Republic of Moldova

²¹⁸ Albania, Republic of Moldova, and Ukraine

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

²²⁰ 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?²²¹

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;²²²
- 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

²²¹ CoE, *Organisations entitled to lodge complaints with the Committee*, www.coe.int

²²² For the list on INGOs entitled to submit collective complaints as of 1 July 2014, see 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.

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

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”.²²³ These recommendations are available on the Committee of Ministers website.²²⁴

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.²²⁵

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

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

²²⁴ CoE, *Committee of Ministers Adopted Texts*, www.coe.int/t/cm/adoptedTexts_en.asp

²²⁵ 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.”²²⁶
- Greece “is in breach of its obligation to monitor the enforcement of regulations on health and safety at work properly.”²²⁷
- The Greek government “has taken no subsequent steps to enforce the right embodied in Article 2§4.”²²⁸

➔ FIDH v. Greece (2013)²²⁹

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.²³⁰

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**.

* * *

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

²²⁷ *Ibid.*, (iii).

²²⁸ *Ibid.*, (iv).

²²⁹ *International Federation for Human Rights (FIDH) v. Greece*, Complaint No. 72/2011, www.coe.int

²³⁰ 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. See also 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.

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/
- For application procedures, see ECHR’s website, 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
 - 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/
- Online tutorial for applicants explaining how to correctly fill in the application form: www.youtube.com/user/EuropeanCourt

On the European Social Charter:

- CoE, Rules of the European Committee of Social Rights, adopted on 29th March 2004, most recently amended by the Committee on 6 December 2013: 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
 - CoE, “List of complaints and state of procedure” 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,²³¹ 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.²³² 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.

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

²³² *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.**²³³ 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.²³⁴
- **The Charter on the Rights and Welfare of the Child.**²³⁵ 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 Child²³⁶ 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).²³⁷ 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

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

²³⁴ 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

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

²³⁶ AU, “African Committee of Experts on the Rights and Welfare of the Child”, www.africa-union.org/child

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

resolutions,²³⁸ 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 rights²³⁹.

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)

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

²³⁹ 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 guidelines²⁴⁰ 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 Kenya²⁴¹

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.²⁴² 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 complainants²⁴³. 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

²⁴⁰ 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>

²⁴¹ ACHPR, *Centre for Minority Rights Development and MRG on behalf of Endorois Community v. the Republic of Kenya*, Communication No. 176/2003, 4th 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

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

²⁴³ See case description ESCR-Net, www.escr-net.org/node/365690

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

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.²⁴⁵ 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 54th session, the ACHPR issued a new resolution²⁴⁶ affirming the need for Kenya to demonstrate tangible implementation progress.²⁴⁷ 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**.²⁴⁸ 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)

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

²⁴⁵ 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

²⁴⁶ ACHPR/Res.257 (LIV)

²⁴⁷ ESCR-Net, *Implementing the ACHPR’s ruling on the Endorois case*, 2 October 2014, accessible on ESCR-Net’s website www.escr-net.org

²⁴⁸ 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?²⁴⁹

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.²⁵⁰ 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.²⁵¹ 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.²⁵² 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

²⁴⁹ 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

²⁵⁰ 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.

²⁵¹ Chapter II of Part I develops on the duties of individuals. See Articles 27, 28 and 29 of the African Charter.
²⁵² *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”²⁵³ 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.²⁵⁴

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.²⁵⁵

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.²⁵⁶
- If the matter has not already been settled by another international human rights body (art. 56(7)).

²⁵³ 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*, 9th ordinary session, Banjul, 25-29 June, § 63.

²⁵⁴ *Ibid.*

²⁵⁵ SAIFAC, *op. cit.*

²⁵⁶ 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.

HOW TO FILE A COMMUNICATION?

FIDH and partner organisations produced a manual to file communications before the Commission.²⁵⁷

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.²⁵⁸ 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

²⁵⁷ *Ibid*

²⁵⁸ 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

For additional information on how to submit a communication, see: 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

① Process and outcome²⁵⁹

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.²⁶⁰ Communications sent to the Commission should therefore indicate if the victim’s life, personal integrity or health are in imminent danger.

²⁵⁹ ACHPR, *Communications procedure*, www.achpr.org

²⁶⁰ ACHPR, *Rules of procedure*, Rule 98, 2010, 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.

RAPORTEURS & 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.²⁶¹ They may then decide to take action, for example by sending a diplomatic letter to a Member State or by transmitting urgent appeals.²⁶² In 2011 the Commission

²⁶¹ ACHPR, *Communications procedure*, Information Sheet No.3, www.achpr.org

²⁶² 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.²⁶³

The Commission in action in corporate-related human rights abuses

➔ The case of Shell in Nigeria²⁶⁴

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,²⁶⁵ the UN Sub-Commission on prevention and discrimination of Minorities resolution 1994/8 and the Universal Declaration on the Eradication of Hunger and Malnutrition.

²⁶³ ACHPR, *Working Group on Communications*, www.achpr.org

²⁶⁴ ACHPR, Re: Communication 155/96, 27 May 2002, ACHPR/COMM/A044/1, www.cesr.org

²⁶⁵ 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".²⁶⁶

* * *

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.

²⁶⁶ International Crisis Group, *Nigeria: Ogoni Land after Shell, Africa Briefing n°54*, 18 September 2008, 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' Rights²⁶⁷ 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 2013.²⁶⁸

As of March 2016, 24 States have ratified the Protocol,²⁶⁹ and 7 States have made a declaration accepting the Court's competence to receive applications from individuals or NGOs.²⁷⁰ 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.²⁷¹

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**.²⁷²

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

²⁶⁷ *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.

²⁶⁸ 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.

²⁶⁹ 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

²⁷⁰ As of 2015, seven countries had made such a declaration, namely Benin, Burkina Faso, Cote d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania.

²⁷¹ 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.

²⁷² 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

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."²⁷³

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 Policy²⁷⁴ 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.²⁷⁵ 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.**"²⁷⁶

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.

²⁷³ Press release, *Judgement in the matter of late Norbert Zongo and others v. Burkina Faso*, available at www.african-court.org

²⁷⁴ African Court on Human and Peoples' Rights (ACtHPR), *Legal Aid Policy for the African Court on Human and Peoples' Rights*, www.african-court.org.

²⁷⁵ ACtHPR, Legal Aid Policy, www.african-court.org/en/index.php/54-legal-aid/579-legal-aid-policy

²⁷⁶ 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.²⁷⁷ As of 2015, seven states have made such a declaration.²⁷⁸

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).

²⁷⁷ 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.

²⁷⁸ 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.²⁷⁹

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.

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;

²⁷⁹ 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/

- 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
- See also: African Court, “Lodging Complaints” 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.²⁸⁰

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);
- Judgement²⁸¹ (art. 3, 5, 6, and 7 of the Protocol)

²⁸⁰ Phases of proceedings, Rule 27.

²⁸¹ 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”.²⁸²

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

²⁸² Order of Provisional Measures, Application no.006/2012, available at 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

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).

* * *

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.

HOW TO FILE A COMPLAINT?²⁸³

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)

²⁸³ 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**²⁸⁴

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.²⁸⁵ 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”.²⁸⁶

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.

²⁸⁴ *Serap vs. Federal Republic of Nigeria*, Case, Ecowas, ECW/CCJ/JUD/18/12, available at www.courte-cowas.org

²⁸⁵ *Socio-Economic Rights and Accountability Project (SERAP) v. Nigeria*, Case No. ECW/CCJ/APP/08/09, Judgment, (Dec. 14, 2012)

²⁸⁶ *Serap vs. Federal Republic of Nigeria*, Case, Ecowas, ECW/CCJ/JUD/18/12, available at 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

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**²⁸⁷

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 law²⁸⁸, 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 &*

²⁸⁷ 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

²⁸⁸ *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.”²⁸⁹

HOW TO FILE A COMPLAINT?²⁹⁰

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.

²⁸⁹ 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

²⁹⁰ 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**²⁹¹

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”.²⁹² 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.²⁹³

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.**

²⁹¹ 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.

²⁹² 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.

²⁹³ 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
- African Commission on Human and Peoples' Rights
www.achpr.org
- Case law on the African Commission (ESCR-NET)
www.escr-net.org/caselaw
- African Court on Human and Peoples' Rights
www.african-court.org
- Coalition for an Effective African Court on Human and Peoples' Rights
www.africancourtcoalition.org
- Information on the mechanisms in Africa for the protection of human rights:
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
- M. Evans, R. Murray, *The African Charter on Human and Peoples' Rights*, Cambridge University Press, Cambridge, Second Edition, 2008
- African Commission on Human and Peoples' Rights & Centre for Human Rights (University of Pretoria), *Celebrating the African Charter at 30: A Guide to the African Human Rights*

System, available at: 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

– Tribunal of SADC

www.sadc.int/tribunal/index.php

– EACJ Court of Justice

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

– AICT (African International Courts and Tribunals)

www.aict-ctia.org

– SAFLII (Southern African Legal Information Institute), Regional Courts of Justice

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

– 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



➤ 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

* * *

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”²⁹⁴.

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”.

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 Rights²⁹⁵. **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 particular²⁹⁶:

- 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 businesses²⁹⁷;
- 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

²⁹⁵ OAS, *Charter of the Organisation of American States*, adopted on 1948, lastly revised on 25 September 1997, www.oas.org, Chapter XV, Article 106

²⁹⁶ IACHR, *Rules of Procedure of the Inter-American Commission on Human Rights*, adopted at the 137th regular period of sessions from 28 October to 13 November 2009, and lastly revised at the 147th regular period of sessions from 8 to 22 March 2013, <http://www.oas.org>

²⁹⁷ 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.²⁹⁸ 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

²⁹⁸ 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 127th 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 Man²⁹⁹

- 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 not³⁰⁰ 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.³⁰¹ 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”.³⁰² 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 Commission³⁰³.

²⁹⁹ IACHR, *American Declaration on the Rights and Duties of Man*, adopted in 1948, <http://www.cidh.org>

³⁰⁰ Antigua y Barbuda, Bahamas, Belize, Canada, Guyana, St Kitts & Nevis, St Lucie, St Vincent & Grenadines, USA.

³⁰¹ Globalex, *The Inter-American System of Human Rights: A research Guide*, by Cecilia Cristina Naddeo, September 2010, www.nyulawglobal.org

³⁰² 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.

³⁰³ 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

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”.³⁰⁴ 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.”³⁰⁵ 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.³⁰⁶

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 [...]”³⁰⁷.

³⁰⁴ 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.

³⁰⁵ 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.

³⁰⁶ IACHR, *Guantanamo Bay Precautionary Measures*, 12 March 2002, 41 ILM (2002) 532.

³⁰⁷ 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.³⁰⁸ **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):³⁰⁹

- 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;

³⁰⁸ IACHR, American Convention on Human Rights, *Op. cit.*, article 44

³⁰⁹ 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.
-

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”.

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.³¹⁰ 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.³¹¹ Hearings are subsequently made available via

³¹⁰ IACHR, *Rules of procedure of the Inter-American Commission on Human Rights*, *op.cit.*, Chapter VI.

³¹¹ *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.

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

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/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.³¹² 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

³¹² 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

the legal foundations of States' extraterritorial human rights obligations with regard to corporate accountability.³¹³

In the proceedings of individual petitions, the Commission can also receive support from the Rapporteurs of the Inter-American system.

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.³¹⁴ 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.

³¹³ 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

³¹⁴ 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”.³¹⁵ 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.³¹⁶ 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.³¹⁷ 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.³¹⁸

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.³¹⁹

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).

³¹⁵ IACHR, *Rules of procedure of the Inter-American Commission on Human Rights*, op.cit., Article 25 (1).

³¹⁶ *Ibid.*, Article 25(2).

³¹⁷ *Ibid.*, Article 25(4c).

³¹⁸ *Ibid.*, Article 25(3), (8).

³¹⁹ *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.³²⁰

➤ 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.³²¹

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,³²² 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".³²³

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).

³²⁰ *Ibid*, Article 44(3).

³²¹ 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>

³²² At the time this case was filed, Brazil was not a State Party to the American Convention.

³²³ 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”.³²⁴

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:³²⁵

- 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.³²⁶ 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

³²⁴ IACHR, *Mercedes Julia Huenteao Beroiza et al. v. Chile*, Case No. 4617/02, Report 30/04, March 2004, § 1-2.

³²⁵ *Ibid.*, Chapter III.

³²⁶ 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.³²⁷

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.³²⁸

➔ **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.³²⁹

³²⁷ IACHR, *Ngöbe Indigenous Community et al. v. Panama*, Precautionary Measures 56/08, 2009.

³²⁸ Cultural Survival, *Panama does not intend to suspend Dam construction in Ngöbe lands*, 21 July 2009, www.culturalsurvival.org

³²⁹ 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

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.³³⁰

NGOs, including FIDH and its member organisation in Peru,³³¹ 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.³³²

➔ 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.³³³

³³⁰ 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>

³³¹ FIDH, *Informe sobre la situación de La Oroya: cuando la protección de los inversores amenaza los derechos humanos*, May 2013, www.fidh.org

³³² 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>

³³³ 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.³³⁴ 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.³³⁵

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 16th 2015, they issued a statement urging the Brazilian government to respect human rights.³³⁶ The Working Group is expected to present the final report of its visit to Brazil to the Human Rights Council in June 2016.³³⁷

On January 11th 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 2016.³³⁸

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.³³⁹

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.

334 AIDA, Environmental Law for the Americas, *Belo Monte hydro-electric dam*, 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

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

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

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**³⁴⁰

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”.³⁴¹ 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.³⁴² Protests from affected villages continue, notably to reclaim their right to access water.³⁴³

³⁴⁰ IACHR, *Marco Arana, Mirtha Vasquez et al. v. Peru, Precautionary measures*, 2007 paragraph 44 www.cidh.org

³⁴¹ See C.Anima, *op. Cit.*

³⁴² Oxfam America, *Oxfam calls on mining company to respect human rights*, 1 July 2009, www.oxfam-america.org

³⁴³ *Pobladores de 11 caseríos de Cajamarca realizan movilización contra minera Yanacocha*, 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,³⁴⁴ 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.³⁴⁵

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.³⁴⁶

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.

³⁴⁴ 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 85th regular period of session from 16 to 28 November 2009, Article 37, www.cidh.oas.org

³⁴⁵ I/A Court H.R., *Rules of Procedure of the Inter-American Court of Human Rights*, op. cit., Article 44.

³⁴⁶ 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

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.³⁴⁷

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.³⁴⁸

Judgements

➔ **Saramaka People v. Suriname**³⁴⁹

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

³⁴⁷ I/A Court H.R., *Rules of Procedure of the Inter-American Court of Human Rights*, *op.cit.*, Article 27(3).

³⁴⁸ See C. Anicama, *op. cit.*

³⁴⁹ 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.”³⁵⁰

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.”³⁵¹

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”.³⁵² The Court came to the same conclusions regarding the gold mining concessions.³⁵³

In 2007, the government ended logging and mining operations in 9000 square kilometres of Saramaka territory.³⁵⁴

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).³⁵⁵

³⁵⁰ *Ibid.*, § 77.

³⁵¹ *Ibid.*, § 129.

³⁵² *Ibid.*, § 154.

³⁵³ *Ibid.*, §§ 156 & 158.

³⁵⁴ The Goldman Environmental Prize, *Wanze Eduards and S. Hugo Jabini - Suriname Forests*, www.goldmanprize.org/2009/southcentralamerica

³⁵⁵ 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”.³⁵⁶ 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.”³⁵⁷

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.³⁵⁸

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.³⁵⁹

³⁵⁶ IACHR, *Annual Report of the Inter-American Commission on Human Rights 2008*, 2008, Chapter III, § 1133.

³⁵⁷ I/A Court H.R., *Baena-Ricardo et al. v. Panama*, 2 February 2001, Series C No. 72, § 134.

³⁵⁸ ESCR-Net, *Baena Ricardo et al. (270 workers v. Panama)*, www.escr-net.org

³⁵⁹ FIDH, *Carta abierta al Presidente de Panama: Caso Beana Ricardo y otros vs. Panama*, 13 March 2008

➔ **Claude Reyes et al. v. Chile**³⁶⁰

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.³⁶¹

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

³⁶⁰ I/A Court H.R., *Claude Reyes et al. v. Chile*, 19 September 2006, Series C, § 151.

³⁶¹ 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 2003.³⁶²

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).³⁶³

³⁶² FIDH, *Op. cit.*

³⁶³ 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 2014.³⁶⁴

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**³⁶⁵

In this case the Court concluded that Nicaragua had violated the right to judicial protection and to property.³⁶⁶ 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."³⁶⁷

³⁶⁴ *Idem*

³⁶⁵ I/A Court H.R., *Mayagna (Sumo) Awas Tingni community v. Nicaragua*, 31 August 2001, Series C No. 70.

³⁶⁶ See above section 'Commission in action' for the proceeding of the case before the Commission.

³⁶⁷ 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”.³⁶⁸ 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.³⁶⁹ Finally, the Court asked the State to report every six months on measures taken to ensure compliance with their judgement.³⁷⁰

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.”³⁷¹

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.

³⁶⁸ *Ibid.*, §142, b.

³⁶⁹ I/A Court H.R., *The Mayagna (Sumo) Awas Tingni community v. Nicaragua*, *op.cit.*, § 153

³⁷⁰ *Ibid.*, Chapter XII, § 8. 108

³⁷¹ IACHR, *IACHR hails titling of Awas Tingni community lands in Nicaragua*, Press release, no.62/08, www.cidh.oas.org

* * *

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.



➤ Inde, 2013. © FIDH

ADDITIONAL RESOURCES

– **Inter-American Commission on Human Rights**

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

– **Inter-American Human Rights Database**

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

– **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

– **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**



SECTION II

* * *

JUDICIAL MECHANISMS



➤ Bhopal: an environmental industrial catastrophe. A toxic cloud escaping from a chemical plant operated by a subsidiary of Union Carbide Company (USA) led to the death of more than 25 000 people.

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SECTION II

JUDICIAL MECHANISMS

PART I

The Extraterritorial Civil Liability of Multinational Corporations for Human Rights Violations

Presently, it is most common and legally most tenable to seek to hold multinational corporations liable for civil damages through actions pursued at the national level, either in the corporation's country of origin or in its host country.

In countries where the parent companies of multinational corporations are based, a variety of systems have been used over time to prosecute multinationals for their abuses, despite the complexities of their structures and operations. This is an important development because the individuals affected by a multinational's activities often have a low probability of obtaining redress in their own country, the host country of an investment. A lack of political will and insufficient legal capacity among local authorities (i.e., inadequate legislation, poor infrastructure, corruption, lack of legal aid, the politicisation of the judiciary), at times due to pressures intended to attract foreign investment, are common in this area. It is not uncommon for a multinational's implementing local intermediaries (subsidiaries, subcontractors or business partners) to be insolvent or uninsured. Because the parent company often perpetrates the alleged crime, or at least makes decisions that lead to the violation, evidence is often located in the multinational's country of origin or domicile. Numerous obstacles continue to prevent victims from accessing justice, including issues associated with access to information, the costs of legal proceedings, and both substantive and procedural norms.

In this study, we limit ourselves to the examination of three separate legal systems: those of the United States, Canada and the European Union.¹ Beyond the practical

¹ See also Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse - A Comparative Submission Prepared for Prof. John Ruggie, UN SG Special Representative on Business and Human Rights*, 3 November 2008, www.law.ox.ac.uk/opbp. The report examines the legal systems of the following countries: Australia, The Democratic Republic of the Congo, The European Union, France, Germany, India, Malaysia, China, Russia, South Africa, The United Kingdom and The United States. For illustrative purposes, this chapter discusses several decisions by Canadian courts, without analysing specific legislation.

considerations related to the impossibility of conducting an exhaustive study, this limitation is based on three primary factors:

- 1 – The parent companies of multinational corporations are often located in the U.S., Canada and the EU;
- 2 – Over the past decade, the volume of legal proceedings brought by victims anxious to see the recognition of and compensation for their injuries has increased in countries where multinationals are domiciled, and
- 3 – More than those of other countries, these three legal systems have developed specific procedures to hold legal persons liable for acts committed abroad. References to specific cases brought before foreign courts, however, are inserted occasionally in the text.

► NOTE

Courts in other geographic areas have accepted cases against corporations in recent years, and it is anticipated that more cases will be filed against multinationals for human rights abuses in an increasing number of countries. For example, in June 2014, the Thai Supreme Administrative Court accepted a lawsuit filed by 37 Thai villagers against state-owned Electricity Generating Authority of Thailand (EGAT) and four other state bodies for signing of an agreement to purchase power from the Xayaburi Dam in neighbouring Laos, which poses a threat to the environment and food security.² Villagers from Thai provinces near the Mekong had petitioned the Administrative Court in August 2012, alleging that the power purchase agreement is illegal both under the Thai Constitution and the 1995 Mekong Agreement, approved without an assessment of the project's environmental and health impacts and without adequate consultations in Thailand.³ In February 2013, the Administrative Court denied jurisdiction to hear the case. Overruling the lower court decision, the Thai Supreme Administrative Court said it had jurisdiction to hear the lawsuit and ordered the five government bodies, against which the lawsuit was brought, to “undertake their duty under the Constitution, laws and resolutions of the [Thai] Government, through the notification and dissemination of appropriate information, adequate hearing and consultation and further environmental, health and social impact assessment for the Xayaburi Dam.”⁴ This is said to be the first case in Thailand to recognize the transboundary impacts of a project being built in a neighboring country, and the first to require a Thai state-owned company building a project overseas to comply with Thai laws.⁵ EGAT is supposed to buy 95 percent of the power from the Xayaburi dam under the agreement, and if the court finds the purchase agreement was approved illegally, it could cancel the agreement altogether.

2 Radio Free Asia, *Thai Court Agrees to Hear Lawsuit over Controversial Xayaburi Dam in Laos*, June 24, 2014, www.rfa.org.

3 Reuters, *Thai court takes villagers' case against power firm, Laos dam*, June 24, 2014, www.thanhnien-news.com.

4 Pianporn Deetes, International Rivers, “Justice for the Mekong – Thai Villagers Back at Court” (June 20, 2014), www.internationalrivers.org/blogs/259-0

5 *Idem*

What are the current methods of seeking compensation through **suing a multinational corporation in a U.S., Canadian, or EU Member State's civil court** when the multinational violates the rights of its employees or the surrounding local community as part of its operations abroad?

Our inquiry looks to private international law as it relates to personal relationships with foreign components. Our situation is therefore subject to the internal regulations of each state. The application of private international law can be examined from two angles:

Jurisdictional conflict

- **International jurisdiction:** In which courts will the matter be considered? Which state will have jurisdiction?
- **Recognition and enforcement of foreign judgements:** This point concerns the recognition and enforcement of foreign judgements issued by the forum court. It involves determining the binding effect and enforceability of a foreign authority's legal decision. Because this guide focuses on ways to file suit against a multinational corporation for human rights violations, the recognition and enforcement of foreign judgements will not be discussed herein.

Conflict of laws:

What law will apply to the case at hand?

The EU has issued several community regulations which standardize the rules governing conflicts of jurisdiction and law within the EU's 28 different legal systems. These EU standards are compulsory and applicable in all Member States immediately upon publication. This study is devoted primarily to these community standards and their application in EU Member States.⁶

⁶ Note that there is one exception. The Rome II regulation does not apply to Denmark.

CHAPTER I

Establishing the Jurisdiction of a US Court and Determining the Law Applicable to the Case

* * *

Under what conditions will a US court recognize jurisdiction?

The primary instrument U.S. courts use to establish their jurisdiction for cases that fall within our inquiry is the **Alien Tort Statute (ATS) of 1789**.⁷

➔ An overview of the Alien Tort Statute

Enacted in 1789 and revived in 1980 for human rights cases and in the landmark case *Filártiga v. Peña-Irala*,⁸ the ATS has become the **central basis** for asserting jurisdiction in most **tort cases** brought in the U.S. against multinational corporations for human rights violations committed abroad.

U.S. federal courts may hear civil cases:

- Introduced by a **foreigner**,
- Introduced by a victim of a **serious violation of the “law of nations”, or customary international law**,⁹
- Which **“touch and concern the territory of the United States” “with sufficient force”** to displace the presumption against extraterritoriality,¹⁰
- In which **the defendant is on U.S. soil when the suit is brought**.

In addition to the *Alien Tort Statute*, the **Torture Victim Protection Act (TVPA)** is another tool which allows U.S. courts to hear cases involving violations of international law committed against private persons.

⁷ The Alien Tort Statute is also known as the “Alien Tort Claims Act” or ATCA. We recommend reading the chapter on the United States in: Pro Bono Publico Oxford, op. cit., p. 303 and following.

⁸ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980)

⁹ First Judiciary Act 1789 (ch. 20, §9(b)), as codified in 28 USC. § 1350: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

¹⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013)

➔ An overview of the Torture Victim Protection Act

Adopted in 1991, the TPVA allows U.S. and foreign nationals to sue in federal court for redress from perpetrators of torture or extrajudicial executions,¹¹ including those carried out outside the U.S. The TPVA does not replace the ATS, but complements it. On the one hand, the TPVA's scope is more limited than that of the ATS because only acts of torture and extrajudicial executions can be litigated under the TPVA. On the other hand, the TPVA extends the scope of the ATS, in that it accords the right to sue not only to foreigners, but to U.S. citizens as well.¹² However, as the U.S. Supreme Court recently clarified, only natural persons are subject to liability under the TPVA.¹³ It can therefore only be used to sue corporate officers, but not corporations.

1. Applying the ATS to private individuals and multinational corporations

The application of the ATS for violations of international human rights law is the culmination of a long process of evolution. In the initial years since its rebirth as a vehicle for bringing human rights cases, the ATS was invoked and applied in situations involving human rights violations committed by persons **acting under color of law** as public officials (see *Filártiga v. Peña-Irala*).¹⁴ The ATS's scope was subsequently extended to cover violations committed by individuals **acting outside any official capacity** (see *Kadić v. Karadžić*).¹⁵ The application of the ATS to tort actions brought in the U.S. **against multinational corporations for violations of human rights committed abroad** is more recent and will be discussed below in detail. (see, e.g., *Wiwa*¹⁶ and *Unocal*¹⁷)

11 Unlike the ATS, which leaves to international law the task of defining the norms, the TPVA defines torture and summary execution.

12 B. Stephens; J. Chomsky; J. Green; P. Hoffman; M. Ratner, *International Human Rights Litigation in U.S. Courts*, 2nd Revised Edition (2008). B. Stephens, "Corporate Accountability : International Human Rights Litigation Against Corporations in U.S. Courts," in M. T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, 2000, p. 210; *Wiwa v. Royal Dutch Petroleum Co*, F.Supp.2d, 2002 WL 319887 (S.D.N.Y., 2002).

13 *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012).

14 *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). See K. Gallagher, "Civil Litigation and Transnational Business: An Alien Tort Statute Primer," 8 *Journal of International Criminal Justice* 745 (2010).

15 *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

16 *Wiwa v. Royal Dutch Petroleum Co*, F.Supp.2d, 2002 WL 319887 (S.D.N.Y., 2002).

17 *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).

➔ **Sosa v. Alvarez-Machain**¹⁸

At the request of the U.S. Drug Enforcement Agency, a group of Mexican nationals took Mexican physician Alvarez-Machain by force on U.S. soil to face trial in U.S. courts. After being found not guilty, Alvarez-Machain brought an ATS lawsuit for arbitrary arrest and detention against Jose Francisco Sosa, one of the alleged Mexican perpetrators of the disputed events. This was **the first time the U.S. Supreme Court heard not only an ATS case, but also a transnational human rights case.**

The Court found that the ATS provides an opportunity for individuals with cause of action for a limited number of international law violations, a right that was previously unrecognized.

The Court subsequently provided a **more precise definition of the law of nations** contained in the ATS, ruling that all actions based upon “a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of 18th century paradigms” may be introduced.¹⁹ At that time, torts included infringement of rights of diplomats and consular officials, safe conduct, and piracy. While being clear that the ATS should be understood to apply to violations in the modern era, the Court remains vague, however, about the content and the specificities of these norms.

The Court clarified that individuals may bring human rights cases under the ATS provided that the violation concerns **universal, obligatory, specific and definable international norm** such as the prohibitions of torture and genocide. In the case at hand, the Court held that arbitrary detention as pled in this case does not violate well-established customary international law and therefore denied cause of action.²⁰

The Court also recognized that individuals could bring ATS action against private actors for violations of international norms. The Court held that it must “consider **whether international law extends the scope of liability** for a violation of a given norm to the **perpetrator being sued**, if the **defendant is a private actor such as a corporation or individual.**”²¹

a) Displacing the presumption against extraterritoriality

In April 2013, the Supreme Court released its decision in *Kiobel v. Royal Dutch Petroleum*, ruling that ATS claims must displace the presumption against extraterritoriality. The presumption is linked to concerns for international comity, that adjudicating a claim could cause “diplomatic strife,” or “international discord.”²²

¹⁸ 542 US 692 (2004)

¹⁹ 542 US at 725

²⁰ 542 US at 732

²¹ 542 U.S. at 732, n.20

²² *Kiobel*, 133 S. Ct. at 1664, 1669

The Court held that “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”²³ The facts of *Kiobel*, in which Nigerian plaintiffs sued U.K. and Dutch parent companies for allegedly abetting the Nigerian government in committing abuses in Nigeria, were insufficient to displace the presumption against extraterritoriality.

How can a claim displace the presumption against extraterritoriality?

In *Kiobel*, the Supreme Court noted that “it would reach too far to say that mere corporate presence” – via a public relations office in New York and listings on the New York Stock Exchange – suffices.²⁴ The Supreme Court did not specify what specific factors would be sufficient to displace the presumption, but suggested that ATS claims should be evaluated on a claim-by-claim basis,²⁵ and that displacing the presumption turns on whether the “claim,” rather than the alleged tortious conduct, sufficiently touches and concerns U.S. territory. This means that courts can and must consider all the facts that give rise to ATS claims, including the parties’ identities, their relationship to the causes of action, and the relationship of the claims to the United States’ territory and interests. In citing *Morrison v. National Australia Bank Ltd.*,²⁶ the Supreme Court explained that courts must inquire about the “focus” or purpose of the statute in determining how to apply the presumption. Accordingly, the historical purpose of the ATS was to provide foreigners with access to a U.S. forum for violations of international law that could be attributed to the U.S., such as violations committed by a U.S. citizen, violations committed on U.S. territory or situations where the U.S. provided “safe harbour” for an international law violation, as well as for violations that occur outside the U.S. such as piracy, must be considered when assessing claims brought under the ATS. Justice Kennedy noted in his concurring opinion that “[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute” and left open the possibility of application of the ATS to “human rights abuses committed abroad.”²⁷

²³ *Kiobel* 133 S. Ct. at 1669

²⁴ *Idem*

²⁵ See *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014)

²⁶ 130 S. Ct. 2869 (2010)

²⁷ *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

Situations where the presumption against extraterritoriality might be displaced include cases in which:

- **the alleged tort occurs on American soil;**²⁸
- **the defendant is an American national;**²⁹
- **significant conduct that contributed to the commission of the violation occurred on U.S. soil;**
- **the defendant's conduct substantially and adversely affects an important American national interest.**³⁰

The Post-Kiobel Landscape

➔ **Al Shimari v. CACI Int'l and CACI Premier Technology, Inc.**

In June 2008, the Center for Constitutional Rights (CCR) filed a civil lawsuit on behalf of four Iraqi former detainees who, had been tortured at Abu Ghraib, against CACI International, Inc. and CACI Premier Technology (CACI), a private contractor that provided interrogators to the U.S. government. In 2004, U.S. military investigators had determined that employees of the company, headquartered in Arlington, Virginia, had participated in torture and other

- 28 All Justices seem to agree that an ATS claim in which the tortious conduct occurred in the U.S. would be able to proceed. Justice Alito, joined by Justice Thomas, filed a separate concurring opinion arguing that this should be the only circumstance in which ATS claims should proceed, but this view was not accepted by the majority.
- 29 We do not know whether the Supreme Court would allow an ATS claim to proceed on the sole basis of the defendant's U.S. citizenship alone. Justice Breyer, joined by Justices Ginsburg, Sotomayor and Kagan indicated that they, at least, would accept a claim on this basis, but we do not know whether additional justices would join them in such a case. The majority opinion distinguished a 1795 opinion by Attorney General William Bradford stating that U.S. courts may have jurisdiction over civil suits arising outside of the U.S. because the case "deal[t] with U.S. citizens." *Kiobel*, 133 S. Ct. at 1668. In determining whether the presumption against extraterritoriality is displaced for other statutes, courts have considered the "focus" of the statute. See *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010). A core historical underpinning of the ATS is to remediate international law violations committed by U.S. subjects. See Brief of Amicus Curiae Professors of Legal History, *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08–CV–00827 (GBL/JFA) 2014 WL 2922840 (Nov. 5, 2013). Furthermore, the presumption aims to avoid international discord, but adjudicating claims against a U.S. corporation would not present a risk of international discord, on the contrary, it would promote international relations. See *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014); *Sexual Minorities Uganda v. Lively*, 960 F.Supp.2d 304, 322–24 (D.Mass. 2013) (holding that *Kiobel* did not bar ATS claims against an American citizen, in part because "[t]his is not a case where a foreign national is being haled into an unfamiliar court to defend himself"). See also Restatement (Third) of Foreign Relations Law of the United States, §402(2) and cmt. e (1987) (recognizing jurisdiction over a state's nationals for activities inside and outside its territory).
- 30 For example, preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring). The U.S. Government has noted that it has an important foreign affairs interest in not harboring torturers or other "enemies of mankind." The U.S. may be faulted for not providing a remedy under U.S. law for torts committed by individuals present in the U.S.. See U.S. Supplemental Brief as Amicus Curiae in *Kiobel*, 2012 WL 2161290 at *19–20. CACI.; Mwani v. Laden "a case involving an attack on the United States Embassy in Nairobi is tied much more closely to our national interests" 947 F.Supp.2d 1 (DDC May 29, 2013).

“sadistic, blatant, and wanton criminal abuses” of detainees at Abu Ghraib. The plaintiffs brought claims of war crimes, torture and cruel, inhuman and degrading treatment, as well as state law claims including assault and battery. The complaint alleged that the plaintiffs were deprived of food and water, sexually assaulted, beaten, forced to witness the rape of another prisoner, and imprisoned under conditions of sensory deprivation. However, in June 2013, a district judge ruled that the Supreme Court decision in *Kiobel* foreclosed claims arising outside the United States, and therefore dismissed the case because he found the violations all occurred in Iraq.³¹ The plaintiffs filed an appeal with the Fourth Circuit Court of Appeals in October 2013.³² In June 2014, the Fourth Circuit Court of Appeals reversed and vacated the district court’s decision and remanded the plaintiffs’ claims for further proceedings.

The Fourth Circuit Court of Appeals found that the Supreme Court in *Kiobel* had broadly stated that the “claims,” rather than the alleged tortious conduct, must “touch and concern” the United States, “suggesting that courts must consider all the facts that give rise to ATS claims, including the parties’ identities and their relationship to the causes of action.”³³ Because plaintiffs aimed to enforce the customary law of nations “recognized by other nations as being actionable,” and because “defendants are United States citizens,” the Court concluded that there was no risk of “international discord,” which the presumption of extraterritoriality is meant to avoid.³⁴

The Court of Appeals concluded that the plaintiffs’ ATS claims “touch and concern” the territory of the United States with sufficient force to displace the presumption against extraterritorial application based on a combination of factors: (1) CACI’s status as a United States corporation, (2) the United States citizenship of CACI’s employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI’s contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI’s employees to obtain security clearances from the United States Department of Defense; (4) the allegations that CACI’s managers in the United States gave tacit approval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to “cover up” the misconduct, and “implicitly, if not expressly, encouraged” it; and (5) the expressed intent of Congress, through enactment of the TVPA and the torture statute (18 U.S.C. § 2340A), to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad.

31 *Al Shimari v. CACI Int’l, Inc.*, 951 F. Supp. 2d 857 (E.D. Va. 2013).

32 See Gwynne Skinner, Robert McCorquodale, and Olivier de Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, 2013. Report commissioned by CORE, ECCJ, of which FIDH is a steering group member, and ICAR.

33 *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 527 (4th Cir. 2014).

34 *Al Shimari*, 758 F.3d at 528-30

After this overturn of the lower court's decision to dismiss, the case was sent back to the lower court for judgment on the merits. However, on June 18, 2015, the lower court granted CACI's motion to dismiss the case on the basis that the case presents a « political question » due to the fact that the actions of the company were controlled by the US military, the evaluation of the existence of the alleged violations committed at Abu Ghraib would require assessing sensible elements of the actions of the military. Plaintiffs have appealed the decision, and several amicus brief were submitted by UN Special Rapporteur on Torture Juan Méndez, retired military officers, human rights organizations, former Navy General Counsel Alberto Mora, and survivors of gross human rights violations.³⁵

➔ Sexual Minorities Uganda v. Lively.

On March 14, 2012, CCR, representing Sexual Minorities Uganda (SMUG), a coalition of Ugandan LGBTI organisations, filed suit under the ATS against Abiding Truth Ministries President Scott Lively, for his role in the persecution of the LGBTI community in Uganda. The complaint alleges that the defendant, an American citizen, acting in concert with others through actions taken in both the United States and Uganda, violated the law of nations and conspired to persecute the LGBTI community in Uganda. The defendant worked for over a decade from Massachusetts to support the oppression of gays and lesbians in Uganda, including through legislation imposing the death penalty for homosexuality. In August 2013, a federal judge ruled that persecution on the basis of sexual orientation and gender identity is a crime against humanity and that the case could proceed to discovery. The Court distinguished the case from *Kiobel* because 1) the Defendant was a U.S. citizen, and 2) the conduct partially occurred in the United States, with only infrequent visits to Uganda.³⁶ Since then, parties have been arguing over discovery.³⁷

A number of corporate cases involving U.S. corporations have addressed *Kiobel*'s "touch and concern" requirement. These include *Cardona v. Chiquita*, a case filed in June 2007 on behalf of multiple plaintiffs by NGO EarthRights International with the Colombian Institute of International Law, Cohen Milstein Sellers & Toll PLLC, Paul Hoffman, Judith Brown Chomsky, and other counsel arising out of Chiquita's alleged financing of paramilitary death squads in Colombia. Chiquita is a U.S. company, and there is evidence that Chiquita's board of directors in the United States approved payments to paramilitaries.³⁸ In July 2014, the Eleventh Circuit concluded that the alleged acts of torture perpetrated by a private actor

³⁵ See CCR, Al Shimari v. CACI et al, <http://ccrjustice.org>

³⁶ *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013). Center for Constitutional Rights, *Court Allows Groundbreaking Case Against Anti-Gay Religious Leader to Proceed*, Aug. 14, 2013, <http://ccrjustice.org/newsroom/press-releases/court-allows-groundbreaking-case-against-anti-gay-religious-leader-proceed>; see also: <http://ccrjustice.org/LGBTUganda/>

³⁷ For more information on the procedure See : www.gpo.gov

³⁸ Marco Simmons, *What does the Kiobel decision mean for ERI's cases?*, EarthRights International Blog, (Apr. 19, 2013) www.earthrights.org/blog/what-does-kiobel-decision-mean-eris-cases

(rather than by a state) did not satisfy the requirement in *Sosa* of being sufficiently clearly prohibited by customary international law.³⁹ Additionally, while the dissent maintained that relevant conduct – the decisions to fund the paramilitaries and funding of them – occurred within the United States, the Eleventh Circuit rejected that reasoning, holding that “all relevant conduct” took place outside the United States. As the Eleventh Circuit believed neither the specificity nor “touch and concern” requirements were met, it concluded the case should be dismissed. In April 2015, the Supreme Court declined to review the Eleventh Circuit’s decision.⁴⁰

In *Doe v. Nestle*, Malian children forced to work on cocoa fields in Cote d’Ivoire brought a class action against Nestle, Archer Midlands and Cargill. In September 2014, the Ninth Circuit Court of Appeals held that corporations can be held liable under the ATS and granted the plaintiffs leave to amend their complaint in light of the *Kiobel* decision, in order to present allegations that their claims “touch and concern” the territory of the United States with sufficient force to displace the presumption against extraterritoriality.⁴¹ The Court did not resolve the question of the appropriate standard of mens rea for aiding and abetting (see discussion below), but found that in any case, both purpose and knowledge were satisfied by the facts; in finding that “purpose” was established, the court reasoned that because the violation benefitted the defendants the inference could be made that they acted with the purpose to facilitate it.⁴²

Doe v. Drummond involves allegations that Drummond, a U.S.-based coal mining company, provided funding to paramilitaries to drive guerrillas out of the areas of Drummond’s operations in Colombia. The complaint further alleges that Drummond’s collaboration with the paramilitaries brought a surge of paramilitary combatants, and that hundreds were killed as the paramilitaries conducted cleansing operations in these areas. In March 2015, the Eleventh Circuit Court of Appeals concluded the case was properly dismissed, on the grounds that it did not displace the presumption against extraterritoriality.⁴³ The Court found that only more general decisions about funding were made in the United States, and that planning, execution of the crimes, and collaboration with the principals, occurred outside the United States. The Court found that “mere consent” to the violations in the United States did not sufficiently touch and concern the United States, and dismissed the case.

Baloco v. Drummond involves largely the same allegations as those in *Doe v. Drummond*. In September 2014, the Eleventh Circuit Court of Appeals found that the case did not displace the presumption against extraterritoriality. It found that although the Director of U.S. Security for Drummond, a U.S. national, allegedly

39 *Cardona v Chiquita Brands Int’l, Inc.*, 760 F.3d 1185 (11th Cir. 2014)

40 *Cardona v Chiquita Brands Int’l, Inc.*, 135 S. Ct. 1842 (U.S., 2015)

41 *Doe I v. Nestle USA, et al*, 766 F.3d 1013 (9th Cir. 2014). *reh’g en banc denied Doe v. Nestle USA*, 2015 U.S. App. LEXIS 8543 (9th Cir. May 6, 2015).

42 *Doe I v. Nestle*, 766 F.3d at 1024.

43 *Doe v. Drummond Co.*, 782 F.3d 576 (11th Cir. 2015).

participated in meetings in Colombia where the murders of union leaders were discussed, that conduct did not “touch and concern the territory of the United States.”⁴⁴ The Court thus dismissed the ATS claim. The plaintiffs’ petition for review by the Supreme Court was denied in November 2015.

Doe v. Cisco Systems, Inc. is a case in the Northern District of California against Cisco Systems, Inc., a U.S. network technology corporation. The plaintiffs, represented by the Human Rights Law Foundation, are a group of Falun Gong practitioners who allege they were subjected to serious human rights abuses in China through the use of China’s “Golden Shield” project, a network security system used for the widespread censorship and surveillance of Chinese dissidents. Cisco is alleged to have played a central role in the design and implementation of the Golden Shield, despite widespread knowledge that its central purpose is to facilitate the violent persecution of dissident groups. The plaintiffs were detained and severely mistreated for visiting Falun Gong websites, discussing the practice of Falun Gong online, and sharing information about the widespread human rights abuses suffered by Falun Gong practitioners in China. One of the plaintiffs was beaten to death while in custody and another has disappeared. Cisco continues to work with Chinese security officials.⁴⁵ In September 2014, a District Court for the Northern District of California dismissed the plaintiffs’ claims, finding that the claims did not “touch and concern” the United States, as the human rights abuses were not planned, directed, or executed in the United States.⁴⁶ It also held that the fact that the customization and implementation of the Golden Shield system did not support an inference that Cisco systems knew that the human rights abuses would be committed, and thus the requisite mens rea had not been pled. Plaintiffs have appealed to the Ninth Circuit Court of Appeals. *Amicus* briefs were submitted on January 2016 by The Center for Constitutional Rights (FIDH member organisation), the Electronic Frontier Foundation and former U.S. Ambassador-at-Large for War Crimes Issues David Scheffer.⁴⁷

Mastafa v. Chevron Corp., a case against Chevron Corporation and Banque Nationale de Paris Paribas, was dismissed by the Second Circuit Court of Appeals in October 2014. The defendants allegedly provided money to Saddam Hussein’s regime, in violation of customary international law and sanctions, and which financed the torture of their families.⁴⁸ The Second Circuit found that the proper focus of the touch and concern test was whether the relevant conduct – which it defines as the conduct which actually violated the law of nations – occurred within the United States. The Court found this satisfied by the fact that defendants provided money to Hussein’s regime through domestic purchases and financing

⁴⁴ *Baloco v. Drummond Co.*, 767 F.3d 1229, 1235 (11th Cir. 2014).

⁴⁵ See Human Rights Law Foundation, *Doe v. Cisco Systems, Inc.* <http://www.hrlf.net/cisco-case.html>

⁴⁶ *Doe v Cisco Sys.*, 66 F. Supp. 3d 1239 (N.D. Cal. 2014) *reconsideration denied* 2015 U.S. LEXIS 115681 (N.D. Cal. Aug. 31, 2015)

⁴⁷ See : CCR, *Doe v. Cisco Systems, Inc.* (Amicus), 13 January 2016: <https://ccrjustice.org>

⁴⁸ *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014).

in the United States, and payments conducted through an account there. However, the Court found that international law only recognized the *mens rea* of purpose for aiding and abetting liability, and thus the conduct alleged did not constitute a violation of the law of nations.

In *Doe v. Exxon Mobil Corp.*, Exxon Mobil Corporation is alleged to have funded security forces who killed and tortured civilians living nearby Exxon’s facilities in the Aceh Province of Indonesia.⁴⁹ In July 2015, the District Court of the District of Columbia found that in an aiding and abetting case, the decision to provide assistance to the principals touched and concerned the United States, notwithstanding the fact that the actual provisions of assistance occurred outside the United States. The Court also noted that an accepted standard of *mens rea* for aiding and abetting under customary international law and the ATS was knowing that one’s acts assist the crime, rather than having the purpose that they do so. The Court thus found Exxon’s awareness of the security forces’ record of human rights abuses satisfied the knowledge requirement, and the Court found the *Kiobel* test satisfied and refused to dismiss the case. The Court also noted that, apart from the location of the conduct, “important national interests” might “warrant an expansive application of the touch and concern test,” though it found no such interests in the case.⁵⁰

b) Conditions for the application of the ATS to private persons

The decision in *Kadić v. Karadžić* clarified the law governing the ATS’s application to private persons. The outcome of the case is that for some of the most serious human rights violations, private individuals not acting under color of law may be held directly responsible. In other cases, the court must establish a private actor’s *de jure* or *de facto* complicity with a government. Two findings must be established:

- **Direct liability:** The private actor’s complicity with the state need **not** be demonstrated if the acts in question can be considered to be **piracy, slavery, genocide, war crimes, crimes against humanity or forced labour**.⁵¹ Private persons may be sued directly using the ATS.
- **Indirect liability or the state action requirement:** For other violations of international law, private persons must have acted as a state agent or “under color of law”.⁵² Examples include torture, extrajudicial execution, prolonged arbitrary detention, and racial discrimination.

⁴⁹ *Doe v Exxon Mobil Corp.*, 2015 U.S. Dist. LEXIS 91107 (D.D.C. July 6, 2015).

⁵⁰ *Doe v Exxon Mobil Corp.*, 2015 U.S. Dist. LEXIS 91107 at 38.

⁵¹ *Doe v. Unocal*, 2002 U.S. App. LEXIS 19263 (9th Cir. Cal. 2002). This list is not necessarily exhaustive.

⁵² See, e.g., *Kadić v. Karadžić*, 70 F.3d at 239; *Romero v Drummond*, 552 F.3d 1303, 1316-18 (11th Cir. 2008); *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000). On the difficulties related to the state action doctrine, see O. De Schutter, *Fonction de juger et droits fondamentaux. Transformation du contrôle juridictionnel dans les ordres juridiques américain et européens*, Bruylant, Bruxelles, 1999.

In this case, the activities of private persons may violate international law when, in accordance with international law, the person in question has acted **with the complicity of a state** and can be considered a **public agent**. Otherwise, one of the following **alternative criteria** must be met in accordance with national law (case references to these criteria are not uniform):⁵³

- **Public function:** A private person's activities are traditionally state functions,
- **State compulsion:** A private person's activities are imposed by the state,
- **Nexus:** An individual's conduct is strongly interwoven with that of the state such that it renders the individual responsible for the action as if the action had been carried out by the state (the state's involvement in the international law violation must be important),⁵⁴
- **Joint action:** The violation resulted from a significant degree of collaboration between a private person and a public authority,⁵⁵ or
- **Proximate cause:** The private person exercises control over government decisions linked to the commission of violations.⁵⁶

Under the **TPVA**, action may be brought only **against individuals** who have committed acts of torture or extrajudicial executions “under actual or apparent authority, or color of law, of any foreign nation.”⁵⁷ This state action must have been committed by a foreign state or by an official agent of the U.S. government acting under the direction of or in partnership with a foreign government.⁵⁸

⁵³ *Doe v. Unocal*, op. cit., 2002 (International law principals, military tribunal precedents at Nuremberg and Tokyo and the jurisprudence of international criminal tribunals. Dissenting opinion of Judge Reinhart: referencing the criteria for classic responsibility under common law). For more, see R.A. Tyz, “Searching for a corporate liability standard under the Alien Tort Claims Act in *Doe v. Unocal*”, *Oregon Law Review*, 82, summer 2003, p. 572.

⁵⁴ Oxford Pro Bono Publico, op. cit., p. 310.

⁵⁵ See *Wiwa v. Royal Dutch Petroleum Co*, op. cit., 2002; *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal., 1997), p. This theory is based on criteria developed under 42 U.S.C § 1983 which governs liability in suits seeking reparation for constitutional rights breaches (*Dennis v. Sparks*, 449 U.S. 24, 27-28, 101 S. Ct. 183, 186, 66 L. Ed., 2d 185 (1980)).

⁵⁶ *Doe v. Unocal*, op. cit., 2000. R.L. Herz, “Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment”, *Virginia J. Int’l L.*, 2000, 40, p. 559. A.K. Sacharoff, “Multinationals in host countries: can they be held liable under the Alien Tort Claims Act for human rights violations?”, *Brooklyn Journal of International Law*, Vol. 23, p. 943.

⁵⁷ TVPA, 28 U.S.C. § 1350 note § 2(a).

⁵⁸ EarthRights International, *Transnational Litigation Manual for Human Rights and Environmental Cases in United States Courts – A resource for Non-Lawyers*, Rev. Sec. Ed., 2006, p. 26.

c) Applying the ATS for violations committed by multinational corporations

The Second Circuit’s decision in *Kadić v. Karadžić*⁵⁹ **opened the door for filing suit for international law violations by non-state actors**, including those committed by multinational corporations.

Following *Kadić*, and encouraged by *Sosa v. Alvarez-Machain*, numerous foreign victims addressed U.S. courts to obtain redress for human rights violations committed by multinationals through their operations abroad, in which the multinational was either a **perpetrator** or an **accomplice** to the investment’s host government. Among these are companies with headquarters in the United States, including Chevron Texaco, Wal-Mart, ExxonMobil, Shell Oil, Coca-Cola, Southern Peru Copper, Pfizer, Ford, Del Monte, Chiquita, Firestone, Unocal, Union Carbide, Gap, Nike, Citigroup, IBM and General Motors, and other corporations in the United Kingdom, Australia and Canada, including Rio Tinto, Barclays Bank and Talisman Energy.

A minority of federal judges recently questioned the applicability of the ATS to corporations. In 2010, a panel of the Second Circuit Court of Appeals held that the ATS does not confer jurisdiction over claims against corporations in the *Kiobel v. Royal Dutch Petroleum Co* case.⁶⁰ Although the Supreme Court granted *certiorari* on the question of whether corporations could be held liable under the ATS, its decision in the case did not directly address the issue, but implied that corporations may be held liable under the ATS if the presumption against extraterritoriality is displaced, noting that “mere corporate presence” alone was not enough to do so. Since the Second Circuit’s decision in *Kiobel*, the Seventh, Ninth and District of Columbia Courts of Appeal joined the Fifth and Eleventh Circuits in finding that corporations can be sued under the ATS, and since the Supreme Court’s ruling, a district court in New York has done likewise.⁶¹

Both the U.S. federal government and industrial groups have been active in corporate cases via *amicus curiae*,⁶² including in the recent *Kiobel* case before the Supreme Court.⁶³ Faced with the multiplicity of cases against multinational corporations and due to concerns about the cases’ potential interference with the fight against

⁵⁹ *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

⁶⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148 (2d Cir. 2010)

⁶¹ See *Doe v. Nestle*, 738 F.3d 1048 (9th Cir. 2013); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), vacated, 527 Fed.Appx. 7, 7 (D.C. Cir. 2013); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Beanal v. Freeport–McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *In re S. African Apartheid Litig.*, 02 MDL 1499 SAS, 2014 WL 1569423 (S.D.N.Y. Apr. 17, 2014).

⁶² Oxford Pro Bono Publico, op. cit., p 303.

⁶³ Amicus briefs in support of both plaintiffs and defendants, on the questions of corporate liability and extraterritoriality, can be found at: www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/.

terrorism, U.S. foreign policy and overall trade and investment, the State Department under the Bush administration exercised *amicus curiae* in the following case to express its view that the ATS does not grant victims cause of action.

➔ **Corrie v Caterpillar**

Corrie v. Caterpillar was a federal lawsuit filed against Illinois-based Caterpillar, Inc. on behalf of the parents of Rachel Corrie and four Palestinian families whose relatives were killed or injured when Caterpillar bulldozers demolished their homes. Corrie, a 23-year old American human rights defender, was crushed to death by a Caterpillar D9 bulldozer in 2003 as she attempted to defend a Palestinian family's home from being demolished by the Israeli military while the family was inside.

Since 1967, Caterpillar, Inc. has supplied the Israel Defense Forces (IDF) with D9 bulldozers which have been used to demolish Palestinian homes in the Occupied Palestinian Territory, leaving thousands of families homeless. Caterpillar, Inc. has known about the human rights abuses committed with its bulldozers since at least 1989, when human rights groups began publicly condemning the violations. Since 2001, human rights groups have sent over 50,000 letters to Caterpillar, Inc. executives decrying the use of its bulldozers to carry out human rights abuses.

The case alleges that Caterpillar, Inc. aided and abetted war crimes and other serious human rights violations on the grounds that the company provided bulldozers to the Israeli military knowing they would be used unlawfully to demolish homes and endanger civilians in Palestine. In addition to ATS claims, Plaintiffs allege Caterpillar violated the Racketeer Influenced and Corrupt Organisations (RICO) Act, and brought claims of wrongful death, public nuisance, and negligence.

In September 2007, the Ninth Circuit Court of Appeals affirmed the district court's dismissal of the lawsuit under the political question doctrine, ruling that the court did not have jurisdiction to decide the case because Caterpillar's bulldozers were ultimately paid for by the United States Government. Because of the U.S. government's decision to grant military assistance to Israel, any decision regarding whether Caterpillar aided and abetted war crimes would impermissibly intrude upon the executive branch's foreign policy decisions. The Court's reasoning for dismissal is in accord with the position put forward by the United States in its *amicus* brief urging dismissal.⁶⁴ In January 2009 Plaintiffs' petition for panel rehearing and rehearing en banc was denied, rendering the case's dismissal final.

⁶⁴ The U.S. *amicus* brief is available at: https://ccrjustice.org/sites/default/files/assets/us_amicus_brief-AS-FILED.pdf. The United States also argued against aiding and abetting liability for ATS claims.

The Obama Administration has not pursued a policy of active opposition to corporate cases under the ATS, with more of a mixed record.

► NOTE

Determining the **liability of multinational corporations** in the U.S. is a subject of some controversy. The question is whether liability should be guided by the norms of international law or those of U.S. federal law.⁶⁵ One area where this debate has had particular consequences is in relation to **aiding and abetting**. Some courts and judges favoured looking to federal common law for the requisite *mens rea* for aiding and abetting, and concluded that the standard was knowledge.⁶⁶ In recent years, however, courts have looked to internal law to provide the standard. Circuits' standards for the requisite *mens rea* for aiding and abetting liability differ: some hold the accomplice must **know** their actions will further the principal's commission of the violation, and other Circuits require that the accomplice must further have the **purpose** that the principal commit the crime.

Courts that hold the appropriate standard is **purpose** focus on, *inter alia*, the fact that the Rome Statute permits a finding of aiding and abetting liability if the accomplice provides assistance “[f]or the purpose of facilitating the commission” of the crime. Art. 25(3)(c). In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the Second Circuit found that this and one of the Nuremberg trials indicate that customary international law only recognizes claims of aiding abetting liability in which the accomplice not only knew that his actions would assist the perpetrator's commission of the crime, but he specifically intended they would do so.⁶⁷ Subsequent cases in the Second Circuit have applied this requirement; for example in July 2015, the court in *Balintulo v. Ford Motor Co.* held the ATS claim should be dismissed because the requisite *mens rea* was not present.⁶⁸ It found that, in designing vehicles and software for the implementation of apartheid in South Africa, defendants might have known their efforts would further the crimes of the principal, but the defendants did not have the purpose that the principal commit those acts. Other Circuits have adopted the Second Circuit's reasoning.⁶⁹

Other Circuits have focused on extensive jurisprudence of other international tribunals, such as the ICTY and ICTR, which have found that the proper *mens rea* is **knowledge** that the accomplice's actions will further the violations of the

⁶⁵ Oxford Pro Bono Publico, *op. cit.*, p. 311.

⁶⁶ See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 2007 U.S. App. LEXIS 24370 (2d Cir. N.Y. 2007) (Judge Hall concurrence)

⁶⁷ *Presbyterian Church Of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009)

⁶⁸ *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 169 (2d Cir. 2015)

⁶⁹ See, e.g., *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399–400 (4th Cir.2011) (holding that the Fourth Circuit is persuaded by *Talisman*, and adopts a *mens rea* of purpose for aiding and abetting liability).

perpetrator.⁷⁰ In *Doe. v. Exxon*, the District of Columbia Circuit Court of Appeals held that significant jurisprudence from international tribunals supports a *mens rea* of knowledge for aiding and abetting liability.⁷¹ The Court also added that the Rome Statute itself, properly construed permits such liability: in addition to Article 25(3)(c), Article 25(3)(d)(ii) considers the *mens rea* also established when an accomplice provides assistance “in the knowledge of the intention of the group to commit the crime.” Other Circuits also apply a *mens rea* of knowledge for aiding and abetting liability.⁷²

Courts’ approach to the *actus reus* of aiding and abetting liability is more consistent, finding that the standard is providing practical assistance to the principal which has a substantial effect on the perpetration of the crime.⁷³ In *Prosecutor v. Perišić*, the ICTY suggested an additional element of the *actus reus*, that is that the accomplice’s assistance be “specifically directed” towards the commission of the crime.⁷⁴ The Court defined this to mean the establishment of “a culpable link between assistance provided by an accused individual, and the crimes of principal perpetrators.”⁷⁵ It can be anticipated that defendants will argue for a heightened standard for the *actus reus*, and that additional clarifications from Courts of Appeal will be forthcoming.

⁷⁰ The ICTY recently reemphasized that this is the established *mens rea* in the *Prosecutor v. Perišić*, Appeals Chamber Judgment, Case No. IT-04-81-T, 28 Feb., 2013, ¶ 48 (“[T]he Appeals Chamber recalls again that the *mens rea* required to support a conviction for aiding and abetting is knowledge that assistance aids the commission of criminal acts...”). See also, e.g., *Prosecutor v. Sanovic et al.*, Appeals Judgment, Case No. IT-05-087-A, 23 Jan. 2014, ¶ 1649; *Prosecutor v. Popovic*, Appeal Judgment Case No. IT-05-88-A, 30 Jan., 2015, ¶ 1732; *Prosecutor v. Furundžija*, Trial Chamber Judgment, Case No. IT-95-17/1, 10 Dec., 1998, ¶¶ 236, 245; *Prosecutor v. Krstic*, Appeals Judgment, Case No. IT-98-33-A, 19 Apr. 2004, ¶¶ 139–41; *Prosecutor v. Delalic*, Case No. IT-96-21-I, Trial Chamber Judgement, 16 Nov., 1998, ¶¶ 325–29; *Tadic*, Trial Chamber Judgement, Case No. IT-94-1-T, 7 May 1997, ¶¶ 674, 692. ICTR cases hold the same. See, e.g., *Karera v. Prosecutor*, Appeal Judgment, Case No. ICTR-01-74-A, 2 Feb. 2009, ¶ 321; *Prosecutor v. Ntakirutimana*, Appeals Judgment, Case No. ICTR-96-13-I, 13 Dec. 2004, ¶ 501; *Prosecutor v. Musema*, Trial Chamber Judgment, Case No. ICTR-96-13-I, 27 Jan. 2000, ¶¶ 180–82.

⁷¹ *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 37 (D.C. Cir. 2011) vacated, 527 F. App’x 7 (D.C. Cir. 2013). This decision was vacated, and remanded to the District Court to decide the *mens rea* in light of *Prosecutor v. Perišić*, Appeals Chamber Judgment, Case No. IT-04-81-T, 28 Feb., 2013. The D.C. Circuit has not altered its position, and the District Court found the proper *mens rea* standard for aiding and abetting liability was knowledge, and Persic had not altered the determination of liability. *Doe v. Exxon Mobil Corp.*, 2015 U.S. Dist. LEXIS 91107 (D.D.C. July 6, 2015).

⁷² See, e.g., *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005). Still other Circuits have not fully resolved the issue. See, e.g., *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1023 (9th Cir. 2014).

⁷³ See, generally *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1026 (9th Cir. 2014); *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 167 (2d Cir. 2015).

⁷⁴ Appeals Judgement, Case No. IT-04-81-T, 28 Feb., 2013,

⁷⁵ *Idem.*, ¶ 37.

It has been rare for cases against multinationals to proceed to trial.⁷⁶ In some cases, the parties have entered into financial settlement.⁷⁷ The development of the ATS's usage in U.S. courts and the numerous exceptions that may arise during proceedings effectively render the **application of the ATS difficult and unpredictable**.

2. Conditions for bringing action under the ATS

a) *An alien tort victim*

The first material condition for bringing action under the ATS is that the victim of the alleged tort is not a U.S. national. **The ATS may be invoked only by foreigners.**

The practical impact of this restriction, however, is limited because in our scenario the tort is committed by a multinational during its operations abroad, where victims tend to be foreign nationals.

Moreover, **it is not necessary for the victim to exhaust domestic remedies** available in his or her country of residence prior to bringing action under the ATS.⁷⁸ The TPVA, by contrast, does require the exhaustion of domestic remedies.

➔ **Class action lawsuits in the U.S.**

In civil procedure, U.S. courts recognise class action lawsuits. Class action suits can take two forms:

Opt-in: To be part of the class action, each individual must declare his or her intention to participate. This is the case in the U.K. and Québec, for example.

Opt-out: Everyone sharing the defendant's situation is automatically part of the class action, but may opt out with a formal statement. This system is in place in the United States.

In the United States, an individual or group of individuals (both private and legal persons) whose rights have been violated may sue on behalf of an unlimited number of victims in similar circumstances. The court's decision will be binding upon all victims in the same circumstances, whether they are party to the proceedings or not. The aim of the class action process is to address large numbers of related complaints through a single legal action, and to facilitate access to justice for all who suffered similarly. This type of collective action is in the victims' financial interest because it reduces the costs of litigation.

⁷⁶ See *Bowoto v. Chevron* www.earthrights.org; *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D.Fla. 2008) (plaintiffs awarded \$80 million on forced labor claims).

⁷⁷ See *Wiwa v Royal Dutch Petroleum* (<https://ccrjustice.org>); *Doe v. Unocal* (www.earthrights.org); *In re XE Services Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009) (<https://ccrjustice.org>); *Al-Quraishi v Nakhla and L-3 Services* (<https://ccrjustice.org>)

⁷⁸ The Court's response to this question, however, was ambiguous in *Sosa*. *Sosa v Alvarez-Machain, op. cit.*, 2004, cited in Oxford Pro Bono Publico, *op. cit.*, pp. 315-316.

In addition to permitting class action lawsuits, the U.S. legal system provides numerous other advantages, including the discovery procedure and the system of contingency fees. These aspects are discussed briefly in the annex at the end of chapter III.

b) A violation of international law

For the ATS to be applicable, **the harm must have been caused by a violation of international law**, in our case, a violation of international human rights law. Violations of international law which provide a U.S. court with jurisdiction may take two forms:

– A violation of a treaty by which the U.S. is bound

In most cases, the U.S. has refused to recognize the direct applicability of human rights treaties it has signed. Accordingly, few cases cite this basis for jurisdiction.⁷⁹

– A violation of customary international law (the law of nations)

For an international human rights law norm to be characterized as customary international law, it must be **universal, definable and obligatory**.⁸⁰ These norms need not necessarily fall under *jus cogens*. The concept refers to customary practices and principles clearly defined by the international community.⁸¹ The norm is flexible and should be interpreted dynamically.⁸²

A violation of a *jus cogens* norm, however, clearly provides U.S. courts with jurisdiction to hear allegations of the following.⁸³

- Genocide, war crimes, and crimes against humanity,
- Slavery and forced labour,
- Summary execution, torture, and disappearance,
- Cruel, inhuman, and degrading treatment,
- Prolonged arbitrary detention,
- Serious violations of the right to life and personal security, and
- Serious violations of the right to peaceful demonstration.

⁷⁹ B. Stephens and M. Ratner, *op. cit.*, 1996, p. 60.

⁸⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); see also R.L. Herz, *op. cit.*, 2000, p. 556-557; B. Stephens and M. Ratner, *op. cit.*, 1996, p. 52; B. Stephens, *op. cit.*, 2000, p. 405.

⁸¹ *Filartiga v. Peña-Irala*, *op. cit.*, 1980; *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1264 (N.D. Ala. 2003); *Kadić v. Karadžić*, 70 F.3d at 238.

⁸² *Filartiga v. Peña-Irala*, *op. cit.*, 1980, p. 878; *Kadic v. Karadzic*, *op. cit.*, 1995, p. 238; *Beanal v. Freeport-McMoran Inc*, *op. cit.*, 1999; *Doe v. Unocal*, *op. cit.*, 2000, p. 1304; *Wiwa v. Royal Dutch Petroleum Co*, *op. cit.*, 2002; *Presbyterian Church of Sudan v. Talisman Energy, Inc and The Republic of Sudan*, *op. cit.*. See also R.L. Herz, *op. cit.*, p. 558; B. Stephens and M. Ratner, *op. cit.*, 1996, p. 53.

⁸³ *Doe v. Unocal*, *op. cit.*, 2002; *Presbyterian Church of Sudan v. Talisman Energy, Inc and The Republic of Sudan*, *op. cit.*, note 18. See W.S. Dodge, “Which Torts in Violation of the Law of Nations?” *Hasting Int’l & Comp. L. Rev.*, 2000-2001, 24, p. 351; R.L. Herz, *op. cit.*, p. 554.

Environmental abuses **have not been found to constitute violations** of international law under the ATS;⁸⁴ in light of the growing international movement related to climate change and environmental issues, and resulting changes to regulatory frameworks, human rights advocates might consider asking courts to reconsider this finding. For the time being, however, to bolster the admissibility of a complaint, it is more useful to bring action for the human rights violations so often tied to environmental abuses

A case against a U.S. corporation deemed the human rights to freedom of association and collective bargaining defensible under the ATS.⁸⁵ The fate of social rights, however, remains uncertain in the event of suits against non-U.S. firms. Freedom of association and collective bargaining rights still fail to be regarded as part of customary international law, a *sine qua non* for the ATS to be applied.⁸⁶

► NOTE

The Supreme Court's ruling in *Sosa v. Alvarez-Machain* confirms earlier jurisprudence defining international law norms under the ATS as being universal, definable and obligatory. At the same time, the ruling requires federal judges to exercise **great judicial caution in ensuring that violations meet these criteria**.⁸⁷ Prior to accepting jurisdiction, U.S. courts must consider how the practical consequences of hearing a case will impact foreign relations.⁸⁸ In addition, if bringing action under the ATS does not first require the exhaustion of domestic and international remedies, U.S. courts may, according to the Supreme Court, take that fact into consideration before accepting jurisdiction. This is a **prudential** rather than a jurisdictional requirement.

* * *

Meeting the above-mentioned conditions, particularly with regard to violations of customary international law, is not easy. In addition to *Sosa*'s requirements, and those stemming from *Kiobel* (infra), domestic law provides several procedures requiring a link between the case and the forum court.

⁸⁴ *Beanal v. Freeport-McMoran Inc.*, *op. cit.*, 1999, p. 166; *Flores v. Southern Peru Copper Corp.*, 1587224 (S.D.N.Y. 2002).

⁸⁵ *Estate of Rodriguez v. Drummond Co.*, *op. cit.*, 2003.

⁸⁶ For a closer look at this topic, see W.V. Carrington, "Corporate Liability for Violation of Labor Rights Under the Alien Tort Claims Act", www.law.uiowa.edu/journals

⁸⁷ See also E.J. Brav, "Recent Developments – Opening the Courtroom to Non-Citizens : Cautiously Affirming Filartiga for the Alien Tort Statute", *Harvard Int'l L.J.*, 2005, vol. 46, pp. 276 and following.

⁸⁸ *Sosa v. Alvarez-Machain et al.*, *op. cit.*, 2004, p. 2766 and note 21.

c) A procedural requirement: personal jurisdiction

Whether a multinational defendant is headquartered in the U.S. or elsewhere, plaintiffs must establish personal jurisdiction in a U.S. court prior to bringing action under the ATS. This requirement is complex. To fulfil it, plaintiffs must demonstrate that the corporation maintains affiliations “so constant and pervasive as to render it essentially at home in the forum state.”⁸⁹ In January 2014, in *Daimler AG v. Bauman*, the Supreme Court found that sizable sales were not enough to establish jurisdiction over a corporation, when the tortious conduct occurred abroad.

Generally speaking, however, regardless of where the facts of the case took place, U.S. states recognize a court's jurisdiction in the following situations:⁹⁰

- The corporation's headquarters are located **in the state** of the forum court, or
- The company (U.S. or foreign) has its head office in another state but is **conducting ongoing and systematic business** in the forum state.⁹¹

The following fictitious example, taken from a guide published by EarthRights International, illustrates the difficulty of the question:⁹²

Big Oil Inc is a multinational company with headquarters in the United Kingdom. It has two subsidiaries, Big Oil U.S.A and Big Oil Sudan, which operate in the United States and Sudan, respectively. Big Oil Sudan has committed serious violations of international human rights law and the victims seek to bring action in U.S. courts. They have three options:

- 1) **Pursue Big Oil Sudan directly** if the corporation has ties with the U.S. This situation is improbable, however, because Big Oil Inc, the parent company, has likely ensured that its subsidiary in Sudan has no connection to or activity in other jurisdictions.

⁸⁹ *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

⁹⁰ Most states also grant specific jurisdiction where the case relates to a corporation's activities in the forum state, provided the activities are substantial (B. Stephens and M. Ratner, *op. cit.*, 1996, p. 100; *Doe v. Unocal*, 248 F.3d 915 (9th Cir. 2001)).

⁹¹ For individuals, a court's jurisdiction is based on the individual's domicile or residence in the forum state, or on the individual's physical presence, temporary or otherwise, therein. See *Kadic v. Karadzic*, *op. cit.*, 1995, p. 247; B. Stephens and M. Ratner, *op. cit.*, 1996, p. 100; B. Stephens, *op. cit.*, in M.T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, 2000, p. 220; S.M. Hall, S.M. Hall, “Multinational Corporations' Post-Unocal Liabilities for Violations of International Law”, *The Geo. Wash. Int'l L. Rev.*, 2002, 34, p. 408. The above requirement implies that “such contacts are not accidental but rather based upon purposeful availment of the benefits and protection of the forum's law”. U. Mattei and J. Lena, “U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications”, *Hastings Int'l & Comp. L. Rev.*, 2000-2001, 24, p. 389. *Wiwa v. Royal Dutch Petroleum Co*, 226 F.3d 88, 92-93 (2d Cir. 2000), p. 95; See also *Presbyterian Church of Sudan v. Talisman Energy, Inc and The Republic of Sudan*, *op. cit.*

⁹² EarthRights International, *op. cit.*, 2006, p. 28.

2) **Pursue Big Oil U.S.A.** The U.S. subsidiary is subject to the personal jurisdiction of U.S. courts, but was not involved in the human rights violation. Unless there is a link between Big Oil U.S.A and Big Oil Sudan, in which case the connection must be demonstrated, Big Oil U.S.A cannot be pursued for human rights violations perpetrated by Big Oil Sudan.

3) **Pursue the U.K.-domiciled parent company in U.S. court.** To establish a U.S. court's personal jurisdiction, plaintiffs must prove that Big Oil Inc has sufficient connections with the U.S. This may be the case if the company is listed on a U.S. market and maintains offices in the U.S., or if the parent company is sufficiently involved in the activities of its U.S. subsidiary such that the two entities cannot be considered legally separate. In order to establish the parent company's liability, victims must prove a) that the parent company, Big Oil Inc, controlled its subsidiary, Big Oil Sudan, b) that the subsidiary was acting on behalf of the parent company, or c) that Big Oil Inc itself was involved in activities that contributed to the human rights violations. Such conditions are difficult to meet.

Examining a subsidiary's activities

Is it possible to tie the activities of a U.S. subsidiary to those of a foreign parent company in order to establish a U.S. federal court's personal jurisdiction over the parent company? If yes, what are the criteria for doing so? The questions are numerous:

- Does the mere location of a foreign multinational corporation's subsidiary on U.S. soil satisfy the criteria for being "at home" in a forum state to establish a U.S. forum court's personal jurisdiction under the ATS?
- Failing this, is it possible to examine the U.S. subsidiary's activities in the U.S. in order to identify whether the foreign parent company has sufficient connections to the U.S., thus establishing a U.S. court's personal jurisdiction over the parent company?

Beyond their symbolic nature, they raise a number of legal questions regarding the ATS's applicability to the activities of multinational corporations abroad.

➔ **Doe v. Unocal⁹³ (Doe I)**

This case is the second suit filed in October 1996 in the dispute pitting the consortium of oil corporations comprised of Unocal, Total, the MOGE and the SLORC against Burmese victims whose rights were violated during the construction of the Yadana pipeline in Burma (for a detailed description of the facts, see Roe I above). The suit also targets two Unocal executives. The allegations are based on the ATS. Seeking redress for harm to the population, eighteen Burmese villagers brought the class action suit in U.S. federal court on behalf of all the inhabitants affected by the project.

According to the plaintiffs, SLORC soldiers in charge of securing the pipeline route violated the rights of the local populations. The plaintiffs said they were victims of a variety of abuses, including forced displacement, the confiscation and destruction of homes, fields, food stocks and other assets, the use of forced labour, threats and beatings, the torture of those who refused to cooperate, and in some cases, rape and sexual abuse. The plaintiffs said that Unocal and Total knew or should have known that the SLORC was accustomed to such practices. The oil companies thus benefited directly from these abuses, particularly the forced labour and displacement. Despite information the corporations had or should have had in their possession, they paid the SLORC for its security services. In 1995, prior to being legally pursued, the corporations compensated 463 villagers who were victims of forced labour, demonstrating that the corporations had been aware of the abuses since 1995. The plaintiffs considered the corporations liable for the atrocities the Burmese military committed during the Yadana project.

In 1997 a U.S. federal court in Los Angeles ruled that the suit against Unocal and Total was admissible.

The U.S. court's personal jurisdiction over Total⁹⁴

In 1998, the U.S. court had to determine its personal jurisdiction over Total, a French company with several subsidiaries on U.S. soil. To do so, the court had to rule on contacts between the subsidiaries and the parent company. It was held that the mere existence of a relationship between the various legal entities was insufficient to establish the presence of one via the presence of the other and thus recognize jurisdiction over the multinational.⁹⁵ On their own, the identity of the entities' leaders or the parent company's normal direct involvement as an investor are unlikely to call into question the general principles of separation under entity

⁹³ Information on this case is pulled in part from papers published by *EarthRights International*. Also on this subject, see the documentary *Total Denial* (2006) by Milena Kaneva, Oxford Pro Bono Publico, *op. cit.*, p. 303; *Doe v. Unocal Corp.*, *op. cit.*, 1997; *National Coalition Government of the Union of Burma v. Unocal, Inc.*, *op. cit.*, 1997; *Doe v. Unocal*, 27 F. Supp. 2D 1174, 1184 (C.D. Cal. 1998), *Doe v. Unocal*, *op. cit.*, 2001; *Doe I v. Unocal Corp.*, *op. cit.*, 2000; *Doe v. Unocal*, *op. cit.*, 2002; *Doe v. Unocal*, Brief of the United States of America as amicus curiae, *op. cit.*, 2003. See also L. Bowersett, "Doe v. Unocal: Torturous Decision for Multinationals Doing Business in Politically Unstable Environments", *The Transnational Lawyer*, 1998, 11, p. 361; S.M. Hall, *op. cit.*, 2002, p. 402; R.A. Tyz, *op. cit.*, 2003, p. 559.

⁹⁴ *Doe I v. Unocal corp.*, *op. cit.*, 1998.

⁹⁵ *Doe v. Unocal*, *op. cit.*, 2001, p. 926.

law.⁹⁶ However, the existence of an alter ego relationship (establishing that the entities are not legally separate) or agency relationship (determining that one entity acted on behalf of the other, under the supervision of one, with the mutual consent of both) was entered into evidence, helping to establish the court's jurisdiction over the foreign corporation due to the activities of its U.S. subsidiaries. This issue will be discussed in chapter III.B.

Establishing Unocal's liability

The evidence at trial led to the conclusion that Unocal was aware of and benefitted from forced labour. Testimony demonstrated that the plaintiffs were victims of violence. The trial court dismissed the case, however, due to insufficient evidence of Unocal's active participation in the use of forced labour. It was not established that the company itself desired the military's violations of international human rights norms, and as a result, Unocal could not be held liable. The district court's decision was similar in *Roe I* and on appeal, the two cases were combined. A California Court of Appeals reversed the trial court's decision on 18 September 2002, setting a precedent by agreeing to hear cases in which corporations are charged for human rights violations committed abroad. The court acknowledged that Unocal exercised a degree of control over the Burmese army tasked with securing the pipeline and evidence indicated that Unocal was aware of both the risk and the actual use of forced labour by the Burmese military before and during the project. The court held that sufficient physical evidence existed to determine whether Unocal was complicit in the human rights violations committed by the Burmese army.

A hearing on the limited charges of murder, rape and forced labour was set for June 2005. In March 2005, however, the parties reached a settlement whereby Unocal formally denied any complicity and the corporation compensated the plaintiffs, established funds to improve living conditions, care, education, and to protect the rights of the populations living near the project, in return for the relinquishment of legal proceedings. The terms of the agreement remain confidential.

➔ Wiwa et al v. Royal Dutch Petroleum et al⁹⁷

The Center for Constitutional Rights (CCR) and co-counsel from EarthRights International brought three suits – *Wiwa v. Royal Dutch Petroleum*, *Wiwa v. Anderson* and *Wiwa v. Shell Petroleum Development Company* – on behalf of the relatives of activists killed while demonstrating for the protection of human rights and the environment in Nigeria. The suits targeted Netherlands-domiciled Royal Dutch Petroleum Company and Shell Transport and Trading Company, merged in 2005 under the name Royal Dutch/Shell plc, the head of the corporation's operations in Nigeria, Brian Anderson, and the corporation's subsidiary in Nigeria, Shell Petroleum Development Company (SPDC).

⁹⁶ P.I. Blumberg, "Asserting Human Rights Against Multinational Corporation Under United States Law : Conceptual and Procedural Problems", *American J. Comp. L.*, 2002, 50, pp. 496 and following.

⁹⁷ The facts of these cases are very similar to those in *Kiobel*, and a court today would probably not find that the presumption against extraterritoriality is displaced. However, they are still useful to look at.

The defendants were accused under the ATS and the TVPA of complicity in human rights violations against Nigeria's Ogoni people. The specific violations included summary execution, crimes against humanity, torture, inhumane treatment, arbitrary detention, murder, aggravated assault and subjection to emotional distress. The suit against Royal Dutch/Shell was also based on the Racketeer Influenced and Corrupt Organisations (RICO) Act, a federal law that aims to combat organised crime.

Royal Dutch/Shell has worked since 1958 to extract oil from Nigerian soil in a region where the Ogoni people lived. The pollution resulting from the work has contaminated the agricultural land and water supplies upon which the regional economy depends. The plaintiffs alleged that for decades, Royal Dutch/Shell worked with the Nigerian military regime to stifle all opposition to the company's activities. The oil company and its Nigerian subsidiary provided financial and logistical support to the Nigerian police and bribed witnesses to produce false evidence.

In 1995, the parent company and its subsidiary worked together with the Nigerian government to arrest and execute the Ogoni Nine. This group included three leaders of the Movement for the Survival of Ogoni People (MOSOP) and the Commissioner of the Ministry of Trade and Tourism, a member of the Rivers State Executive Board. On the basis of false accusations, a special military tribunal tried the Ogoni Nine and they were hanged on 10 November 1995. Human rights defenders and political leaders alike have condemned both the killings and the failure to respect the victims' right to a fair trial.

On behalf of the victims and relatives of the deceased, CCR filed suit on 8 November 1996 against Royal Dutch Shell and Shell Transport and Trading Company in the Southern District of New York. In 2000, the Court of Appeals acknowledged that the United States was an appropriate forum to decide the case. The court established personal jurisdiction with respect to Royal Dutch Shell/Shell Transport and Trade by virtue of their maintenance of offices in New York. District Court Judge Kimba Wood acknowledged the plaintiffs' ability to bring legal action under the ATS, the TPVA and RICO.

In September 2006, Judge Wood admitted the charges of crimes against humanity, torture, prolonged arbitrary detention and abetting these crimes. He declared inadmissible the charges of summary execution, forced exile, and infringements of the rights to life, freedom of assembly, and freedom of association. The trial for *Wiwa v. RPDC* and *Wiwa v. Anderson* began on 26 May 2009. In June 2009, following 13 years of proceedings in *Wiwa v. Shell*, the parties came to a settlement that covered all three cases. The terms of the settlement were released: U.S.D 15.5 million in damages, the creation of a trust benefitting the Ogoni people, and the reimbursement of certain costs of litigation. The settlement is currently being implemented.

d) Time limits: the statute of limitations

Present in both the U.S. and European legal systems, the statute of limitations, as it is known in U.S. law, is a procedural element that applies to both civil and criminal cases. The statute of limitations requires the plaintiff to bring action within a defined period of time after the starting point of the event, either the commission of a harmful act, or the discovery of the harm. Failure to do so will deprive the plaintiff of his or her cause of action.

Grounds for tolling the statute

The statute of limitations is a defence often invoked by defendants. In the U.S., however, few transnational disputes have been declared inadmissible on this basis. Indeed, a plaintiff can prove that the reason for the limitation was suspended. This argument, if granted by a court, has the effect of delaying (tolling) the period during which legal action may be brought. For example, it has been found that the statute of limitations may be tolled if:

- The plaintiff has been detained,
- The plaintiff was not on U.S. soil,
- The plaintiff had access to ineffective remedies,⁹⁸
- It was difficult to gather evidence during a civil war, or
- The defendant attempted to conceal evidence.⁹⁹

The limitations period continues again from the time the cause of the suspension ceases to remain in effect.

If the defendant has always been subject to the jurisdiction of U.S. courts (by virtue of being a U.S. resident or a corporation headquartered in the U.S.) and if the plaintiff's life was not in danger, the statute of limitations cannot be tolled.

⁹⁸ A 1991 U.S. Senate report states the grounds for tolling the statute of limitations under the TVPA: The statute of limitations should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available. Excluded also from calculation of the statute of limitations would be the period in which the plaintiff is imprisoned or otherwise incapacitated. It should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender." S. Rep. No. 102-249, at 11 (1991). See also H.R. Rep. No. 102-367(I), at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 88.

⁹⁹ *Romagoza Arce et al. v. Garcia and Vides Casanova*, 434 F.3d 1254 (11th Cir. 2006). The suit was brought under the TVPA and the ATS.

Duration

The statute of limitations is generally defined by law. Under the TVPA, the statute of limitations is 10 years from the time the misconduct occurred. The ATS, however, prescribes no specific time period and U.S. courts determine the statute of limitations by drawing parallels with similar federal laws. Given the ATS and TVPA's common purpose (protecting human rights), the type of proceedings (civil suits to protect human rights), and the place they share in U.S. legislation, several jurisdictions have borrowed the TVPA's 10-year statute of limitations for cases brought under the ATS. Similarly, some courts have adopted the grounds for tolling denoted under the TPVA (listed by the 1991 U.S. Senate report) for use with litigation invoking the ATS.¹⁰⁰

What are the obstacles to a U.S. court recognizing jurisdiction?

1. The doctrine of *forum non conveniens*

The doctrine of *forum non conveniens* aims to allow cases to be heard in the **most appropriate venue**, generally the jurisdiction in which the tort occurred. In the U.S., the doctrine calls upon the court hearing a case under the ATS to consider whether U.S. courts are best placed to hear the case, or whether a foreign court seems more appropriate, given the circumstances of the case. If a U.S. court is best placed to hear the case, the court is to grant the relief requested.¹⁰¹

Applying this theory to our situation, however, often raises difficulties related to the fact that the legislative and judicial systems of countries with human rights violations – typically developing countries – are defective or incomplete and do not provide optimal conditions for the legal pursuit of multinational corporations that commit violations. Multinational defendants¹⁰² frequently invoke *forum non conveniens*.¹⁰³

¹⁰⁰ S. Rep. No. 102-249, at 11 (1991), *op. cit.*

¹⁰¹ On this issue, see EarthRights International, *op. cit.*, 2006, p. 32.

¹⁰² Unlike in the U.K., U.S. federal courts may raise the *forum non conveniens* exception on their own. See A. Nuyts, *L'exception de forum non conveniens – Étude de droit international privé comparé*, Bruylant, Bruxelles, LGDJ, 2004, p. 294, No. 202.

¹⁰³ O. De Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law", in Ph. Alston (ed.), *Labour rights as human rights*, Oxford University Press, 2005.

a) Grounds for refusing jurisdiction

For *forum non conveniens* to apply and for a U.S. court to decline jurisdiction:

- The court must be convinced not only that another court exists to which the plaintiff could turn to seek redress for the harm he or she claims to have suffered;
- The court must also be convinced that an assessment of all the interests involved (including the public interest¹⁰⁴) leads to a conclusion that the alternative forum is the most appropriate.

In principle, the burden of proof for each of these issues lies with the defendant.¹⁰⁵

b) Adequate alternative forum

When considering the plaintiff's arguments, the proposed alternative forum (usually that of the place the damage occurred or where the defendant(s) is/are domiciled) can be considered adequate **if it provides an effective solution**, that is to say, **if it authorizes the legal action in question on proper grounds and provides an acceptable remedy**.

A judiciary of questionable independence or in which similar cases have never been heard or never been successful does not meet these criteria.¹⁰⁶

By contrast, it has been held, for example, that the lack of such a contingency fees system, under which an attorney is paid only for positive results, does not necessarily preclude the application of *forum non conveniens*.¹⁰⁷ The court may consider this factor, although it is not determinative on its own.

➔ Sequihua v. Texaco, Inc

Ecuadorian citizens who felt that Texaco's operations were causing air, water and soil pollution filed suit in U.S. courts under the ATS. A New York federal court dismissed the suit on appeal, on the basis of *forum non conveniens*. The court ruled that crucial factors indicated Ecuador's courts would be more appropriate to handle the case, including: access

¹⁰⁴ The interests taken into account are both private (those of the parties) and public (those of the jurisdiction). Private interests which the court may assess include the accessibility of evidence, witness availability and all other elements that render a trial easy, rapid and less costly. Assessing the public interest involved takes into account the court's caseload, the interests of the forum in trying the case and the judge's familiarity with the applicable law. B. Stephens and M. Ratner, *op.cit.*, 1996, p. 151, note 60; P.I. Blumberg, *op. cit.*, pp. 506-509; R.L. Herz, *op.cit.*, p. 568, note 152.

¹⁰⁵ B. Stephens and M. Ratner, *op.cit.*, 1996, pp. 151 and following; P.I. Blumberg, *op.cit.*, pp. 501 and following.

¹⁰⁶ B. Stephens and M. Ratner, *op.cit.*, 1996, pp. 151 and following; R.L. Herz, *op. cit.*, p. 567; P.I. Blumberg, *op. cit.*, p. 504.

¹⁰⁷ P.I. Blumberg, *op. cit.*, p. 507.

to evidence and witnesses, the opportunity to visit the disputed areas, the cost of travel between Ecuador and the U.S. and uncertainty regarding the ability to enforce in Ecuador a court ruling made in the U.S.¹⁰⁸

Whether a plaintiff be national or foreigner, **his or her residence in a territory generally has a favourable effect upon the selection of that territory as the forum for the case.**¹⁰⁹ For non-resident plaintiffs, the doctrine of *forum non conveniens* still applies.¹¹⁰

Because the facts of ATS cases (and therefore the parties, evidence, witnesses, etc.) are generally located abroad, *forum non conveniens* is an **obstacle** to suits brought under the ATS.¹¹¹ In addition, exercising *forum non conveniens* can result in the ***de facto* rejection of civil liability**¹¹² and few cases lead to legal proceedings in the foreign forum.

In the U.S., exercising *forum non conveniens* involves the definitive rejection of the suit from U.S. courts. Plaintiffs may bring new legal action if and only if the defendant (in our situation, the corporation) fails to meet the conditions set forth by the court that handled the case at the time it was referred to an adequate alternative forum.¹¹³

In *Aldana v. Del Monte Fresh Produce*, Guatemalan union leaders residing in the United States sued Del Monte under the ATS and TVPA, for taking them hostage and threatening them.¹¹⁴ Plaintiffs argued that *forum non conveniens* should not apply: firstly because Guatemala was not safe for them, and secondly because Guatemalan courts were corrupt, ill-equipped to address a case implicating politics and officials, and judges often turned a blind eye to violence against unionists. The Court found the forum was adequate because the plaintiffs would not necessarily have to return to Guatemala, and the Guatemalan courts were adequate. The Court then considered the interests of the litigants and the public. The Court found that the plaintiffs' selection of courts where they resided, the United States, strongly pointed towards the U.S. being an appropriate forum. However, other interests of the litigants outweighed this: the evidence and witnesses were in Guatemala and the U.S. had no power to compel necessary witnesses to attend. Finally, the Court found that public interest concerns are given minimal weight; but they pointed to having the case in Guatemala: that it was an important issue for

¹⁰⁸ 847 F Supp 61 (1994) 63–65, cited in Oxford Pro Bono Publico, *op.cit.*, p. 324.

¹⁰⁹ *Wiwa v. Royal Dutch Petroleum Co*, *op.cit.*, 2000.

¹¹⁰ P.I. Blumberg, *op.cit.*, p. 501.

¹¹¹ B. Stephens and M. Ratner, *op.cit.*, p. 151; P.I. Blumberg, *op. cit.*, p. 503; S.M. Hall, *op.cit.*, p. 408.

¹¹² A. Nuyts, *op.cit.*, p. 457.

¹¹³ P.I. Blumberg, *op.cit.*, p. 509; B. Stephens, *op. cit.*, in M.T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, 2000, p. 228.

¹¹⁴ 578 F.3d 1283 (11th Cir. 2009).

Guatemalan people to be resolved in their courts, the need to protect comity, and more. In light of all of these, the Court rejected the case on *forum non-conveniens* grounds.

In *Mastafa v. Australian Wheat*, Iraqi plaintiffs sued Australia’s Wheat Board and others under the ATS and TVPA for providing funds to the Saddam Hussein regime, which purportedly funded the torture, killing, and illegal imprisonment of the plaintiffs’ husbands.¹¹⁵ Plaintiffs alleged Australia was not an adequate forum, since the causes of action it recognized (such as negligence, battery, and wrongful death) did not “recognize the gravity” of the international law claims of crimes against humanity, war crimes, genocide, torture etc. The Court rejected this argument, finding the difference largely semantic. The Court then found the litigants’ interests weighed in favor of Australia rather than the U.S., taking the case: the plaintiffs had no particular connection to the U.S., as they were in Iraq, the activities in question (planning for the funding of Hussein) took place in Australia and evidence was there, and the useful witnesses were AWB’s staff in Australia. The Court found public considerations weighed in favor of Australia too: it made more sense to burden Australian citizenry with being on a jury, since Australian jurors would be more affected by the litigation than American ones. In light of these factors, the Court rejected the case on *forum non-conveniens* grounds.

In *Sarei v. Rio Tinto PLC*, Papua New Guinean plaintiffs sued a mining group under the ATS for war crimes, murder and other crimes.¹¹⁶ The District Court found that there were procedural differences to Papua New Guinea’s law of class actions, hiring of lawyers on a contingency basis, and discovery law; but it found these did not render Papua New Guinean courts inadequate. The Court then assessed the interests of the litigants, finding the preceding issues, and fact that the plaintiffs faced harm in Papua New Guinea pointed against it exercising jurisdiction. It also found that the local interest in the controversy and appropriateness of putting the obligation of judging on their citizenry, pointed towards Papua New Guinea; however this was outweighed by the fact that Courts there are extremely congested. Taking all the considerations into account then, the Court found that *forum non conveniens* was not appropriate here, and permitted the case to go forward.

➔ **Filártiga v. Peña-Irala**

In 1979, two Paraguayan citizens filed an ATS lawsuit in U.S. federal court after a Paraguayan police officer carried out acts of torture on U.S. soil that resulted in the death of a family member of the two Paraguayans. This was the first case dealing with acts of torture under the ATS. In 1984, the plaintiffs received U.S.D 10,375,000 in damages. *Forum*

¹¹⁵ *Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 CIV. 7955 (GEL), 2008 WL 4378443, at 7 (S.D.N.Y. Sept. 25, 2008)

¹¹⁶ *Sarei v. Rio Tinto PLC.*, 221 F. Supp. 2d 1116, 1130 (C.D. Cal. 2002).

non conveniens was briefly discussed in the case, but because it was impossible for the victims to expect reasonable chances of success before Paraguayan courts,¹¹⁷ the U.S. court accepted jurisdiction.

➔ **Wiwa v. Royal Dutch Petroleum Co. and Shell Transport**

In this case (cited earlier in Chapter I.A.2), the doctrine of *forum non conveniens* has played an important role. Action was brought under both the ATS and the TVPA. Although several of the plaintiffs resided in the U.S., Royal Dutch/Shell is domiciled in the U.K., and the U.S. trial judge that heard the case ruled that English courts were best placed to hear the Ogoni people's representatives' call for redress from Royal Dutch/Shell's Nigerian subsidiary.¹¹⁸ The appeals court, however, reversed that decision, identifying several criteria that preclude the application of *forum non conveniens*:¹¹⁹

1. In particular, the court noted that several of the alleged victims, the plaintiffs, resided in the United States, a particularly favourable fact for the admissibility of their claim. Under the ATS, foreigners residing in the U.S. receive preference over foreigners living abroad. In addition, **requiring persons residing in the U.S. to bring claim in the courts of another state would be particularly expensive**, and could lead to impunity for the perpetrators charged.¹²⁰
2. In rejecting the admissibility of the claim on the basis of *forum non conveniens*, **the trial judge did not give adequate weight to the federal legislature's expressed intention** and to the idea that it is in the interest of the United States to provide a forum for victims of international law breaches committed by persons on U.S. soil.

The court stated the need to consider international human rights law in assessing the interest of the United States in hearing the case and, thus, the pre-eminence of public interest over private interests.¹²¹ According to the court, torture contradicts both international law and U.S. domestic law. This resulted in the 1991 adoption of the TVPA which establishes the ability of U.S. courts to rule on torture and extrajudicial executions committed by public officials or under color of law.¹²² According to the court, it would be paradoxical to deny U.S. courts jurisdiction under the ATS for acts of torture in the name of *forum non conveniens* when

¹¹⁷ *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 865 (1984). "The United States policy against forum shopping does not warrant a denial. Plaintiffs could get no redress in Paraguay and sued Peña where they found him".

¹¹⁸ *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW)(HBP), 1998 U.S. Dist. LEXIS 23064 (S.D.N.Y. Sept. 25, 1998).

¹¹⁹ *Wiwa v. Royal Dutch Petroleum Co.*, *op. cit.*, 2000.

¹²⁰ *Ibid.*, p. 101 and 102: "the greater the plaintiff's ties to the plaintiff's chosen forum, the more likely it is that the plaintiff would be inconvenienced by a requirement to bring the claim in a foreign jurisdiction".

¹²¹ *Wiwa v. Royal Dutch Petroleum Co.*, *op.cit.*, 2000. "[...] the interests of the United States are involved in the eradication of torture committed under color of law in foreign nations."

¹²² *Ibid.*, "The new formulations of the Torture Victim Protection Act convey the message that torture committed under color of law of a foreign nation in violation of international law is 'our business'".

the legislature has clearly expressed its willingness to aggressively pursue perpetrators of torture under the TVPA. In some ways, Congress's adoption of the TVPA tipped the scales in favour of U.S. courts recognizing jurisdiction over acts of torture under the ATS, provided the criteria for the case's referral to another forum are not fully met.¹²³

It is important to analyze **the impact of these important, yet isolated decisions** on subsequent jurisprudence involving *forum non conveniens*, particularly the extent to which *forum non conveniens* is applicable to claims under the ATS. Some, however, believe that a judge's unfettered discretion in the matter¹²⁴ and the multiplicity of factors at work prevent any consistency or predictability.¹²⁵

It is also worth noting that if one pursues state tort claims (see section I.D, *infra*), states have their own doctrines of *forum non conveniens* which may differ significantly from the federal doctrine outlined above, and from each other.¹²⁶ The doctrine of *forum non conveniens* cannot be discussed without mentioning the *Bhopal* case.

➔ The Bhopal case

One of the largest industrial disasters recorded to date occurred on the night of 2-3 December 1984 in India. A toxic cloud escaped from a chemical plant operated by Union Carbide India Limited (UCIL), an Indian subsidiary of the U.S. multinational Union Carbide Corporation (UCC). Large quantities of toxic substances from the accident spread through the atmosphere, with disastrous human and environmental consequences. According to Amnesty International, between 7,000 and 10,000 people died shortly after the disaster, and 15,000 others in the twenty years that followed. More than 100,000 people were affected.¹²⁷

The Indian government's legal framework was not equipped to handle this type of harm, and was inundated with requests for action. In response, the government adopted the Bhopal Act on 29 March 1985, a law authorizing the Indian government to represent the interests of victims before the courts. India filed a claim in the Southern District Court of New York, relying precisely on the inability of India's legal system and judiciary to deal with such disputes¹²⁸ on the one hand, and the direct involvement of the multinational UCC on the other. Holding the parent company liable was all the more necessary because the subsidiary did not have sufficient financial resources to meet the victims' needs.

¹²³ P.I. Blumberg, *op.cit.*, p. 521.

¹²⁴ P.I. Blumberg, *op.cit.*, p. 506; S.M. Hall, *op. cit.*, p. 408; R.L. Herz, *op. cit.*, pp. 567-568.

¹²⁵ P.I. Blumberg, *op.cit.*, p. 505.

¹²⁶ See, e.g., Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in A New (Post-Kiobel) World*, 46 Colum. Hum. Rts. L. Rev. 158, 207-08 (2014).

¹²⁷ Amnesty International, *Clouds of Injustice: Bhopal disaster 20 years on*, 2004.

¹²⁸ *In Re Union Carbide Corp Gas Plant Disaster at Bhopal*, 634 F Supp 842 (SDNY 1986), 846-48.

The case was dismissed under the doctrine of *forum non conveniens*, notably because witnesses and evidence were located on Indian soil. The Court of Appeals for the Second Circuit upheld the lower court's decision but did not retain one of three conditions established by the trial judge: the requirement that UCC provide all files requested by the opposing party in accordance with the discovery procedure applicable in the United States (the discovery procedure requires parties to disclose all exhibits in their possession, whether favourable or not).¹²⁹ The court maintained conditions barring the invocation of statute of limitations to avoid the jurisdiction of Indian courts, and the obligation to carry out the foreign judgement to be adopted by the alternative forum.

In India, the trial was held on 5 September 1986. The Indian Union demanded “fair and full” compensation as well as punitive damages to deter UCC and other multinational corporations from repeating such acts with wilful, free and malicious disregard for the rights and safety of Indian citizens. After a long legal battle, the parties reached an agreement whereby UCC would pay the sum of U.S.D 470 million in return for a guarantee of no future civil or criminal claims from any individuals.

Several cases have called the constitutionality of the Bhopal Act into question on the grounds that it infringed upon the right of Indian citizens to individually pursue UCC. The plaintiffs also cite the Indian government's lack of consultation with victims prior to the agreement. Although the Supreme Court of India upheld the validity of the Bhopal Act it has also permitted criminal prosecutions.

The Bhopal case led the Indian government to strengthen its legal system in terms of liability for environmental damage and tort liability following a major accident. It should be noted, however, that the slowness and complexity of trials has prevented victims from accessing justice. The relief granted to victims was also inadequate and litigation concerning the redress continues. More than 30 years after the disaster, victims are still fighting to obtain justice and the site has still not been decontaminated.¹³⁰

2. Immunities and acts of state

a) Sovereign immunity

The U.S. government

The U.S. government, including its federal agencies, enjoys sovereign immunity from all civil and criminal claims, unless it waives immunity or agrees to be pursued in a particular case. Under the ATS, plaintiffs may not seek redress from the U.S. government in U.S. federal courts. In certain specific cases, however, the government has waived immunity.

¹²⁹ *Union Carbide*, 809 F.2d 195 - 2nd Cir 1987.

¹³⁰ Amnesty International, *Thirty years from Bhopal disaster: Still Fighting for Justice*, www.amnesty.org.

The situation regarding government officials is more complex, and depends on whether the person acted as an official within the scope of his or her authority,¹³¹ which is often difficult to determine.

The Federal Tort Claim Act (FTCA) allows foreign U.S. residents and non-residents to bring civil claims in U.S. courts for harm caused by a federal employee. The FTCA contains many exceptions which could hypothetically result in the lifting of immunity. In addition, the dispute will be subject not to international law, but to the tort laws of the United States, specifically the law of the place where the act of negligence or omission occurred.¹³² Some sections of international law, however, are incorporated into the laws of individual states, and thus certain provisions of international law are considered to be an integral part of domestic law and may be heard under the FTCA.

Foreign states

By virtue of the Foreign Sovereign Immunities Act (FSIA), a **Foreign state**, understood to be “a political subdivision of a foreign state or an agency or instrumentality of a foreign state,”¹³³ benefits from absolute immunity in civil actions heard by U.S. courts.¹³⁴ “Agency” and “instrumentality” are defined as “any entity— (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.”¹³⁵

There are several exceptions to the granting of such immunity. One is a commercial exception. Immunity is absolute when an act is carried out on public authority, in other words, when a foreign state acts in its sovereign capacity. However, foreign states do not enjoy immunity from acts that have caused damage when the acts are governed by private law in the context of commercial transactions, in other words, when the state conducts an act of management as opposed to an act of sovereignty. The commercial exception covers loan agreements, investment offers, purchase and sales contracts and employment contracts. A link to the U.S. must be established: this is most often done when the commercial activity is conducted directly by the foreign state on U.S. soil (e.g. when a company whose majority shareholder is a foreign

¹³¹ EarthRights International, *op. cit.*, 2006, p. 29.

¹³² *Richards v. United States*, 369 U.S. 1 (1962). “An FTCA claim is decided under the law of the place in which the negligent act or omission occurred and not the place in which the act or omission had its operative effect”.

¹³³ Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, 1602-11 (1988). “a political subdivision of a foreign state or an agency or instrumentality of a foreign state”. See also B. Stephens and M. Ratner, *op.cit.*, 1996, pp. 39 and 125 and following; L. Bowersett, *op.cit.*, pp. 366 and following.

¹³⁴ 28 U.S.C. § 1330(a). “The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state [...]”.

¹³⁵ 28 U.S.C. § 1603(b).

state is located in the U.S.), or where an act linked to the foreign state's business was carried out on U.S. soil (e.g., the signing of a commodities contract in the U.S.)¹³⁶.

➔ Doe v. Unocal

Both the trial and appellate courts recognized the immunity of SLORC and MOGE, ruling that the security of the Yadana pipeline, for which they were responsible under the framework of their joint venture with Unocal, was not a commercial activity¹³⁷ within the meaning of the definition of exceptions lifting immunity. The SLORC and MOGE were therefore able to rely on the immunity granted by the Foreign Sovereign Immunities Act.

Questions regarding immunity for agents of a foreign government are a point of contention in U.S. federal courts. In June 2010, the Supreme Court ruled in *Samantar v. Yousuf* that the FSIA statute itself provides no recognition of sovereign immunity for individuals representing a foreign state. However, the Court left open the possibility that such individuals might still enjoy immunity outside the FSIA, under common law.

Immunity under the common law is complex and unresolved, but certain aspects are important for human rights litigation. Firstly, high ranking officials, such as heads of state, may enjoy immunity for all of their acts while they hold their offices. Secondly, officials may enjoy immunity for acts within their duties, even after they have left office.¹³⁸ However, some courts have ruled such immunity does not extend to violations of *jus cogens*.¹³⁹ Others have found this immunity does extend to *jus cogens* violations; thus the issue is an open one.¹⁴⁰ Finally, the Court may apply or withhold immunity according to the State Department's recommendation.¹⁴¹

¹³⁶ 28 U.S.C. § 1605 (a) (2): “[...] commercial activity carried on in the United States or an act performed in the United States in connection with a commercial activity elsewhere, or an act in connection with a commercial activity of a foreign state elsewhere that causes a direct effect in the United States;”

¹³⁷ *Doe v. Unocal*, *op. cit.*, 1997, p. 897; *Doe v. Unocal*, *op. cit.*, 2002; L. Bowersett, *op. cit.*, p. 370.

¹³⁸ For a discussion on both types of immunity, respectively known as “status” immunity, and “conduct” immunity, see, e.g., Curtis A. Bradley, Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 Sup. Ct. Rev. 213 (2010).

¹³⁹ See *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012) (conduct immunity does not extend to violations of *jus cogens*).

¹⁴⁰ See, e.g., *Rosenberg v. Pasha*, 577 F. App'x 22, 23 (2d Cir. 2014) (common law conduct immunity extends to violations of *jus cogens*); *Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 250 (D.D.C. 2011) *aff'd*, 493 F. App'x 106 (D.C. Cir. 2012) (same).

¹⁴¹ The effect of the State Department's recommendation to apply or withhold conduct immunity is significant, but whether it completely binds courts is unresolved. Compare *Rosenberg v. Pasha*, 577 F. App'x 22 (2d Cir. 2014) (suggesting Executive's recommendation is binding on courts), with *Yousuf v. Samantar*, 699 F.3d 763, 773 (4th Cir. 2012) (Executive's recommendation is entitled to substantial weight).

b) Act of state immunity

U.S. courts may also invoke the **act of state doctrine** to refuse to hear a lawsuit, particularly when a foreign state does not enjoy immunity under the FSIA. This doctrine further restricts the scope of a foreign state's liability, when the case would require the court to pass on certain of the foreign states acts. The doctrine is grounded in the idea that the courts of one state shall not judge the acts of a foreign government carried out in that government's state.¹⁴² Like the political question doctrine (see below), act of state immunity in U.S. courts is also partially grounded in the court's unwillingness to interfere with or contradict U.S. foreign policy largely entrusted to other branches.¹⁴³ The more likely a case is to require the court to make a determination that would frustrate or contradict U.S. foreign policy, the more likely the Court is to invoke the act of state doctrine.

Acts of state could include, for example, another state's adoption of a law or decree, or a police action or military activities carried out on a state's own soil. As the name suggests, acts such as these are governmental in nature. They are also of an official nature, carried out by government officials acting in the name and on behalf of a foreign state. The abovementioned list is not exhaustive. The court has the discretion to determine whether an act is an act of state by assessing the case's implications for U.S. foreign policy through three criteria:

- **The behaviour in question.** In evaluating the dispute, the court must consider the **degree of international consensus** regarding the behaviour. The more international consensus there is prohibiting the behaviour, the less necessary courts will consider the act of state doctrine. Some consider that universally condemned serious human rights violations (particularly *jus cogens* norms) cannot constitute acts of state.¹⁴⁴ The application of the act of state doctrine in the field of human rights remains ambiguous, however, although most U.S. courts have ignored the doctrine when faced with human rights violations committed by state agents.
- **The significance for U.S. foreign policy.** The less important the issue is for U.S. foreign policy, the less likely a Court is to invoke the act of state doctrine. **The continued existence of the state committing the act.**¹⁴⁵ If the state that committed the act on which the court must pass is no longer in existence, the act

¹⁴² *Underhill v. Hernandez*, 168 U.S. 250, 252, 42 L. Ed. 456, 18 S. CT 83 (1897). "Every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the act of government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves". See also *Doe v. Unocal*, *op. cit.*, 1997; *Wiwa v. Royal Dutch Petroleum Co*, *op. cit.*, 2002; *Doe v. Unocal*, *op. cit.*, 2002.

¹⁴³ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964).

¹⁴⁴ B. Stephens and M. Ratner, *op. cit.*, 1996, p. 139. *Doe v. Unocal*, *op. cit.*, 1997, p. 894.

¹⁴⁵ *Doe v. Unocal*, *op. cit.*, 2002. The court adds a fourth criteria, that of public interest.

of state doctrine is less likely to apply, since any pronouncement is less likely to offend the current country or aggravate U.S. foreign relations.

The act of state doctrine has rarely been used in ATS cases. In *Sarei v. Rio Tinto*, a claim based on environmental damage, the court invoked the act of state doctrine and justified it based on a lack of international consensus on the specific nature of the violation.¹⁴⁶ *Du Daobin v. Cisco Systems, Inc.*, concerned Cisco's aiding and abetting in the torture of Chinese dissidents. The court invoked the act of state doctrine, because of the second of the factors above: it found that a U.S. pronouncement on China's application of Chinese law against Chinese citizens, which the case would involve, would significantly impact and damage U.S. foreign relations.¹⁴⁷ *Mezerhane v. Republica Bolivariana de Venezuela* concerned a foreign sovereign taking property in violation of human rights law. The Court appeared to adopt a similar analysis, but went as far as to suggest that acts committed by a foreign sovereign outside the U.S., and to a foreign plaintiff were always acts of state.¹⁴⁸

c) Political question doctrine and international comity doctrine

Defendants may also rely on **political question doctrine** and **international comity doctrine** to block lawsuits targeting them.

The political question doctrine is often invoked in transnational disputes relating to human rights, and more generally in terms of foreign policy. It allows U.S. courts to decline jurisdiction when the case at hand raises a "political" question relating to the executive and legislative branches of government. The doctrine prevents the judiciary from interfering in politically sensitive affairs and poses an obstacle to the application of international law. Most importantly for international human rights litigation, an issue is likely to be political when as with the act of state doctrine, the court's ruling on it could frustrate or contradict U.S. foreign policy. An issue may also be political when it entails a court's judgment about the propriety of the Executive's exercise of a power committed to it, such as the power to conduct foreign affairs and the military.

Corrie v. Caterpillar, for example, concerned a suit against a manufacturer for providing bulldozers it knew would be used for the demolition of homes in violation of international law.¹⁴⁹ The Court dismissed the case on political question grounds. Firstly, because a court's ruling would implicate the legality of U.S. foreign policy of other branches – its aid to Israel, since the U.S. had helped purchase the bulldozers. Secondly, a ruling could make U.S. foreign policy manoeuvring on the

¹⁴⁶ *Sarei v. Rio Tinto plc.*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), p. 1183. See also L. J. Dhooge, "The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism", *Geo J. Int'l L.*, 2003, No. 35, p. 90.

¹⁴⁷ *Du Daobin v. Cisco Sys., Inc.*, 2 F. Supp. 3d 717, 725-26 (D. Md. 2014).

¹⁴⁸ 785 F.3d 545, 552 (11th Cir. 2015).

¹⁴⁹ *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007)

Israeli-Palestinian conflict very difficult, since it would require the court's finding that Israel's demolitions were illegal under international law.

Hwang Geum Joo v. Japan concerned a suit against Japan, by Phillipina, Chinese, Taiwanese and South Korean “comfort women” forced into sexual slavery during World War II by the Japanese army.¹⁵⁰ The Court was presented with whether the “commercial exception” to the FSIA discussed above applied to Japan. However, it rejected the case on political question grounds. Japan had signed a peace treaty with the United States waiving suits by U.S. nationals for acts committed during the war, and subsequent peace treaties with China, Taiwan and South Korea that did not explicitly extinguish liability. China, Taiwan, and South Korea maintained that neither agreement extinguished their nationals’ claims against Japan, though Japan disagreed. The Court found that the suit would involve a declaration about which states’ interpretations were correct, which the Executive noted could damage delicate regional relations and undo stability in the region. The Court found that since the case would be of considerable significance for the Executive’s foreign relation policy, the case was a political question it would not adjudicate.

In *Saldana v. Occidental Petroleum Corp.*, family members of union leaders sued Occidental Petroleum for funding a brigade committing the murder of civilians and other human rights abuses, with full knowledge of the brigade’s acts.¹⁵¹ The United States had also provided substantially more funding to the same brigade, and the court thus found that the case would also involve ruling on the propriety of how the Executive exercised its foreign relations power. Consequently, it found the case raised a political question, and rejected it.

Courts have also, however, refused to invoke the political question doctrine. In *re South African Apartheid Litigation*, for example, concerned a suit against multinational corporations for aiding and abetting the South African government in implementing apartheid.¹⁵² The Court found that since the act in question was a violation of *jus cogens*, judging the propriety of the Executive’s actions cannot be politically fraught, and the political question could not apply for this reason. It also found that a judicial determination would not contradict U.S. policy: a determination about businesses’ aiding and abetting apartheid would not affect business in South Africa more generally. In *Doe v. Exxon Mobil Corporation*, Indonesian plaintiffs sued Exxon Mobil for its knowing employment of Indonesian soldiers engaged in torture and extrajudicial killings in Indonesia.¹⁵³ Indonesia had informed the State Department that adjudicating the claim and deciding on the legality of the soldiers’ actions would upset U.S. foreign policy commitments to peace in Indonesia and the Helsinki Accord. The court rejected Exxon’s claim; holding that since the State

¹⁵⁰ *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 5005)

¹⁵¹ 774 F.3d 544, 554 (9th Cir. 2014).

¹⁵² 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

¹⁵³ *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75 (D.D.C. 2014).

Department had not released a recent or definite statement on the matter, the Court would not assume the issue would have significant foreign policy implications for the U.S., and so invocation of the political question doctrine was inappropriate.¹⁵⁴

International comity doctrine is more an act of courtesy than an obligation binding the judiciary. U.S. courts may decline jurisdiction under international comity doctrine where there is a conflict of law between the legal systems of the U.S. and a foreign state.

➔ **Aguinda v. Texaco – Jota v. Texaco**¹⁵⁵

This dispute opposed some 30,000 indigenous Ecuadorian farmers and the U.S. corporation Chevron-Texaco, which extracted oil in Ecuador's Oriente region from 1972-1992. The company reportedly used operating techniques that were outdated or banned in other countries due to their adverse environmental and health consequences. Texaco, the Government of Ecuador, and Petroecuador, Ecuador's national oil company, have consistently denied liability for the environmental damage and health problems that resulted from such practices. Since 1972, Texaco has been accused of discharging toxic waste and more than 70 billion gallons of polluted water into rivers and streams. Soil has also been contaminated and the pollution has affected the indigenous peoples and farmers, whose ways of life depended on these natural resources (securing water, irrigating agriculture and fishing). Particularly high rates of cancer, leukaemia, digestive and respiratory problems, birth defects, miscarriages and other ailments have also been noted.

The affected communities filed their first claim in a New York federal Court in 1993. The Ecuadorian government intervened in the trial, claiming in particular that it alone had the authority to adjudicate disputes concerning public land in Ecuador and that individuals could not sue to defend their rights with regards to public lands. The Ecuadorian government's reluctance for the trial to take place in the United States was a key factor in the U.S. federal court's decision to decline jurisdiction under international comity **doctrine**. U.S. federal courts finally agreed to hear the case under the ATS, but only after a new government in Ecuador expressed a desire for the trial to proceed.

Meanwhile, in 1999, the Ecuadorian parliament adopted the Environmental Management Act (EMA) which allows individuals to bring action seeking redress for environmental damage affecting public lands. Throughout the trial, Chevron argued that according to *forum non conveniens*, Ecuadorian courts alone are an appropriate forum. In 2002, a New York court of appeals affirmed Chevron's argument and referred the matter to Ecuadorian courts, with the stipulation that Chevron must submit to the jurisdiction of Ecuadorian courts and their rulings.

¹⁵⁴ *Exxon Mobil Corp.*, 69 F. Supp. at 92.

¹⁵⁵ *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996); *Jota v. Texaco, Inc.*, 157 F.3d 153, 158-61 (2d Cir. 1998); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002)

In 2003, the same victims filed a class action suit against Chevron in the Superior Court of Nueva Loja, Ecuador, under the EMA. On 12 November 2013, Ecuador Supreme Court upheld the August 2012 ruling against Texaco/Chevron for environmental damage but halved damages to \$9.51 billion. Since then, Chevron has multiplied legal actions.

Lawsuits are taking place in the U.S., in Ecuador, in Canada (see below in this section), before an investment tribunal and now before the International Criminal Court. In March 2015, the arbitration tribunal held that the settlement between Chevron and Ecuador did not preclude residents from suing over the future effects of pollution. However, in January 2016, the tribunal ruled in favour of Chevron on the basis of US-Ecuador investment agreement.¹⁵⁶ A lawsuit in the U.S. was also initiated by Chevron following the Supreme Court's decision in Ecuador: Chevron filed a racketeering lawsuit against the plaintiffs' lawyers and representatives in US federal court on 1 February 2011. In October 2012 the US Supreme Court refused to hear Chevron's appeal on the basis that Judge Kaplan lacked authority to block the enforcement of the Ecuadorian judgment.¹⁵⁷ In October 2014, Ecuadorian rainforest communities filed a communication at the International Criminal Court in respect of Chevron chief executive's acts to prevent the ordered clean-up of toxic waste in the Amazon.¹⁵⁸

➔ **Apartheid in U.S. courts**¹⁵⁹

In 2002, a group of South African nationals brought action under the ATS against 20 banks and companies accused of aiding and abetting human rights violations committed by the South African government during apartheid. The plaintiffs were victims of extrajudicial killings, torture and rape. The South African government publicly opposed the trial before both the district and appellate courts in the United States. In October 2007, the court of appeals overturned the trial court's dismissal of the case. The defendants appealed the overturn, but the U.S. Supreme Court upheld the appellate court's decision in May 2008. On 8 April 2009, a district court judge dropped several of the charges, while allowing a continuation of the suit against Daimler, Ford, General Motors, IBM and Rheinmetall Group. The judge refused to accept the defendants' arguments invoking the doctrines of political question and international comity. The judge also rejected arguments that the statute of limitations had expired. In a September 2009 letter to the judge describing the district court as the "appropriate forum", the South African government announced its support for the trial to proceed.

The defendants then filed an interlocutory appeal (an appeal filed in civil proceedings prior to the court's ruling) with the Second Circuit Court of Appeals. Before accepting jurisdiction, the court of appeals asked the parties to submit their arguments on the question of whether companies can be held accountable for violations of customary international law.

¹⁵⁶ See: Business and Human Rights Resource Centre, *Texaco/Chevron lawsuits (re Ecuador)*, <http://business-humanrights.org>

¹⁵⁷ *Ibid.*

¹⁵⁸ Business and Human Rights Resource Centre, *Texaco/Chevron (re Ecuador)*, <http://business-humanrights.org>

¹⁵⁹ *In re Africa Apartheid Litig.*, 346F Supp.2d 538 (S.D.N.Y 2004); *In re Africa Apartheid Litig.*, 617F Supp.2d 228 (S.D.N.Y 2009); *In re Africa Apartheid Litig.*, 624 Supp.2d 336 (S.D.N.Y 2009).

In particular, the victims needed to prove that companies can be held civilly and criminally liable under customary international law. In April 2014, federal judge Shira A. Scheindlin concluded that companies may be held civilly liable under customary international law and the ATS.¹⁶⁰ However, Judge Scheindlin dismissed the case, finding that it did not touch and concern the United States. In July 2015, the Second Circuit found that the *mens rea* required for liability under the ATS for aiding and abetting required that the defendant acted with the purpose of facilitating the commission of the crime, rather than knowledge that it would be committed.¹⁶¹ The Court found that such purpose was not present in the case, and while the defendants could have known their efforts would further the violations, it was not their specific purpose to do so. The Court therefore affirmed Judge Scheindlin's dismissal, and on September 2015, the Second Circuit refused to rehear the case.

What law will the U.S. forum court apply?

The very wording of the ATS – “a tort only, committed in violation of the law of nations” – suggests that not only a court’s jurisdiction, but also the norms applicable to a civil liability suit must be considered in the light of international law. This point is controversial in U.S. jurisprudence and doctrine. In determining the applicable law, **U.S. courts have three options available to them:**

- International law,
- The law of the forum court (*lex fori*), including federal common law,¹⁶² and
- The law of the place where the damage occurs.¹⁶³

1. International law: jurisprudence selection

Most ATS cases refer to international law to decide which law is applicable to the case.

In *Doe v. Unocal*, the court ruled¹⁶⁴ that it was preferable to apply international law rather than the law of a particular country¹⁶⁵ in determining Unocal’s liability for violations committed by Burmese forces, due to the nature of the alleged violations

¹⁶⁰ *In re S. African Apartheid Litig.*, 15 F. Supp. 3d 454, 461 (S.D.N.Y. 2014).

¹⁶¹ *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 169 (2d Cir. 2015)

¹⁶² Common law countries, such as the U.S. and U.K., as opposed to civil law, have legal systems characterized by the pre-eminence of jurisprudence. Courts create a “precedent” which serves more as a basis for subsequent rulings than the law or statute itself. Legal systems in civil law countries are characterized by lawmaking and an emphasis on the law itself. Federal common law refers to the law in force in each state in the U.S., based primarily on precedent.

¹⁶³ B. Stephens and M. Ratner, *op. cit.*, 1996, p. 120; R. A. Tyz, *op. cit.*, 2003, p. 572. See also *Doe v. Unocal*, *op. cit.*, 2002, p. 14214; *Wiwa v. Royal Dutch Petroleum Co*, *op. cit.*, 2000, note 12.

¹⁶⁴ The court expressly stated that its reasoning was justified by the facts of the case, and that in the presence of other facts, the application of forum law or *lex loci delicti commissi* may have been appropriate.

¹⁶⁵ The defendants were in favour of *lex loci delicti commissi*, i.e. Burmese law.

(of *jus cogens* norms).¹⁶⁶ The court's decision was based on jurisprudence from international criminal tribunals for Rwanda and the former Yugoslavia.¹⁶⁷

References to international law may

- Be **direct**, or
- Be **based in federal common law**.¹⁶⁸

Opinions are divided on choosing between these two options. In the *Unocal* case, the court did not address its selection of international law because the applicable norms of international law were similar to those of forum law.¹⁶⁹

2. *Lex fori* (federal common law): doctrine selection

Unlike international or foreign law, federal common law offers **maximum flexibility in determining the applicable standards of liability and compensation**. The application of federal common law does not preclude consideration of international law objectives, provided they are part of the case, and it has the additional advantage of being well-known by the court. In the eyes of federal common law, the application of international law is disadvantaged by its incomplete nature and, more particularly, by its lack of criteria for determining adequate compensation.¹⁷⁰

3. Law of the place where the damage occurs: an inadequate solution

With several exceptions,¹⁷¹ jurisprudence indicates that **turning to the law of the place where the damage occurs (*lex loci damni*) is inadequate**.¹⁷²

The application of foreign law can be problematic, for example, when:

- It is not sufficiently protective of victims,
- It tolerates or even requires the non-observance of international human rights law,
- It provides certain amnesties,
- It does not provide for the awarding of damages, or
- It provides a short statute of limitations.

¹⁶⁶ *Doe v. Unocal*, *op. cit.*, 2002, p. 14214. In his dissenting opinion, Judge Reinhardt rejected international law as the applicable law and expressed a preference for “*general federal common law tort principles*”.

¹⁶⁷ *Doe v. Unocal*, *op. cit.*, 2002, pp. 14216 and following.

¹⁶⁸ See *Doe v. Unocal*, *op. cit.*, 2002, pp. 14214 and following.

¹⁶⁹ *Ibid.*, 2002, p. 14214, note 23; R. A. Tyz, *op. cit.*, pp. 573-574.

¹⁷⁰ B. Stephens and M. Ratner, *op. cit.*, 1996, pp. 121-122; R. A. Tyz, *op. cit.*, pp. 574-575.

¹⁷¹ See *Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542 (D.D.C. 1981), 726 F.2d 774 (Feb. 3 1984), p. 781; *In Re Estate of Ferdinand E. Marcos Human Rights Litigation/Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992).

¹⁷² See *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), pp. 182-183.

Another option: Transitory Tort Litigation in State Courts

State courts can hear “transitory torts,” claims arising outside their territory, if the court has personal jurisdiction over the defendant, by virtue of the defendant’s transitory presence in the United States at the time of the suit.¹⁷³ The Supreme Court briefly mentioned the transitory tort doctrine in *Kiobel* without questioning it.¹⁷⁴

Litigating in state court implies a choice of law analysis. Different states have different choice of law rules. When a human rights case involves conduct outside the forum state’s territory, there are at least three potential sources of applicable law: the domestic law of the place where the conduct occurred (*lex loci*), the domestic law of the forum state (*lex fori*), and international law.¹⁷⁵ Many international human rights claims have parallels in state tort law, for example, wrongful death, assault, and battery. However, transitory tort cases involving foreign litigants and foreign events will generally apply the law of the place of injury.¹⁷⁶ Under almost every choice-of-law approach, concerns for international comity and foreign sovereign interests must be built into the analysis.

Possible advantages

- May avoid heightened federal pleading standards;
- Avoids the high threshold of definiteness and universality required by *Sosa*;
- *Forum non conveniens* does not have the same importance as in federal courts;
- Theories of corporate liability are likely to be more expansive and less contested than in ATS litigation.¹⁷⁷

Possible disadvantages

- Procedural rules are different in each state, whereas federal rules are the same all over the U.S.;
- Each state has its own standards for personal jurisdiction;
- Each state has different pleading requirements;
- Statutes of limitations will likely be shorter than in federal court;
- State court judges are elected and therefore may be more vulnerable to pressure from corporations.

¹⁷³ Paul Hoffman and Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 UC Irvine L. Rev. 9, 11 (2013).

¹⁷⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665-66 (2013).

¹⁷⁵ Chimène I. Keitner, “State Courts and Transitory Torts in Transnational Human Rights Cases” 3 UC Irvine L. Rev. 81 (2013).

¹⁷⁶ *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 69-70 (D.C. Cir. 2011) (holding that Indonesian law applied to claims arising in Indonesia).

¹⁷⁷ Paul Hoffman and Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 UC Irvine L. Rev. 9, 19 (2013).

Examples

Cases against *Union Carbide (Bhopal)* and *Occidental Petroleum*, which involve environmental contamination in foreign countries, are proceeding under ordinary claims for “toxic torts” (negligence, trespass, nuisance, for example) under the “transitory tort” doctrine.¹⁷⁸

In *Doe v. Unocal Corp.* (see above), the plaintiffs refiled their pendent state claims in the state trial court after the ATS claims were dismissed in the federal trial court. While an appeal of the dismissal of the ATS claims was pending, plaintiffs completed discovery in state court and prepared for trial. The case settled several months before the state court trial was scheduled to begin and shortly before an oral argument before the Ninth Circuit. The *Unocal* plaintiffs were able to assert all of their ATS claims as state common law tort claims in the state court case.¹⁷⁹



➤ ECUADOR, Quito: A march of Ecuadorean indigenous people arrives in Quito on July 1, 2014 protesting for the Water Law that withdraws the right of the natives to administrate the water sources in their territories.
© AFP PHOTO/JUAN CEVALLOS.

¹⁷⁸ These cases have been filed by EarthRights International. See Marco Simmons, “What does the Kiobel decision mean for ERI’s cases?” EarthRights International Blog, (Apr. 19, 2013) www.earthrights.org.

¹⁷⁹ Paul Hoffman and Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 UC Irvine L. Rev. 9, 16 (2013).

CONCLUSION

Although *Kiobel* limited the scope of the ATS and a number of lower federal courts have dismissed ATS cases since *Kiobel*, it remains an important tool for corporate accountability, particularly in the case of U.S. corporations. Current procedures are favourable to situations such as ours, given the existence of class action lawsuits, the discovery procedure and the contingency system for remunerating attorneys. The ATS has also accepted international law as the law applicable to the case and developed a liberal approach in terms of piercing the corporate veil.

In practice, however, **ATS trials are characterized by numerous difficulties and uncertainties which render the process unpredictable.** Some go as far as saying the ATS process is compromised from the outset. It is difficult to meet the substantive conditions for civil action in our situation, particularly with regard to international law violations. The quasi-universal jurisdiction granted by the ATS is limited by various procedural hurdles which require a territorial connection between the U.S. and the dispute, either through personal jurisdiction or *forum non conveniens*, or which aim to avoid any interference with U.S. foreign policy. ATS trials are lengthy and costly for victims.

In addition, despite an increasing body of favourable case law affirming the right of victims of international law violations to a remedy in the U.S., **many doctrinal and jurisprudential controversies remain with regard to the application and appropriateness of legislation such as the ATS.**

Despite the low number of actual settlements or trials, some have stressed the value of the cases introduced under the ATS, noting that the ATS provides a forum where victims can publicly denounce the abuses they suffered, force companies to answer for their actions before an independent court and disclose relevant documents via the disclosure procedure. In addition, calling the reputation of corporations into question plays a preventive role.¹⁸⁰

Despite these obstacles, it remains pertinent to **draw lessons** from the ATS, particularly in terms of the content and principles it ascribes. It is also important to learn from the practices it generates for **building an appropriate model of civil liability and responding to the challenges of globalisation.**

Thus, waiting for the law to develop a truly effective legal system, it is important to **coordinate efforts between NGOs and attorneys, to further advocate** and to

¹⁸⁰ See H. Ward, Governing Multinationals: the role of foreign direct liability”, Briefing Paper, Energy and Environment Programme, New Series, No. 18, February 2001; D. Kirkowski, “Economic Sanctions vs. Litigation under ATCA: U.S. Strategies to Effect Human Rights Norms; Perspectives from Burma”, Working Paper, 2003.

increase litigation relating to human rights violations committed by multinational companies.

ADDITIONAL RESOURCES

- International Commission of Jurists, *Corporate complicity & legal accountability*, vol. 3: civil remedies, Genève, 2008.
- Oxford Pro-bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse – A Comparative Submission Prepared for Prof. John Ruggie, UN SG Special Representative on Business and Human Rights*, 3 November 2008, www.law.ox.ac.uk/opbp.
- L. Boy, JB Racine, F. Siirainen, *Droits économiques et droits de l'homme*, Larcier, Belgique, 2009.
- EarthRights International, *Out of Bounds: Accountability for Corporate Human Rights Abuse After Kiobel*, Sept. 2013, www.earthrights.org/es/publication/out-bounds.
- Business and Human Rights, Corporate Legal Accountability Portal: www.business-humanrights.org/LegalPortal/Home.
- Center for Constitutional Rights, <http://ccrjustice.org/>.
- EarthRights International, www.earthrights.org.
- Professor Gwynne Skinner, Professor Robert McCorquodale, Professor Olivier De Schutter, and Andie Lambe, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, report released by the International Corporate Accountability Roundtable (ICAR), CORE, and the European Coalition for Corporate Justice (ECCJ), of which FIDH is a steering group member (2013).
- Amnesty International, *Injustice incorporated: Corporate abuses and the human right to remedy* (Mar. 7, 2014), available at: www.amnesty.org/en/library/info/POL30/001/2014/en.
- Canadian Network on Corporate Accountability: <http://cnca-rcrce.ca/>

Litigation examples in Canada

To date, the few business human rights cases litigated in Canada have not achieved positive results for human rights plaintiffs.¹⁸¹ However, recent decisions have opened up possibilities for successful corporate human rights litigation¹⁸².

A Way to Establish Jurisdiction: The “Forum of Necessity” Doctrine

In 2010, the Ontario Court of Appeal recognized that Canadian courts may assert jurisdiction in “exceptional cases”, “despite the absence of a real and substantial connection” under the Forum of Necessity doctrine.¹⁸³ “Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.”¹⁸⁴ On appeal, the Supreme Court of Canada left open the “possible application of the forum of necessity doctrine” but did not address it directly.¹⁸⁵

In March 2014, the Ontario Court of Appeal reviewed this “relatively new Canadian doctrine”, first incorporated in art. 3136 of the *Civil Code of Québec* (C.C.Q.), which was enacted in 1991 and came into force in 1994, and then included in s. 6 of the Uniform Law Conference of Canada’s (“ULCC”) model *Court Jurisdiction and Proceedings Transfer Act*, 1994.¹⁸⁶ The Court noted that “[a]ll jurisdictions in Canada that have recognized the forum of necessity have incorporated a ‘reasonableness’ test.”¹⁸⁷ In Ontario, a plaintiff must establish that “there is no other forum in which the plaintiff can reasonably seek relief”.¹⁸⁸

The “reasonableness” requirement has been stringently construed.¹⁸⁹ To date, only one Ontario court has assumed jurisdiction based solely on the forum of necessity doctrine. In *Bouzari v. Bahremani*, the only Ontario case to successfully invoke forum of necessity, the motion judge found in a default judgment that the plaintiff, an Iranian citizen – although he was a Canadian citizen at the time of the suit – was tortured in Iran by the defendant (another Iranian citizen) or at his instigation. The

¹⁸¹ Michael D. Goldhaber, Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard, 3 UC Irvine L. Rev. 127, 135. See, e.g., *Piedra v. Copper Mesa Mining Corp.*, 2010 ONSC 2421, 2010 CarswellOnt 3623 (Can. Ont. Sup. Ct.) (WL); *Recherches Internationales Québec v. Cambior Inc.*, 1998 CarswellQue 1430 (Can. Que. Sup. Ct.) (WL); *Bil’in (Village Council) v. Green Park Int’l Ltd.*, 009 QCCS 4151 [2009] R.J.Q. 2579; *Anvil Mining Ltd. v. Ass’n Canadienne Contre l’Impunité*, 2012 QCCA 117, 2012 CarswellQue 255 (Can. Que. C.A.) (WL) application for leave to appeal denied.

¹⁸² For a useful overview of lawsuits in Canada against extractive companies, see Above Ground, Transnational Lawsuits in Canada Against Extractive Companies: Developments in Civil Litigation, 1997-2005, www.aboveground.ngo.

¹⁸³ *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84.

¹⁸⁴ *Ibid.*

¹⁸⁵ *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17[2012] 1 S.C.R. 572, at para. 100.

¹⁸⁶ *West Van Inc. v. Daisley*, 2014 ONCA 232, para. 18.

¹⁸⁷ *Ibid.*, para 20.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*, para 21.

motion judge further found that there was “no reasonable basis upon which [the plaintiffs could be] required to commence the action in a foreign jurisdiction, particularly, the state where the torture took place, Iran”.¹⁹⁰ The defendant later had the default judgment set aside, and challenged jurisdiction, claiming that England was a more appropriate forum: both the plaintiff and defendant agreed that the action could not be heard in Iran. The court denied the defendant’s request. Ontario had assumed jurisdiction based on the forum of necessity – which the defendant did not initially challenge – and the defendant had not met his burden of establishing that England was clearly a more appropriate forum.¹⁹¹

Examples of situations in which the doctrine has relevance include, but are not limited to:

1. the breakdown of diplomatic or commercial relations with a foreign State;
2. the need to protect a political refugee; or
3. the existence of a serious physical threat if the debate were to be undertaken before the foreign court.¹⁹²

In the case of *ACCI vs. Anvil Mining Limited*, the plaintiffs tried to argue forum of necessity, but the Court of Appeal rejected the argument. However, the motion judge actually found in the plaintiff’s favour: the judge found that Quebec had jurisdiction simpliciter (i.e. that jurisdiction could be asserted against an out-of-province defendant) and then rejected the defendant’s claim of *forum non conveniens*. On 24 January 2012 the Quebec Court of Appeals reversed and dismissed the case.¹⁹³ This case is addressed in part II of this section looking at extraterritorial criminal liability and the role of victims and the prosecution in initiating proceedings (see below).

➔ **Bil’in v. Greenpark International, Inc et al.**

Bil’in is an agricultural village located in the eastern portion of the Occupied Palestinian Territory. In order to build a settlement, in 1991, the Israeli military confiscated a portion of the land belonging to the village, which depended on farming the land for its livelihood.

In 2001, two Canadian companies, Green Park International, Inc. and Green Mount International, Inc., began to construct the settlements. In 2005, the village of Bil’in filed a civil claim with the Israeli Supreme Court against the two Canadian companies, other Israeli companies involved in the project and the Israeli military and government agencies concerned. It was alleged that both the land acquisition, building plans and permits were illegal. The motion did not mention the illegality under international humanitarian law of regula-

¹⁹⁰ *Bouzari v. Bahremani*, [2011] O.J. No. 5009, para 5.

¹⁹¹ *Bouzari v. Bahremani*, 2013 ONSC 6337, para 27.

¹⁹² *West Van Inc. v. Daisley*, 2014 ONCA 232, para 40.

¹⁹³ Documents related to this case are available at: Canadian Centre for International Justice (CCIJ), www.ccij.ca. For other non-human rights related cases on some non-human rights case that have dealt with forum of necessity see notably *Josephson v Balfour Recreation Commission*, 2010 BCSC 603; *Olney v Rainville*, 2008 BCSC 753.

tions allowing the establishment of settlements in occupied territories. The Israeli Supreme Court had already ruled that the judiciary could not decide the legality of the settlements and that the executive branch alone had jurisdiction in that matter. The village of Bil'in also filed civil suit against the two Canadian companies on 7 July 2008 in the Québec Superior Court in Montreal.

The plaintiffs cited international humanitarian law, specifically the Fourth Geneva Convention of 1949. According to the plaintiffs, the defendant firms were acting as de facto agents of the State of Israel, illegally building homes and other facilities, promoting and managing the sale of these buildings on occupied territory. The target audience for the campaign was only the civilian population of the occupying power creating the new neighbouring settlement on Bil'in's land.

By participating in this illegal project, the companies acted as accomplices to the State of Israel. The plaintiff argued that Canadian courts had jurisdiction to hear the case because of obligations to which Canada had agreed under national and international law, namely by ratifying the Rome Statute of the International Criminal Court and the Fourth Geneva Convention.

The plaintiffs submitted three requests to the court:

1. Recognize violations of the above-mentioned national and international law instruments by the corporations,
2. Order the corporations to halt all construction, sales, advertising and other activities related to the creation of a settlement on Bil'in's lands, remove all on-site supporting materials and equipment, and return the lands to their original state, and
3. Order the company to pay punitive damages in the order of CAD 2,000,000 and order the directors of the companies to pay CAD 25,000. Citing several preliminary objections, such as the fact that the case had already been tried in Israeli courts, or that *forum non conveniens* was an obstacle to Canadian courts accepting jurisdiction, the Québec Superior Court ruled that it did not have jurisdiction and that Israeli courts should be the appropriate forum.

Notwithstanding the above-mentioned decisions, some Bil'in villagers have recently regained some of their land thanks to deviations of the separation barrier Israel built on the Occupied Palestinian Territory. Although this case does not involve any companies, and is in no way linked to the previous case, it deserves to be mentioned as Bil'in was affected by the barrier's route.

In response to deadly attacks targeting Israelis, Israel began in 2002 the construction of a separation barrier on the Occupied Palestinian Territory. On 4 September 2007, the Israeli Supreme Court ordered a revision to the separation barrier's route which effectively prevented some Bil'in villagers from accessing their farmland. On 11 February 2010, two and a half years after the ruling, Israeli authorities began rerouting the portion of barrier running near Bil'in, thus some villagers will regain access to their land. Bil'in villagers filed an appeal which was dismissed in March 2011 by the Québec Superior Court.

➔ **Recherches Internationales Québec v. Cambior Inc.**¹⁹⁴

In this case, the August 1995 bursting of a tailing dam holding back waste from the ore-leaching process, poisoned a river on which the life and culture of nearly 23,000 people in Guyana depended. The Omai mine which caused the damage is wholly owned by Omai Gold Mines Limited (OGML), whose main shareholder (65%) at the time was Canadian company Cambior Inc. In 2002, Cambior Inc. held a 95% stake in OGML. The 23,000 victims, assisted by Recherches Internationales Québec (RIQ), brought a class action lawsuit against Cambior Inc in Québec seeking CAD 69 million for harm suffered.

Having initially accepted the joint jurisdiction of Canadian and Guyanese courts to handle the matter, the Canadian court ultimately ruled that Guyanese courts were the most appropriate forum. Citing *forum non conveniens*, the Canadian court rejected jurisdiction in August 1998. The court held that the fact that the corporation was domiciled in Québec did not constitute a special link in assessing the appropriateness of the jurisdiction. The court also rejected RIQ's argument that Guyana's judicial system failed to guarantee the right to a fair trial. In 2002 the Guyanese court hearing the case dismissed the claim. In 2003, a new claim was brought against Cambior Inc seeking redress for the damages resulting from the bursting of the dam.

In October 2006, the Guyanese court dismissed the claim and ordered the victims to pay for the expenses Cambior Inc. incurred during the trial.

Direct negligence liability and piercing the corporate veil: Choc v. Hudbay Minerals

Mayan Q'eqchi' from Guatemala brought three related actions against a Canadian mining company, Hudbay Minerals, and its subsidiaries, HMI Nickel (formerly Skye Resources, Inc.) and CGN, in Ontario Superior Court of Justice. They allege that security personnel working for Hudbay's subsidiaries, who were allegedly under the control and supervision of Hudbay, committed human rights abuses, including a shooting, a killing, and gang-rapes committed in the vicinity of the former Fenix mining project, a proposed mining operation located in eastern Guatemala. Hudbay Minerals is a Canadian mining company headquartered in Toronto. During the relevant period, Hudbay Minerals owned the Fenix mining project through CGN. Since then, HMI Nickel Inc./ Skye Resources amalgamated with Hudbay, who is now legally responsible for all its legal liabilities. CGN owned and operated the Fenix mining project in Guatemala, and was wholly-controlled and 98.2% owned subsidiary of Hudbay Minerals. The defendants' motion to strike the three actions was denied by Justice Carole J. Brown on July 22, 2013.¹⁹⁵ The two main issues

¹⁹⁴ Recherches Internationales Québec v. Cambior, [1998], Q.J., No. 2554

¹⁹⁵ *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414. Carole J. Brown, J. See also chocversushudbay.com.

were whether Hudbay could be found liable in negligence for actions or omissions in another country and whether the plaintiffs had pleaded facts able to lift the corporate veil and hold Hudbay liable.

An individual complaint against Canada has been filed in February 2013 before the UN Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights.¹⁹⁶

Torts committed in another country

The main issue in *Choc v. Hudbay Minerals* was whether the plaintiffs had pleaded all material facts required to establish the constituent elements of their claim of direct negligence and whether Hudbay “owed a duty of care to the plaintiffs.”¹⁹⁷ Because the plaintiffs did not argue that there is an established duty of care, it was necessary to apply the test for establishing a novel duty of care. **The following must be proven:**

- **the harm complained of is a reasonably foreseeable consequence of the alleged breach;**
- **there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and,**
- **no policy reasons exist to negatively or otherwise restrict that duty.**¹⁹⁸

In *Choc v. Hudbay Minerals*, the judge concluded that the plaintiffs had pleaded all materials facts required to establish their claim of negligence.

Piercing the corporate veil

In her decision in *Choc v. Hudbay Minerals*, the judge explained that “Ontario courts have recognized three circumstances in which separate legal personality can be disregarded and the corporate veil can be pierced: **a) where the corporation is ‘completely dominated and controlled and being used as a shield for fraudulent or improper conduct’**¹⁹⁹; **(b) where the corporation has acted as the authorized agent of its controllers, corporate or human**²⁰⁰; and **(c) where a statute or contract requires it**²⁰¹. The judge noted that “the Plaintiffs have pleaded second exception to the rule of separate legal personality” by pleading that CGN is an agent of Hudbay, and concluded that “[i]f plaintiffs can prove at trial that CGN

196 See: The Global Initiative for Economic, Social and Cultural Rights, *Palestinian village’s complaint against Canada registered with the UN Human Rights Committee*, <http://globalinitiative-eser.org> see also : FIDH, *Re: Submission concerning human rights violations linked to transnational corporations operating in the Occupied Palestinian Territory*, September 19, 2013, www.fidh.org

197 *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, para 55.

198 *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, para. 57 (citing the Supreme Court of Canada in *Odhavi Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R 263).

199 Citing 642947 *Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.) at para. 69.

200 Citing *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256, [2009] O.J. No. 1195 at para. 51.

201 Citing *Parkland Plumbing*, at para. 51.

was Hudbay’s agent at the relevant time, they may be able to lift the corporate veil and hold Hudbay liable.”²⁰²

1) Foreseeability

Because the pleadings state that Hudbay/Skye knew that violence was frequently used by personnel during forced evictions; that violence had been used at previous forced evictions it had requested; that the security personnel was in possession of illegal firearms; and that there was a general risk that violence and rape would occur, the Judge concluded that the pleadings make it reasonably foreseeable that requesting the forced eviction of a community could lead to violence and rape.²⁰³

2) Proximity

The judge noted that “proximity is determined by examining various factors, rather than a single unifying characteristic or test.” These include the parties’ expectations, representations, reliance, the property or other interests involved,²⁰⁴ a close causal connection, and any assumed or imposed obligations.²⁰⁵ The Judge concluded that “[b]ased on the plaintiffs’ pleadings, there were numerous expectations and representations on the part of Hudbay/Skye”, in particular, “Hudbay/Skye made public representations concerning its relationship with local communities and its commitment to respecting human rights, which would have led to expectations on the part of the plaintiffs. There were also a number of interests engaged, such as Hudbay/Skye’s interest in developing the Fenix project, which required a ‘relationship with the broader community, whose efficient functioning and support are critical to the long-term success of the company in Guatemala’, according to Hudbay’s President and CEO.” The judge found that a *prima facie* duty of care may be found to exist.²⁰⁶

3) Policy considerations

The judge found that “it is not plain and obvious that policy reasons would negative or otherwise restrict a *prima facie* duty of care” because there “are clearly competing policy considerations in recognizing a duty of care in the circumstances of the case.”²⁰⁷

The plaintiffs must now prove the facts alleged in their complaint at trial, but the ruling is significant in that it recognizes the possibility of holding corporations liable for their negligence in foreign countries.

²⁰² *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, para 49.

²⁰³ *Id.* at para 63.

²⁰⁴ Citing *Cooper v Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 34

²⁰⁵ Citing *Odhavi Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 55

²⁰⁶ *Choc v. Hudbay Minerals Inc.*, at paras. 69-70.

²⁰⁷ *Choc v. Hudbay Minerals Inc.*, at para. 74.

In June 2015, the Court ordered HudBay to disclose extensive documentation concerning its corporate structure and control over its subsidiaries²⁰⁸.

In sum and as highlighted by Above Ground, “the court’s ruling sets a precedent with respect to parent company liability. For the first time in Canada, cases involving foreign plaintiffs who allege to have suffered harm caused by Canadian company’s overseas operations will proceed to trial.”²⁰⁹

➔ **García, García Monroy, Castillo Pérez, Castillo Herrera, Pérez Martínez, Aguilar Castillo and Martínez Sasvín v. Tahoe Resources Inc.**

On June 18, 2014, seven Guatemalan men filed a civil lawsuit in a Vancouver court against Canadian mining company Tahoe Resources Inc. for injuries they suffered when Tahoe’s security personnel opened fire on them at close range. The men, residents of San Rafael Las Flores, where the company’s Escobal mine is located, allege that Tahoe is legally responsible for the violence inflicted on them as they peacefully protested against the mine²¹⁰.

The plaintiffs are suing Tahoe, a company incorporated in British Columbia, for battery and negligence. The lawsuit claims that Tahoe’s manager of security ordered the shooting. It further alleges that Tahoe expressly or implicitly authorized the manager’s conduct or was negligent in its management of security personnel. The plaintiffs argue that Tahoe was aware of widespread community opposition to the mine and the manager’s conflictive relationship with the community. In addition to the civil case in Canada, criminal charges have been filed in Guatemala against Tahoe’s former security manager.²¹¹ On November 9, 2015, the Supreme Court of British Columbia rendered a decision staying the procedure on the basis of forum non conveniens, considering that “Guatemala is clearly the more appropriate forum for the determining the matters in dispute”.²¹²

➔ **Chevron Corp. v. Yaiguaje**

On 4 September 2015, the Supreme Court of Canada considered that Canadian courts have jurisdiction to decide if Ecuadorian villagers allegedly harmed by Texaco’s (now merged with Chevron) operations in their region can have the Ecuadorian judgment (U.S.\$ 9.51 billion in environmental and punitive damages) recognized and enforced in Canada (against Chevron Canada).²¹³

²⁰⁸ See CNCA, *Important Canadian court ruling in the HudBay Minerals (Guatemala) lawsuit*, 30 June 2015, <http://cnca-rcrce.ca>

²⁰⁹ See Above Ground, *Transnational Lawsuits in Canada Against Extractive Companies: Developments in Civil Litigation, 1997-2005*, www.aboveground.ngo.

²¹⁰ Extract from CCIJ, Tahoe case, www.ccij.ca/cases/tahoe/.

²¹¹ Extract from Above Ground, *Transnational Lawsuits in Canada Against Extractive Companies: Developments in Civil Litigation, 1997-2005*, www.aboveground.ngo.

²¹² *García v. Tahoe Resources Inc.*, 2015 BCSC 2045

²¹³ Extract from Canadian Corporate Accountability Network (CNCA), *Important decision today: Canadian courts have jurisdiction to decide if Ecuadorian villagers allegedly harmed by Texaco’s (now merged with Chevron) operations in their region can have the Ecuadorian judgement (US\$ 9.51 billion in environmental and punitive damages) recognized and enforced in Canada (against Chevron Canada)*, <http://cnca-rcrce.ca/>.

“Since the initial judgment, Chevron has fought the plaintiffs in the U.S. courts and has refused to acknowledge or pay the debt. As Chevron does not hold any Ecuadorian assets, the plaintiffs commenced an action for recognition and enforcement of the Ecuadorian judgment in the Ontario Superior Court of Justice. It served Chevron at its head office in California, and served Chevron Canada, a seventh-level indirect subsidiary of Chevron, first at an extra-provincially registered office in British Columbia, and then at its place of business in Ontario. *Inter alia*, the plaintiffs sought the Canadian equivalent of the award resulting from the judgment of the Appellate Division of the Provincial Court of Justice of Sucumbíos. Chevron and Chevron Canada each sought orders setting aside service *ex juris* of the amended statement of claim, declaring that the court had no jurisdiction to hear the action, and dismissing or permanently staying the action.”

The court found that “To recognize and enforce such a (foreign) judgment, the only prerequisite is that the foreign court had a **real and substantial connection** with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction were satisfied... To conclude otherwise would undermine the important values of order and fairness that underlie all conflicts rules, and would be inconsistent with this Court’s statement that the doctrine of comity must be permitted to evolve concomitantly with international business relations, cross-border transactions, and mobility.”²¹⁴

This case gave rise to legal proceedings in the U.S., in Ecuador as well as in investment arbitration.²¹⁵

ADDITIONAL RESOURCES

- **Above Ground:**
www.aboveground.ngo
- **CNCA (Canadian Network on Corporate Accountability):**
<http://cnca-rcrce.ca>
- **CCIJ (Canadian Centre for International Justice):**
www.cciij.ca

²¹⁴ Full decision accessible here: <http://scc-csc.lexum.com>

²¹⁵ See Business and Human Rights Resource Centre, “Texaco/Chevron Lawsuit (re Ecuador)”, <http://business-humanrights.org>

CHAPTER II

Establishing Jurisdiction in an EU Member State Court and Determining the Law Applicable to the Case

* * *

Under what conditions will an EU Member State court recognize jurisdiction?

The primary instrument currently used in the European Union to establish the civil liability of multinational corporations for human rights violations committed outside the EU is **Regulation 44/2001 of 22 December 2000 (Brussels I)** on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.²¹⁶

Regulation 44/2001 sets out, inter alia, the rules of international jurisdiction in civil and commercial matters which are common to the various EU Member States.²¹⁷ It entered into force on 1 March 2002 and replaces the Brussels Convention of 27 September 1968.²¹⁸

²¹⁶ European Community Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ, L12, 13 January 2001, p. 1. We highly recommend reading the chapter on the European Union in Oxford Pro Bono Publico, *op.cit.*, p. 65 and following.

²¹⁷ Note also the Hague Conference on Private International Law's 30 June 2005 adoption of the "Convention on Choice of Court Agreements", which has allowed the creation of a global legal alternative for the resolution of disputes between corporations when the parties have reached an agreement on the choice of forum. It entered into force on the 1st October 2015, after the approval by the E.U.: see www.hcch.net. See also an analysis of the impact of the Hague Convention on Choice of Court Agreements' ratification by the European Community: Commission Staff Working Document of 5 September 2008 (SEC (2008) 2390)). On this subject, see: B. Van Schaak, "In Defense of civil redress: the domestic enforcement of human rights norms in the context of the proposed Hague judgments convention", *Harvard Int'l L.J.*, 2001, p. 141; B. Stephens, "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", *Yale J. Int'l L.*, 2002, 27, p. 54.

²¹⁸ The Brussels Convention, however, continues to apply on the one hand to actions begun before 1 March 2002 (Regulation (EC) No 44/2001, *op.cit.*, art. 66.1) and on the other hand to the relations between Denmark and other EU Member States as Denmark is not considered a Member State under the terms of Article 1.3 of the Regulation (Regulation (EC) No 44/2001, *op.cit.*, arts. 21 and 22. On that Member State, see: Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ, 16 November 2005, L299/62).

In cross-border disputes, the regulation permits courts in a Member State to determine the state's international jurisdiction, provided the necessary conditions for the regulation's application are met.²¹⁹

1. General condition for the application of Regulation 44/2001

For Regulation 44/2001 to be applied, **the corporation must be domiciled in a Member State.**

Otherwise, under Article 4§1 of the regulation, each Member State determines jurisdiction under its own law.²²⁰ Each Member State has in effect appropriate conflict of jurisdiction rules. In France, for example, Articles 14 and 15 of the French Civil Code allow courts to hear a case if the plaintiff or defendant is French. Furthermore, several countries allow cases to be brought against individuals with personal effects in an EU Member State. This mechanism is known internationally as “the Swedish umbrella rule”, which has its roots in a Swedish rule allowing national courts to prosecute an individual in all types of cases if the individual left his or her umbrella on the soil over which the court has jurisdiction.²²¹

Regulation 44/2001 applies regardless of whether a victim bringing action is a resident or national of a third,²²² non-EU Member State.

2. Three options available to victims

People affected by the foreign operations of a multinational corporation domiciled in a Member State have three primary grounds for jurisdiction to bring action in an EU Member State court:

a) The court with jurisdiction is that of the defendant's domicile

In general, Article 2§1 of Regulation 44/2001 provides that, regardless of their nationality, persons domiciled in an EU Member State (in our situation, the multinational) shall be sued in the courts of that state.

²¹⁹ On this subject, see: European Parliament resolution on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility, COM (2001) 366-C5-0161/2002 - 2002/2069 (COS), 30 May 2002, §50.

²²⁰ Subject to articles 22 and 23 relating to exclusive jurisdiction and the extension of jurisdiction, respectively, issues not considered in this study.

²²¹ H. Smit, “Common and Civil Law Rules of In Personam Adjudicatory Authority: An Analysis of Underlying Policies”, *Hastings Int'l & Comp. L. Rev.*, 1972, p. 335., in B. STEPHENS, “Corporate Liability: Enforcing Human Rights Through Domestic Litigation”, *Hastings Int'l & Comp. L. Rev.*, 2000-2001, p. 410; Y. Kryvoi, “Enforcing Labor Rights Against Multinational Corporate Groups in Europe”, *Industrial Relations: A Journal of Economy and Society*, Vol. 46, No. 2, p. 366-386, April 2007.

²²² CJEC, *Group Josi Reinsurance Company SA v. Universal General Insurance Company*, 13 July 2000, C-412/98, Rec., p. I- 5940, §§ 57 and 59 (The plaintiff was domiciled in Canada).

The concept of “domicile” for legal persons

A company or legal person’s domicile is considered to be **its registered office, central administration or principal place of business** (Art. 60 of the regulation²²³). The Court of Justice of the European Union independently interprets these concepts.²²⁴

Thus, under Article 2§1 of Regulation 44/2001, a foreign person, for example a worker whose rights have been violated by a multinational corporation, may bring action in the court of a Member State if the principal place of business, registered office or central administration of the parent company in question is located in that court’s territorial jurisdiction.

On this legal basis,²²⁵ between 1997 and 1999, South African workers and citizens filed several claims with English courts against Cape plc, a British company which worked with asbestos in South Africa.²²⁶

b) The court with jurisdiction is that of the place where the harmful event occurred or may occur

Article 5§3 of Regulation 44/2001 allows for a person domiciled in one Member State to be sued in another Member State for tort, delict or quasi-delict²²⁷ in the courts of the place where the harmful event occurred or may occur.²²⁸

The concept of “place where the harmful event occurred”

The Court of Justice of the European Union has ruled that the place where the harmful event occurred can be understood in two ways.

- **The place where the damage itself occurred**, or
- **The place of the event giving rise to damage**.²²⁹ For example, if a board of directors makes a decision in a state other than that in which the corporation is

²²³ Article 53 of the Brussels Convention considers the domicile of a company or legal person to be its headquarters, as defined by the rules of private international law in the forum court.

²²⁴ EC Regulation 44/2001, *op.cit.*

²²⁵ In reality, Regulation 44/2001 replaced Article 2 of the Brussels Convention.

²²⁶ *Lubbe et al. v. Cape plc* (CA 30 July 1998) (1998) C.L.C. 1559; *Group Action Afrika et al. v. Cape plc* (QBD 30 July 1999) (2000) 1 Lloyd’s Rep. 139; *Rachel Lubbe et al. v. Cape plc* (CA 29 Nov. 1999) (2000) Lloyd’s Rep. 139.

²²⁷ CJEC, *Athanasios Kalfelis v. Banque Schröder, Münchmeyer, Hengst et Cie, et autres*, 27 September 1988, 189/87, Rec., 1988, p. 5579, §17; CJEC, *Réunion européenne SA e.a. v. Spliethoff’s Bevrachtungskantoor BV et Capitaine commandant le navire “Alblasgracht V002”*, 27 October 1998, C-51/97, Rec., 1998, p. I-6511, §22: The Court of Justice of the European Communities has ruled that the terms “delict and quasi-delict” should be defined independently and that they comprise “all actions seeking to establish the liability of a defendant not contractually bound according to Article 5§1”.

²²⁸ Regulation 44/2001 somewhat modifies the terms of Article 5§3 by replacing the word “defendant” with “any person” and by adding to the place where the harmful event occurred “or may occur”.

²²⁹ See CJEC, *Sté Bier et Fond. Rheinwater v. Mines de Potasse d’Alsace*, Rec., 30 November 1976, 76.1735; CJEC, *Dumez France v. Helaba*, 1990, C-220/88; CJEC, *Réunion européenne, op.cit.*, 1998.

domiciled, and that decision causes the harm for which the plaintiff seeks redress, the claim may be brought in the state where the decision was made.²³⁰

The concept of “place where the harmful event may occur”

To allow preventive legal action, Article 5§3 of Regulation 44/2001 grants jurisdiction to the place where a harmful event may occur. The admissibility of such action depends, however, on the law of the forum court. The potential risk must also have some degree of materiality (the threat of the harmful event must be serious or immediate).²³¹

c) The court with jurisdiction is that of the place where a branch, agency or other establishment is located²³²

The special jurisdiction rules laid forth in Article 5§5 of Regulation 44/2001 allow **a defendant domiciled in a Member State to be sued in the courts of another Member State, provided a branch, agency or any other establishment is located in the other Member State.** Two conditions must be met: 1) the claim must concern operations (see below), 2) the parent company must be located in an EU Member State.

The concepts of “branch, agency or other establishment”

The Court of Justice has held that the terms “branch, agency or other establishment” do not refer to specific legal situations, but imply:

- **The secondary establishment’s dependence** on the parent company, and
- **The secondary establishment’s involvement** in the conclusion of business transacted.²³³

²³⁰ O. De Schutter, *The Role of EU Law in Combating International Crimes*, report prepared as part of the International Commission of Jurist’s project: “Corporate Complicity in International Crimes”, p. 34.

²³¹ G. Tritton, *Intellectual property in Europe*, 2 ed., Sweet & Maxwell, London, 2002, p. 971-975; CJEC, *Fiona Shevill, Ixora Trading Inc, Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA*, 7 March 1995, C-68/93, Rec. C.J.C.E., 1993, p. 415 and following, § 24.

²³² Deriving from Article 2§1, these special rules of jurisdiction allow a plaintiff to withdraw action from the state of the defendant’s domicile and bring it before the court of another Contracting State (See CJEC, *Group Josi Reinsurance Company SA v. Universal General Insurance Company*, *op.cit.*, §34), provided there is a substantial link between the dispute and the court called upon to hear the case (*CJEC SAR Schotte GmbH v. Parfums Rothschild SARL*, 9 December 1987, 218/86, Rec., p. 4905). The special rules are applicable to companies domiciled in Denmark according to the relevant provisions of the Brussels Convention and also to companies domiciled in Switzerland, Norway and Iceland (the rules are applicable to companies domiciled in Finland and Sweden only for actions brought before 1 March 2002) according to the Lugano Convention (convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Lugano 16 September 1988, OJ, L319, p. 9).

²³³ CJEC, *A. De Bloos SPRL v. Société en commandite par actions Bouyer*, 6 October 1976, 14/76, Rec., 1976, p. 1509, §21; CJEC, *Somafer SA v. Saar-Ferngas AG*, 22 November 1978, 33/78, Rec., 1978, p. 2193, §12; CJEC, *Blanckaert et Willems PVBA v. Luise Trost*, 18 March 1981, 139/80, Rec., 1981, p. 819, §13 (Excluding independent commercial agents, who, while representing the company abroad, “merely transmits orders to the parent undertaking, without being involved in either, their terms or their execution”).

According to the Court's rulings, the place of business may enjoy legal personhood provided it has the appearance of permanency and acts publicly as an **extension** of the parent body domiciled in another Member State. Third parties do not have to deal directly with the parent company headquartered in another Member State, but can transact business at the place of business constituting the extension (branch, agency or other establishment). A legal connection is if necessary established between the parent company and the third party.

The concept of “disputes arising out of operations”

Disputes may involve rights, contractual or non-contractual obligations **entered into by the place of business (branch or agency) on behalf of the parent company. The execution of these obligations may take place in the Member State where the secondary establishment is registered, or in another Member State.**²³⁴ The dispute can also relate to rights, contractual or non-contractual obligations resulting from **activities the place of business itself has assumed²³⁵ in relation to its own management.** This applies, for example, to a dispute arising out of employment contracts made by the place of business.²³⁶

To illustrate, consider a parent company domiciled in an EU Member State with a subsidiary in another EU Member State operating a refinery on behalf of the parent company. The subsidiary contaminates water due to faulty operation at the plant. Under Article 5§5, victims can bring action against the parent company in the subsidiary's jurisdiction.

Situations in which a branch's activities cause a tort to occur outside of the European Union are not covered under Article 5§5, but under Article 5§3, discussed above.

3. Two additional grounds for jurisdiction

Regulation 44/2001 provides two additional grounds for jurisdiction:

Nexus between claims

If a lawsuit involves several companies domiciled in different Member States, Article 6§1 of Regulation 44/2001 allows the parties to be **sued in a single jurisdiction, provided that one of the companies is domiciled there, and provided there is a nexus between the claims.**²³⁷ It is thus possible to bring joint action

²³⁴ CJEC, *Lloyd's Register of Shipping v. Société Campenon Bernard*, 6 April 1995, 439/93, Rec., 1995, p. I-981, §22; H. Gaudemet-Tallon, *Les Conventions de Bruxelles et de Lugano. Compétence internationale, reconnaissance et exécution des jugements en Europe*, 2^e éd., L.G.D.J., Paris, 1996, No. 211, p. 158-159.

²³⁵ CJEC, *Somafer, op.cit.*, 33/78, §13.

²³⁶ *Ibid.*

²³⁷ This condition resulting from Court rulings (CJEC, *Athanasios Kalfelis v. Banque Schröder, Münchmeyer, Hengst et Cie, et autres, op.cit.*, p. 5584, §13; H. Gaudemet-Tallon, *op.cit.*, 1996, No. 222 to 224, p. 165-166), was incorporated as Article 6§1 of Regulation 44/2001.

against a parent company and its subsidiary for harm caused by their activities abroad, provided they are both domiciled in the EU. It is also possible to bring joint action against two separate European multinationals operating a joint venture in a third country.

Interim measures

Article 24, in turn, **allows plaintiffs to request Member State courts to grant interim measures**,²³⁸ even when another contracting state has jurisdiction to hear the case, provided there exists “a real link between the relief sought and the territorial jurisdiction of the Contracting State’s forum court”.²³⁹

“COLLECTIVE INTEREST” LAWSUITS IN EUROPE

In Europe, generally, only alleged victims or their assigns may bring civil action. With the exception of certain countries, including the UK, the “class action” suits found in the American system are generally not accepted (See Chapter I.A.2).

In Europe, “collective interest” lawsuits are admissible only in cases clearly enumerated in law.

- In Belgium, “collective interest” lawsuits are permitted for acts of racism, discrimination or damage to the environment.
- In France, associations whose registered purpose is to combat crimes against humanity or war crimes may bring civil action through “collective interest” lawsuits, provided the association has been registered at least five years. Victims may then join the suit as a civil party.²⁴⁰
- In the Netherlands, the Civil Code permits NGOs to bring action as soon as a human rights violation undermines the public interest, as promoted under the civil code’s statutes.²⁴¹

In 2013 the European Commission Issued a recommendation on common principles of injunctive and compensatory collective redress mechanisms in the Member States for cases of violations or rights protected under EU law²⁴². The recommendation establishes specific standards for collective

²³⁸ CJEC, *M. Reichert, H.H. Reichert and I. Kockler v. Dresdner Bank AG*, 26 March 1992, C-261/90, *Rec.*, 1992, p. I-2149, §34: “Article 24 must therefore be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.”

²³⁹ CJEC, *Van Ude Maritime BV v. Kommanditgesellschaft in Firma Deco Line ea*, 17 November 1998, 391/95, *Rec.*, 1998, p. I-7135; CJEC, *Hans-Hermann Mietz v. Intership Yachting Sneek BV*, 27 April 1999, C-99/96, *Rec.*, 1999, p. I-2314, §43.

²⁴⁰ French code of criminal procedure, Art. 2-4.

²⁴¹ Nederlandse Burgerlijke Wetboek (BW), art. 3:305a(1). N. Jägers and M-J. Van Der Heijden, “Corporate Human Rights Violations: The Feasibility of Civil Recourse in The Netherlands”, *Brook. J. Int’L.L.*, 2008, vol. 33, p. 849.

²⁴² European Commission, *Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, 2013/396/EU, 11 June 2013.

redress mechanisms Member States should respect, including elements for cross-border cases.²⁴³ Although it is not binding, it should be reviewed by the Commission by 2017.²⁴⁴ There are some interesting examples of collective redress regarding standing of environmental NGOs, such as in France.²⁴⁵

What are the obstacles to an EU Member State court recognizing jurisdiction?

1. The doctrine of *forum non conveniens*

The applicability of *forum non conveniens* in the context of Regulation 44/2001 (or the Brussels Convention of 1968) and its implied harmonisation of legal jurisdiction is a controversial issue widely discussed in UK and Irish courts.

a) Non-E.U.-domiciled corporations

When a company domiciled outside the EU faces legal action, a situation not expressly addressed under European law, Article 4§1 of Regulation 44/2001 **refers to the national law of the Member State forum court, including with regards to *forum non conveniens*, if applicable.**²⁴⁶

b) E.U.-domiciled corporations

Forum non conveniens is more problematic when a case before an EU Member State court meets all conditions for the application of Regulation 44/2001, but involves ties outside the E.U., **in the sense that the appropriate alternative forum is located in a third country outside the E.U.'s jurisdiction.**

➔ Re Harrods (Buenos Aires) Ltd.²⁴⁷

This case concerns a UK-domiciled company whose activities took place entirely in Argentina. Although liable under Article 2 of the Brussels Convention (the defendant's domi-

²⁴³ *Ibid.*, §17-18

²⁴⁴ For detailed info on the collective redress mechanisms see: British Institute for International and Comparative Law, *Report II on collective redress*, November 2014, available at: www.collectiveredress.org

²⁴⁵ British Institute of International Law and Comparative Law's mapping of collective redress in Europe in collaboration with several firms: www.collectiveredress.org/collective-redress/

²⁴⁶ A. Nuyts, *op.cit.*, p. 246 and following; I.D.I., "The principles for determining when the use of the doctrine of *forum non conveniens* and anti-suit injunctions is appropriate - Preliminary Exposition and Questionnaire (November 2000)", *Ann.*, vol. 70, t.I, 2002-2003, p. 30.

²⁴⁷ *Re Harrods (Buenos Aires) Ltd* (1991) 4 All ER 334, (1992) Ch. 72 (C.A.).

cile), the Court of Appeal in London held that such a basis for jurisdiction did not preclude the use of *forum non conveniens* to refer the case to Argentina,²⁴⁸ a country outside the E.U. Although the court also required **the absence of ties to any other Member State**, subsequent case law has omitted this condition, applying the *Harrods* precedent to disputes involving contact with several European states, including situations in which “the court of any such state has jurisdiction under the Brussels Convention to hear the case.”²⁴⁹

Disagreement over the compatibility of the *Harrods* precedent with the Brussels Convention and Regulation 44/2001 is all the more difficult because many multinational corporations are domiciled in the United Kingdom. *Lubbe v. Cape plc* illustrates the issue.

➔ **Lubbe et al. v. Cape plc**

Filed in February 1997, the suit sought damages from the UK-domiciled company Cape plc in relation to its work with asbestos, carried out in part in South Africa.

The plaintiffs, South African nationals, alleged serious health problems resulting from their occupations or the location of their homes near the factory in question. They argued that the parent company had failed to act with general care and to exercise due diligence in monitoring the factory’s activities, and was thus responsible for the problems. English courts established jurisdiction in both procedures under Article 251 of the Brussels Convention.

Discussion between the parties focused on the application of *forum non conveniens*. The company argued that South African courts were a more appropriate forum, because the damage and the event giving rise to damage took place in South Africa.

After lengthy proceedings,²⁵⁰ the House of Lords rejected the application of *forum non conveniens*, and refused to stay british proceedings in favour of South African jurisdictions. Although the injury, victims and evidence were located in South Africa, the victims could not receive legal aid there.

²⁴⁸ Unlike in the US, the application of *forum non conveniens* does not terminate proceedings, but allows the court to stay the case. If necessary (e.g. if justice is denied abroad), the victim may request a lifting of the stay, see A. Nuyts, *op.cit.*, p.462.

²⁴⁹ A. Nuyts, *op.cit.*, p. 257-258; S. Beernaert and A. Coibion, “La doctrine du forum (non) conveniens - Réconciliation avec le texte de la Convention de Bruxelles”, *Journal des Tribunaux*, 2000, p. 416; I.D.I., *op.cit.*, p. 31.

²⁵⁰ See *Lubbe et al. v. Cape plc*, *op.cit.*, 1998; *Group Action Afrika et al. v. Cape plc* (QBD 30 July 1999) (2000) 1 Lloyd’s Rep. 139; *Rachel Lubbe et al. v. Cape plc*, *op.cit.*, 2000. See also R. Meeran, “Liability of Multinational Corporations : A Critical Stage in the UK”, in M.T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, The Hague / London / Boston, 2000, p. 258.

In *Ngcobo v. Thor* and *Sithole v. Thor*, British courts applied *forum non conveniens* to hear another case involving the activities of a British company's subsidiary abroad.

➔ **Ngcobo v. Thor and Sithole v. Thor**²⁵¹

In 1994 and 1998, two employees of a South African subsidiary filed separate suits in the High Court of Justice against Thor Chemicals (UK) Ltd, Thor Chemical Holdings Ltd, and John Desmond Cowley, CEO of Thor Chemicals Ltd. In the course of their work for the South African subsidiary, which specialized in the production and handling of mercury, the two employees were exposed to excessive levels of mercury and suffered a variety of neurological problems. The plaintiffs argued that the British parent company had been negligent in implementing and monitoring its dangerous operations in South Africa, and that it had not adopted the measures necessary to prevent such harm.

In each of the two cases, British courts rejected the companies' calls for the application of *forum non conveniens*. During the trial of *Ngcobo v. Thor*, the courts ruled that a link existed between the negligence of the parent company in England and the harm caused in South Africa. The courts also cited the risk of a miscarriage of justice. Under South African law, the Workmen's Compensation Act 1941 (SA), granted compensation to victims of work related accidents (who were rendered unable to perform their jobs) and subsequently barred them from suing their employer in court. If victims were able to obtain financial compensation, barring them from pursuing further justice, the amount was ridiculous. Both cases settled with compensation going to the victims.

In *Lubbe v. Cape plc*, the House of Lords did not expressly rule on the question of compatibility between *forum non conveniens* and the Brussels Convention. It was not until the European Court of Justice's (ECJ) 1 March 2005 decision in *Andrew Owusu v. N.B. Jackson* that ***forum non conveniens* theory was declared incompatible with the Brussels Convention of 1968**.²⁵² The case pitted a British national residing in the UK against the company N.B. Jackson, also domiciled in the UK, for harm caused in Jamaica. The decision is in line with previous ECJ rulings.²⁵³ In theory, EU Member States could no longer invoke *forum non conveniens* to dismiss a case from their jurisdiction when the company involved is domiciled in the E.U, without facing the risk of being sentenced by the ECJ.

²⁵¹ *Ngcobo v. Thor Chemicals Holdings* [1995] TLR 579; *Sithole v. Thor Chemicals Holdings* [1999] TLR 100.

²⁵² CJEC, *Andrew Owusu v. N.B. Jackson, agissant sous le nom commercial "Villa Holidays Bal-Inn Villas"* e.a., 1 March 2005, C-281/02, 2005, C-106/2 "The Convention of 27 September 1968 (...) precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting state is in issue or the proceedings have no connecting factors to any other Contracting State."

²⁵³ See, for example ECJ, *Group Josi Reinsurance Company SA v. Universal General Insurance Company*, *op.cit.*

2. Immunity

Because Regulation 44/2001 does not address immunities, they are governed by the national laws of individual states and are thus likely to affect civil suits against multinational companies.

For example, in the UK, immunity applies not only to states, but also to their employees and agents, even when acting outside their official duties.²⁵⁴ A state enterprise acting as an agent of the state could therefore be granted immunity when faced with a civil suit.

The question of a foreign state's immunity from jurisdiction has been raised in French courts in a case against Veolia Transport, Alstom and Alstom Transport. The courts were able to circumvent this obstacle by arguing that the state (in this case Israel) did not exercise sovereignty over the territories in which the events in question took place.

➔ The Jerusalem tramway case

On 17th July 2005, the Israeli government signed a contract with several companies, including the French companies Veolia and Alstom, for the construction and operation of a tramline. The tram is to connect West Jerusalem (Israeli) to two Jewish settlements in the West Bank via East Jerusalem (Palestinian). The companies obtained a thirty-year operational contract.

The Association France Palestine Solidarité (AFPS) lodged two complaints with the High Court of Nanterre, one against the Veolia Transport and Alstom, and the other against Alstom Transport. The Palestinian Liberation Organisation (PLO) joined AFPS in the suit. Initially, the first two companies were ordered to hand over copies of the entire concession contract and its annexes to the plaintiffs. Releasing those documents revealed Alstom Transport's involvement in the project in question, leading to the second complaint.

AFPS and the PLO argue that the contract is illegal, and seek its annulment and a halt to the companies' ongoing activities under the agreement. The plaintiffs argue that the contract was entered into in violation of national and international law and that it violates the Fourth Geneva Convention of 1949 as mentioned in UNSCR 465 of 1 March 1980. Paragraph 5 of that resolution states that "all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem [...] have no legal validity". The Security Council further calls upon all states to deny Israel all assistance in settling the occupied

²⁵⁴ State Immunity Act 1978, sect. 14, cited in M. Byers, "English Courts and Serious Human Rights Violations Abroad: A Preliminary Assessment", in M.T. Kamminga and S. Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*, Kluwer Law International, 2000, p. 245.

territories. Plaintiffs also argue that the contract is contrary to French public policy and therefore null and void under Articles 6, 1131 and 1133 of the French Civil Code.

The defence has argued that French courts do not have jurisdiction and the complaints are thus inadmissible, **particularly on the basis of the State of Israel's immunity from jurisdiction**. The high court issued its decision on 15th April 2009, ruling that only the AFPS was admissible considering that the PLO had no cause of action. The court also accepted material and territorial jurisdiction over the case.

- On the one hand, the companies facing suit could not claim the State of Israel's immunity from jurisdiction. The courts ruled that **not only was the State of Israel not party to the proceedings, but that Israel did not qualify as a sovereign state**. The courts ruled that Israel is an “**occupying power** of the section of the West Bank where the disputed tramway was built and operated, a section recognized by the international community and the International Court of Justice as Palestinian territory” (free translation).
- On the other hand, **the companies were domiciled in France**. The French courts based their decision on Article 6§1 of the European Convention on Human Rights which recognizes the **right to an independent and impartial tribunal**. They expressed their desire to ensure the plaintiffs' free access to justice. The risk of a miscarriage of justice, inherent in disputes of this nature, bolstered the French courts' claim to jurisdiction. To quote the court, “It is well-established in jurisprudence that **the risk of a miscarriage of justice is a criterion for French courts accepting jurisdiction when the dispute has ties with France**” (free translation). Such is the case here, where the companies facing suit are domiciled in France, and specially since 46 of Jerusalem tramway's railcars are produced in french soil by five Alstom Transport's plants.

Alstom and Alstom Transport appealed the decision regarding jurisdiction but on 17th December 2009, the Versailles Court of Appeal upheld the trial court's ruling. On 30th May 2011, the High Court of Nanterre dismissed a petition by the France-Palestine Solidarity Association to nullify under French law contracts signed by French transports Veolia and Alstom. The Nanterre court found that under French law these particular international law provisions have no direct effect on private individuals and companies who are not a party to the conflict. Under French law, only states which signed the Geneva Conventions of 1949 can be regarded as being bound by the specific treaty provisions listed in AFPS's legal arguments.

What law will an EU Member State forum court apply?

On 11 July 2007, the European Parliament and the Council adopted Regulation 864/2007 (Rome II).²⁵⁵ This Regulation aims to:

- standardize rules on **conflicts of law** applicable to **non-contractual obligations**,
- Ensure that the courts of all Member States apply the same law in cross-border civil liability disputes, and
- thus facilitate the mutual recognition of legal rulings in the European Union.

Rome II is **applicable and binding**, since the 11th January 2009, **across all EU Member States except Denmark**.²⁵⁶ It is prudent therefore to describe the system in place before Rome II entered into force and the changes brought by Regulation 864/2007.

1. The law applicable to events giving rise to damage occurring prior to 11 January 2009

a) The law of the place where the event giving rise to damage was committed (*Lex loci delicti commissi*): The generally accepted solution

The rule

Regulation 44/2001 does not determine the law applicable to the merits of the case. Each State's rules of private international law determine the applicable law. There is no clear legal test. Therefore it is up to the courts to interpret the connecting criterion,²⁵⁷ namely the law of the place where the event giving rise to damage occurs (*lex loci delicti commissi*). Within Member States, the notion of *Lex loci delicti* is subject to two interpretations:

- The **law of the place where the damage occurred**, in this case, the foreign law will apply, or
- The **law of the place where the causal behaviour occurred**, in this case, the law of an EU Member State will apply.

Our situation involves a multinational company domiciled in the European Union, which either a) makes direct decisions about its business conducted abroad, causing harm to an employee or member of the local community, or b) without planning the action causing harm, and knowingly or wilfully ignoring it, fails to take preventative measures to avoid harm. According to the criterion the court selects, either the law

²⁵⁵ Regulation (EC) No 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (Rome II), *OJ*, 11 July 2007, p. L 199/40.

²⁵⁶ *Ibid.*, art. 32.

²⁵⁷ F. Rigaux and M. Fallon, *Droit international privé*, Larcier, Bruxelles, 2005, No. 1531, p.700 (the authors suggest applying the law of the place where the perpetrator acted). See also G. Betlem, “*Transnational litigation against multinationals before Dutch courts*”, in M.T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, 2000, p. 290.

of the place where the damage occurred or the law of the place where the causal behaviour occurred will be applied.

Thus, applying *lex loci delicti commissi* involves several uncertainties regarding:

- The implementation of the connecting criterion (*lex loci delicti*) due to **the variety of possible interpretations**,
- The **status of the plaintiff's alleged facts** under foreign legislation, and
- The **applicable law**, for example, if the components of the causal action are geographically disparate, occurring in several different countries (complex torts). This is the case for multinational companies whose policies are decided by the parent company in several EU Member States, and implemented in a third country.

The international public policy exception

The court may cite the international public policy exception to reject the application of a designated foreign law when, for example, the law denies victims the right to a remedy, the right to compensation or when it constitutes a flagrant violation of international human rights law.²⁵⁸

In addition to jurisdiction, EU Member States may also find that the application of a foreign law that would cause a serious human rights violation constitutes a **violation of the Member State's obligations** under the European Convention on Human Rights.²⁵⁹ Where a foreign law runs contrary to international public order, **a court may choose to apply its own law to the case**. In addition to the abovementioned situation, the forum court of an EU Member State may apply its law in the following situations:

- When the injurious activities were **planned and initiated** by a company on the territory of the forum court,
- When the causal event of the violation is the company's **lack of supervision** vis-à-vis its foreign operations and their consequences, or
- When **the parties to the dispute opt** for the application of the law of the EU.

b) The freedom of choice of contracting parties

By common agreement, the **parties may also directly designate** the law applicable to the dispute unless the law selected runs contrary to the international public policy exception.

²⁵⁸ See *Oppenheimer v. Cattermole* (1976) AC 249.

²⁵⁹ O. De Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law", *op.cit.*, p. 40.

2. The law applicable to events giving rise to damage occurring after 11 January 2009

Adopted on 11 July 2007²⁶⁰ to address the abovementioned legal uncertainty, Rome II applies to suits brought for torts occurring after the regulation's entry into force on 11 January 2009.²⁶¹ Non-contractual obligations arising from violations of privacy and rights relating to personality (Article I), however, do not fall within the scope of the regulation and continue to be governed by the conflict rules of the different EU Member States.

a) General rule

Under the general rule laid forth in **Article 4 of Rome II**, the law applicable to non-contractual obligation shall be:

- (1) In principle, the **law of the State where the direct damage occurs** (*lex loci damni*), regardless of the place where the event giving rise to damage occurs and regardless of where the indirect consequences of the event occur, **even when the applicable law is not that of a Member State**,
- (2) However, when both the injured party and the person liable are **habitual residents of the same country** at the time when the damage occurs, **the law of that country shall apply**,
- (3) Otherwise, if the sum of the circumstances indicates that the tort/delict is **manifestly more closely connected with a country** other than those referred to in paragraphs 1 or 2, **the law of that country shall apply**. A manifestly closer connection with another country could consist of a pre-existing relationship between the parties, such as a contract, which presents a close connection with the tort in question.

First it can be difficult and sometimes impossible to determine with accuracy the place where the direct damage occurred (*lex loci damni*). Furthermore, the victim may be more familiar with the law of his country of residence or that of the location of the event giving rise to damage (see the specific environmental situation below) than with the law of the place where the damage occurs, i.e. the law of the place where the effects of the violation were felt. Finally, determining the direct and indirect consequences of the harmful event, as mentioned in Article 4(1) of the regulation, presents a certain difficulty of interpretation because direct damage may occur in several states at once.²⁶²

²⁶⁰ Regulation (EC) 864/2007, *op.cit.* This regulation completes the Rome Convention of 1980 on the law applicable to contractual obligations.

²⁶¹ For the purposes of the regulation, the term “Member State” refers to all Member States except Denmark (Article I(4)).

²⁶² Oxford Pro Bono Publico, *op.cit.*, p. 120 and following.

A specific situation: environmental damage

In a non-contractual obligation arising out of **environmental damage or subsequent harm** to persons or property, the applicable law is that designated in Article 4(1), **the law of the place where the damage occurred**, unless the plaintiff seeking compensation selects **the law of the place where the event giving rise to damage occurred**. This specific situation is defined in Article 7 of Regulation 864/2007. It is important to routinely verify that there is no specific agreement on the damages in question, such as the International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.

A specific situation: Product liability

When harm is caused by a product (Article 5 of Regulation 864/2007), in principle, the applicable law is that of the injured person's habitual residence, the law of the place where the product was purchased, or the law of the place where the damage occurred, if the product was marketed in that country.

➔ *Trafigura Beheer BV & Trafigura Limited in Côte d'Ivoire*²⁶³

These cases began on the night of 19 to 20 August 2006 when the Probo Koala, chartered by Trafigura Ltd., the UK subsidiary of the Dutch company Trafigura, discharged 500 tons of toxic waste into several landfills in Abidjan, Côte d'Ivoire. Puma Energy, an Ivorian subsidiary of Trafigura, had contracted with Société Tommy, an alleged Ivorian shell company registered one month before the Probo Koala's arrival in Abidjan, to handle the waste. The Probo Koala had docked earlier at the port of Amsterdam, where Trafigura refused to pay the additional costs Dutch authorities charged to dispose of the toxic waste. After being exposed to fumes from the waste in Abidjan, more than 100,000 people sought medical care, creating a major health crisis in Côte d'Ivoire. For the most part, patients suffered from nausea, headaches, skin sores and nosebleeds. Official Ivorian sources say that 16 people died after inhaling or otherwise coming into contact with the toxic products.

According to CIAPOL (Center for Anti-Pollution Control in the Ivory Coast) the waste contained at least three substances: hydrogen sulphide, H₂S and mercaptans. The test identified by-product a large amount of sulphur resulting from H₂S refinery in the waste which was potentially dangerous. A Rotterdam laboratory which conducted tests on several samples of waste dumped in Abidjan identified no toxic substances. Doubts remain about the authenticity of the results, however, because the samples were neither sealed nor marked.

On 12th February 2007, Trafigura settled with the Ivorian government. While denying liability for the disaster and insisting that it did not deserve to pay damages, Trafigura agreed to build a waste treatment plant, contribute to health care for the victims and pay U.S.D 198 million to create a victim compensation fund in exchange for a promise from the Ivorian government not to sue the company. Following the settlement, the Ivorian government

²⁶³ This case summary has been largely extracted from the site *Business & Human Rights*, "Case profile: Trafigura Lawsuits (re Côte d'Ivoire)", www.business-humanrights.org

released Trafigura and Puma Energy representatives who had been arrested and imprisoned after arriving in Côte d'Ivoire to ascertain the incident.²⁶⁴

In November 2006, the High Court of Justice in London agreed to hear a suit against Trafigura brought by some 30,000 victims, represented by the law office of Leigh Day & Co.

The plaintiffs qualified the chemicals defendants as hazardous waste under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The European Union has indeed banned the export of hazardous waste from its Member States to developing countries. According to the plaintiffs, Trafigura brought the untreated waste to Côte d'Ivoire knowing the lack of facilities to treat the waste on site.

Trafigura has denied the toxicity of the chemicals and rejected all liability, arguing that the waste resulted from the normal operation of a ship. The company emphasized that it had entrusted the disputed event to Société Tommy and that there was no reason to doubt that company's abilities. According to Trafigura's findings, only 69 individuals actually suffered physical problems. On 23 March 2009, after Trafigura attempted to persuade victims to alter their statements, the court ordered the company to end contact with them.

In September 2009, the parties to the UK civil proceedings reached a settlement whereby Trafigura agreed to pay each of the 30,000 applicants the sum of U.S.D 1,500. In return, the victims acknowledged that no link had been established between exposure to the discharged chemicals and the various acute and chronic illnesses they have documented. The settlement also included a final waiver of all claims against Trafigura. Trafigura held that its compensation to the victims is illustrative of its social and economic commitment in the region, and is in no way a recognition of guilt. In a press release, the company insisted that, in the worst-case scenario, the *Probo Koala* could "only have caused a range of short term, 'flu like' symptoms and anxiety".²⁶⁵

In December 2009, BBC London was ordered to pay Trafigura the sum of GBP 28,000 in damages after Trafigura filed a libel suit. BBC London had accused Trafigura of causing the health problems which occurred following the discharge of toxic waste in Abidjan. The BBC retracted its allegations and had to apologize on the air.

²⁶⁴ FIDH, "Affaire des déchets toxiques: une transaction au détriment de la justice et de la réparation pour les victimes", press release from 16 February 2007, www.fidh.org. FIDH and its member organisations in Côte d'Ivoire, LIDHO and MIDH, denounce this "transaction to the detriment of justice [...] which can in no way be accepted as fair compensation for the injuries the victims suffered. This calls for the establishment of liability, a true assessment of the wrongs suffered, redress for the victims and an understanding of the future consequences for humans and the environment".

²⁶⁵ FIDH and its member organisations in Côte d'Ivoire, LIDHO MIDH, "L'accord intervenu à Londres entre Trafigura et près de 31 000 victimes ivoiriennes ne doit pas occulter la responsabilité de Trafigura!", Press release from 25 September 2009, www.fidh.org

Recurrent complications with material compensation

At the request of Claude Gohourou, the head of a group of local associations called The National Coordination of Victims of Toxic Waste (CNVDT), in late October 2009, Ivorian courts froze the bank accounts into which the victims' compensation had been transferred. On 4th November 2009, the High Court of Justice in London expressed "profound concern" that the money was not being redistributed. On 22nd January 2010, the Court of Appeal in Abidjan unfroze the victims' funds, but ordered the money transferred to the account of Claude Gohourou's group. On 14th February 2010, the victims' law firm, Leigh Day & Co, signed an agreement with Claude Gohourou granting Leigh Day & Co control of the funds to ensure that all the victims effectively obtain redress. Claude Gohourou insisted that the terms of the agreement remain confidential. Although the money should have been transferred to the victims, by in mid-March 2010, the process is laborious because complications continue to crop up.

Criminal Procedures

This case has been and continues to be the subject of criminal proceedings. In June 2007, FIDH's Legal Action Group filed a suit in France against two Trafigura group executives. The complaint was dismissed. In Côte d'Ivoire, Trafigura and its Ivorian subsidiary, Puma Energy, have not been fully prosecuted as proceedings against them were stayed at trial. The complaint filed in Côte d'Ivoire, however, did result in the September and October 2008 criminal trial of Société Tommy representatives involved in the disaster.²⁶⁶ Criminal proceedings against Trafigura are pending in Dutch courts, as discussed in the corporate criminal liability section of this guide.

b) Exceptions

The "Rome II" regulation also provides certain exceptions:

Waiver decided by the parties

The parties may select the applicable law:

- By an agreement following the event giving rise to damage, or
- In situations where all parties are pursuing commercial activities, by an agreement freely negotiated *prior* to the event giving rise to damage.

The national and international public policy exception

The legal provision designated by Rome II may be rejected by national courts if its application is manifestly incompatible with the public policy of the forum (Article 26 of the regulation). Depending on the circumstances of the case and the statute in question, this exception may serve plaintiffs and/or defendants to a

²⁶⁶ FIDH and its member organisations in Côte d'Ivoire, LIDHO and MIDH, and in France, LDH, Greenpeace and Sherpa, "La Cour d'assises d'Abidjan rend son verdict, en l'absence des principaux responsables", Press release from 28 October 2008, www.fidh.org

suit.²⁶⁷ The European Court of Justice may also be asked to rule on interpretations of this exception.²⁶⁸

Because of the many exceptions and exemptions available, it is difficult to predict which law is applicable to a dispute. It appears, however, that the law of the place where the damage occurs, while constituting the general rule, applies in practice only when it is not manifestly inconsistent with the public policy of the state which should have jurisdiction (Article 26 of Rome II).²⁶⁹

c) Scope of the applicable law

Article 15 of Rome II states that the law applicable to non-contractual obligations under the regulation shall address:

- Conditions and extent of liability, including determining who may be held liable,²⁷⁰
- Grounds for exemptions, limitations and the division of liability,
- The existence, nature and assessment of damages or relief sought,
- Within the limits of the powers granted to the court, the actions a court may take to ensure the prevention, cessation or to provide compensation,
- The transferability of the right to reparation, including through inheritance,
- Persons entitled to compensation for harm suffered personally,
- Vicarious liability, and
- The rules for the prescription and extinction of legal actions.

Applying Community regulations: France and the UK

➔ The case of France

According to the French Code of Civil Procedure, in litigations relating to non-contractual obligations, plaintiffs may seize jurisdiction:

- Where the defendant lives (the place where the company is established or domiciled),²⁷¹
- Where the event giving rise to damage occurred, or
- Where the damage was suffered.²⁷²

²⁶⁷ Oxford Pro Bono Publico, *op.cit.*, p. 124 “Rules permitting the awarding of non-compensatory punitive damages that are excessive in relation to the circumstances of the case and to the law of the forum may be held to be manifestly in breach of the public policy of the forum”.

²⁶⁸ For more on the public policy exception in the E.U., see Oxford Pro Bono Publico, *op.cit.*, p. 116 and following.

²⁶⁹ Oxford Pro Bono Publico, *op.cit.*, p. 124.

²⁷⁰ To evaluate the conduct of a person accused of being liable, Article 17 of the regulation states that the “rules of safety and conduct in force at the place and time of the event giving rise to liability” are to be considered. This provision should be clarified by national courts and the Court of Justice. For more, see Pro Bono Publico Oxford, *op.cit.*, p. 122.

²⁷¹ French Code of Civil Procedure Article 42 §1, for the domicile of companies see article 43 of the same code.

²⁷² French Code of Civil Procedure, Article 46§1 & 3.

Any foreign victim of a human rights violation committed by a French company abroad may address the French courts provided the company is domiciled in France. The victim enjoys the same jurisdictional grounds as those designated in Regulation 44/2001. In addition, the doctrines of *forum non conveniens*, act of state and political question found in the US legal system do not apply in France.

Under Rome II, the law applicable to transnational tort litigation (for events giving rise to damage occurring on or after 11 January 2009) is the law of the place in which the direct damage occurred. A foreign victim who brings action against a French company for harm suffered abroad may not benefit from French law. In effect, the French forum court will apply the law of the place the damage occurred, i.e. the foreign law. Most often, however, when victims bring action outside the jurisdiction of their country, they seek the benefit of a more flexible foreign law which will protect the victims' right to compensation. French courts cannot guarantee this unless exceptions to the principle of *lex loci damni* bring the case under French law.

France's Highest Court of Justice, the Court of Cassation has, however, ruled that foreign laws not conforming to the "principles of universal justice considered in French public opinion as being of absolute international value"²⁷³ must be rejected. This condition is unclear and it remains to be seen whether future French courts will opt to apply French law when an otherwise applicable foreign law does not offer essential guarantees of the right to compensation.

➔ The case of the United Kingdom

Regulation 44/2001 has applied to all Member States since 2007. The British legal system, however, presents several peculiarities. In determining jurisdiction in cases where one party is domiciled outside of the E.U., British courts consider the doctrine of *forum non conveniens*, despite the ECJ's interpretation (see Chapter II.B). British courts have ruled that the regulation does not apply unless the dispute involves a link with an EU Member State. A court may also accept the act of state and political question doctrines.

Since 11 January 2009, Rome II has been directly applicable to all Member States, including the UK. However, on 18th November 2008, the British Parliament adopted a law, entered into force on 11th January 2009, which brought UK law into compliance with the provisions of European law, and harmonized (in some cases expanded), the conflict rules between England, Wales, Scotland, Northern Ireland and Gibraltar. With regard to events giving rise to damage occurring on or after 11th January 2009, UK courts must now refer to the provisions of Rome II. Similar remarks to those of France can be made here. For events giving rise to

²⁷³ Cass. fr., ch. Civ., *Lautour*, 25 May 1948.

damage occurring prior to 11 January 2009, case law²⁷⁴ indicates that British courts may reject the application of foreign law (law of the place where the damage occurs, *lex loci damni*) in favour of English Law in cases where a sufficiently close connection exists between the UK-domiciled company and the tort.



➤ A worker boils leftover scraps of chemically soaked leather trimmings. The contaminated leather is then left to dry on the ground and is eventually used to feed livestock.

© Daniel Lanteigne

²⁷⁴ *Ngcobo v. Thor, op.cit*; *Sithole v. Thor, op. cit*; *Connelly v. RTZ co. Plc*, [1998] AC 854, [1999] CLC 533. For more, see K. Sontag, “La justiciabilité des droits de l’homme à l’égard des sociétés transnationales” in *Droits économiques et droits de l’homme*, under the direction of L. Boy, J.B. Racine, F. Siirainen, Larcier, Belgium, 2009, p. 604.

CHAPTER III

The Accountability of Parent Companies for Acts Committed Abroad: “Piercing the Corporate Veil”

* * *

Clarifications

A problem often encountered when attempting to establish a multinational corporation’s liability in a country other than that in which it operates is the way these entities operate abroad. From a legal standpoint, the establishment of an international presence can occur in three ways:

- (1) The company may be **directly present in the host country**, establishing a branch or office in that country.

In this case, there is no specific problem with impunity. Whether in its country of origin (typically at its registered office or principal place of business) or in a host country, a multinational corporation’s actions or omissions are considered its own. Applying the law of the country of origin for such acts is not problematic.

- (2) The company may **create a separate legal entity, subject to the laws of the host country, but which it controls** as a majority shareholder or by selecting the subsidiary’s directors. This establishes a parent-subsidiary relationship which can take many forms and may allow the parent company to maintain strict control.

- (3) The company may develop **contractual relationships with local partners**.²⁷⁵

The accountability of a parent company for violations committed by a foreign subsidiary or other entity active in its supply chain is certainly one of the most complex legal issues in civil litigation targeting multinational companies.²⁷⁶ The parent company’s participation in the event giving rise to damage may be either direct or indirect.

²⁷⁵ O. De Schutter, “Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations”, *op.cit.*, p. 35-37.

²⁷⁶ The issues are similar in criminal procedure.

1. A parent company's direct participation in the event giving rise to damage

The parent company of the multinational corporation may **cause injury or participate directly therein**:

- By commission (the parent company takes part in the decision leading to the harm), or
- By omission (when aware of the decision, the parent company fails to act despite being able to prevent the harm).

In these cases, the parent company falls under the classical legal concept of direct liability,²⁷⁷ or joint and several liability if it acted together with another legal person, subsidiary, subcontractor or other provider. Legally, this situation poses no problem. Nevertheless, on a factual level it is difficult to prove that a parent company caused the tort or directly participated in the facts of the case.

This is true even when the entity responsible for the violation is a branch, office or agency. Because branches, offices and agencies do not have their own legal personhood, the company on which they legally depend will be held liable for the violations they commit, even if the parent company's business activities are conducted abroad. **With the exception of banks, in practice it is rare for companies to carry out direct operations abroad.** Generally, multinational corporations operate abroad through companies with separate legal personhood.

2. A parent company's indirect participation: "piercing the corporate veil"

By contrast, when the link between the parent company and the event giving rise to damage is only indirect, **the principle of legal personhood inherent in commercial law makes it difficult to hold the parent company liable** for the acts of a subsidiary or other entity in its supply chain.

While tied to the multinational corporation by an intra-company relationship (i.e. a branch) or contract (an entity within the supply chain), these entities enjoy **their own legal personhood** and are thus legally liable for their actions. **The parent company** of the multinational corporation is a separate legal person and, **with certain exceptions, cannot be charged for violations** committed by these different legal entities.

These exceptions, while rare, confusing and evolving, permit what is called **"piercing the corporate veil"**. Broadly speaking, **whether the veil can be pierced depends on the nature of the relationship between the direct perpetrator of**

²⁷⁷ On the direct liability of a multinational corporation's parent company, see P. Muchlinski, *Multinational Enterprises and the Law*, Blackwell Publishers, 1995, p. 323 and following; S. Joseph, *Corporations and Transnational Human Rights Litigation*, Hart Publishing, 2004, p. 134 to 138.

the harm and the parent company of the multinational corporation. In the framework of an existing relationship between a parent company of a multinational company and its subsidiary, **“piercing the corporate veil” depends on the degree of *de jure* or *de facto* control the former exercises over the latter.**

By creating separate legal entities, the parent company establishes its relations with different entities of the group such that it escapes its legal liability. The parent company is legally separated from the policy centre and local operators. This is known as the doctrine of limited liability.²⁷⁸ Multinational corporations, however, frequently ignore the legal personhood of other companies, and often delegate activities to other entities with full knowledge of, or at least without ignoring, the conditions under which they are carried out. The legal fiction that constitutes corporate personhood enables businesses to **achieve in third countries what they could not do within the EU or the US**, in order to maximize profits and avoid liability. In determining a company’s liability for harmful acts, it is important to consider **not only the group’s economic organisation, but also the reality of its economic and professional relationships and the nature of the act.** Identifying the parent company is all the more crucial when a subsidiary’s assets are insufficient to compensate the victims. The court’s role in this regard is fundamental.

Thus, given the difficulties arising from the application of *forum non conveniens* theory and the financial imbalance between plaintiffs and defendant companies, **piercing the corporate veil is an additional obstacle** to legal action by victims of human rights violations.

US courts

In proceedings brought under the ATCA, US courts have only cursorily addressed the issue of a parent company’s liability for acts carried out by a subsidiary or other contractually-linked entity. The following analysis is based on general US case law on “piercing the corporate veil” and on existing case law under the ATCA, although to date, no trial has been brought or decided on its merits.²⁷⁹

This jurisprudence is difficult to systematise, and is based on two theories: the theory of piercing the corporate veil and the theory of agency (discussed below – see Chapter III.B.2). Neither theory provides a satisfactory treatment of the issue at hand.

²⁷⁸ R. Meeran, *op.cit.*, 2000, p. 252.

²⁷⁹ Legal reasoning on this issue differs according to the context in which it arises: personal jurisdiction (See above - personal jurisdiction) or the merits of the case (S. Joseph, *op.cit.*, p. 87, P.I. Blumberg, *op.cit.*, p. 500).

1. Piercing the corporate veil

In American jurisprudence,²⁸⁰ the theory of piercing the corporate veil derives from instrumentality doctrine (when the parent company completely dominates the other entity)²⁸¹ and alter ego doctrine (where the ownership and interests of the two entities overlap).²⁸² In practice, these theories are easily interchangeable.²⁸³

Alter ego doctrine aims to **assess the legal separation of two legal entities**. Because the conditions for alter ego doctrine are uncertain and difficult to assemble, it applies only in exceptional cases. To establish that a parent company and its subsidiary are alter egos, and therefore not actually legally separate entities, **the plaintiff in the action must demonstrate:**

- Evidence that the subsidiary does not have its own legal personhood;
- The subsidiary is used to perform fraudulent, unfair or unjust acts for the benefit of the parent company or majority shareholders, and
- A causal connection between the conduct and the injury suffered by the plaintiff.

Case studies reveal several trends:²⁸⁴

- US courts are more inclined to pierce the corporate veil with regards to individual shareholders than with corporate shareholders, and
- US courts make greater use of piercing the corporate veil in contract law cases than in tort proceedings.

Assessments of these conditions are heavily focused on facts. Basing a claim on any generalisation of the criteria used to “pierce” the corporate veil, including determination of an excessive control, provides uncertain results. As of today, the parent company’s control over its subsidiary’s daily operations seems to be the only way to pierce the corporate veil.²⁸⁵

²⁸⁰ This description is based on P.I. Blumberg, *op.cit.*, p. 304 and following. See also S. Joseph, *op.cit.*, p. 129 and following; P. Muchlinski, *op.cit.*, p. 325 to 327.

²⁸¹ P.I. Blumberg, *op.cit.*, p. 297, note 17. Instrumentality doctrine requires excessive control (i.e. complete domination, not only over finances, but also over policy and business practices regarding the transaction in question, such that at the time of the transaction, the concerned entity no longer has its own personhood, will or existence), improper or unfair conduct and a causal relationship between the conduct in question and the harm caused to the plaintiff in the suit.

²⁸² *Ibid.* Alter ego doctrine is applicable when the sum of ownership and interest between the two companies is such that they are no longer legally separate and the subsidiary is relegated to the status of the parent company’s alter ego. Moreover, recognizing the two companies as separate entities should be a warning of fraud or potentially unjust activity.

²⁸³ *Ibid.*

²⁸⁴ S. Joseph, *op.cit.*, p. 130; R.B. Thompson, “Piercing the Corporate Veil : An Empirical Study”, *Cornell L. Rev.*, 1991, vol. 76, p. 1036; R.B. Thompson, “Piercing the Veil Within Corporate Groups : Corporate Shareholders as Mere Investors”, *Conn.J.Int’l L.*, 1998-1999, vol. 13, p. 379 and following.

²⁸⁵ P.I. Blumberg, *op.cit.*, p. 498. See also S. Joseph, *op.cit.*, p. 84.

a) Absence of a subsidiary's own legal personhood

The condition is met **when the parent company (or majority shareholder) exercises excessive control over the subsidiary's management, operations and decision-making**, eliminating the independence of the subsidiary's managers and directors.

The absence of a subsidiary's own legal personhood can be demonstrated by showing, for example, an absence of legal formalities (such as those relating to general meetings of the board of directors, separate accounting, etc.), a lack of premises, assets, employees unique to the subsidiary, inadequate capitalisation or lack of business relations with anyone other than the parent company.

Jurisprudence does not provide a clear indicator of the level of control required to disregard a subsidiary's legal personhood and attribute its actions to the parent company on which it depends. The only certainty is that **the control must be excessive and go beyond that which is generally considered acceptable in practice**. It goes without saying that the question is highly fact-specific and the outcome is subject to the judge's interpretation and discretion.²⁸⁶

b) A parent company's use of the subsidiary for fraud or other wrongful acts

With regards to the second condition, jurisprudence is also incomplete as to what constitutes fraudulent, unfair or unjust acts for the benefit of the parent company or majority shareholder. Again, the judge's determination is fact-specific.

One thing is certain, however. The commission of a tort, on its own, is insufficient and mere negligence or carelessness cannot constitute a fraudulent act. Wilful misconduct is required and plaintiffs must prove that the perpetrator intended to commit the fraud or tort.

c) Causal relationship between the act and the harm

With regards to the third condition, proof of the causal relationship between the act and the harm is seldom verified in practice.

* * *

²⁸⁶ V. Simonart, *La personnalité morale en droit privé comparé*, Bruylant, Bruxelles, 1995, p. 474.

The conditions are such that any company benefiting from professional advice can easily claim to be a mere investor, thus avoiding a piercing of the corporate veil.²⁸⁷ Despite severe limitations to its application, the theory of piercing the corporate veil has in several cases proved useful in establishing the liability of a multinational corporation's parent company.

Wiwa v. Royal Dutch Petroleum/Shell and *Doe v. Unocal* cases demonstrate that the theory of piercing the corporate veil has resonated in several jurisdictions where plaintiffs sought to establish the liability of parent companies for the actions of their subsidiaries.

➔ **Doe v. Unocal et al (Doe I)**

This suit targeted both Total and Unocal in California courts. In 2001, the court applied alter ego doctrine.²⁸⁸

With regards to Total, the court failed to establish personal jurisdiction because it could not prove the existence of an agency or alter ego relationship. It should be noted that at that juncture, the agency or alter ego test was useful only for establishing the existence of sufficient ties between the foreign parent company and the forum. Establishing the above permits US courts to accept personal jurisdiction (the court's motives regarding the agency relationship are outlined below). The court refused to consider Total's California subsidiaries as its alter egos, on the grounds that the parent company's direct and active involvement in its subsidiaries' decision-making processes, while important, was insufficient to establish the total overlap of interest and ownership between them. Total had complied with the formalities necessary to maintain legal separation.²⁸⁹ The court did not examine the other conditions.

By contrast, the State of California Court of Appeal established in its 18th September 2002 ruling that the facts in its possession were sufficient to hold **Unocal** liable for the acts of its subsidiaries in Burma, which became accomplices to the Burmese military's use of forced labour. The two companies involved, Unocal Pipeline Corp and Unocal Offshore Co, were Unocal's alter egos and by consequence, Unocal was liable for their actions. To establish this, the court cited the under-capitalisation of the two subsidiaries and Unocal's direct involvement in managing them.²⁹⁰

²⁸⁷ R.B. Thompson, "Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors", *op.cit.*, p. 391.

²⁸⁸ *Doe v. Unocal*, *op.cit.*, 2001, p. 926.

²⁸⁹ *Doe v. Unocal*, *op.cit.*, 2001, p. 927.

²⁹⁰ *Doe v. Unocal*, *op.cit.*, 2002, p. 14222-14223, note 30. This issue is addressed in a footnote of the ruling, after establishing that the facts of the case showed that the necessary conditions had been met for liability under the ATCA (*actus reus and mens rea*) for complicity with forced labour.

2. Agency theory

The classical theory of agency requires a general agency agreement between the alleged principal and the agent, such that the agent acts in the name and on behalf of the principle.²⁹¹

A subsidiary is an agent of its parent company if it is shown that the functions it performs as a representative of the parent company are significant such that **in the subsidiary's absence, the parent company would be required to provide similar services**. The subsidiary's presence thus substitutes that of the parent company.²⁹²

To assess the presence of an agency relationship and of an agent's continuous presence within their jurisdiction, courts of the State of New York look for several traditional criteria. These are facts such as the possession of an office, bank account, other property or a telephone line and the maintenance of public relations, or the continuous presence of individuals in the State of New York..²⁹³

The existence of an agency relationship is established when:

- The parent company (principal) has expressed a wish that the subsidiary (agent) act in its name and on its behalf,
- The subsidiary (agent) has accepted the commitment, and
- Each of the two parties agree that operational control is vested in the parent company (principal).

Common law requires proof not only of the **parent company's significant control** over the subsidiary, but also of a **consensual transaction** or **mutual consent** between the two entities. If the first condition is generally met through the relationships within a group of companies, it must still be demonstrated by the facts. Although the parent company knowingly uses many subsidiaries to escape liability, the second condition is rarely encountered because it requires the parties to expressly agree that the subsidiary (agent) would act on behalf of the parent company (principal).²⁹⁴

In the *Unocal* and *Wiwa* cases, however, the courts independently²⁹⁵ assess the application of this theory.

²⁹¹ P.I. Blumberg, *op.cit.*, p. 497, note 13. See also S. Joseph, *op.cit.*, p. 85.

²⁹² *Doe v. Unocal*, *op.cit.*, 2001; *Wiwa v. Royal Dutch Petroleum Co*, *op.cit.*, 2000, p. 95.

²⁹³ *Wiwa v. Royal Dutch Petroleum Co*, *op.cit.*, 2000.

²⁹⁴ Restatement of Agency (Third) § 1.01 (Tentative Draft No. 2, Mar. 14, 2001).

²⁹⁵ P.I. Blumberg, *op.cit.*, p. 499. See also S. Joseph, *op.cit.*, p. 85.

➔ Bowoto v. Chevron

This decision recognises the applicability of agency theory and ratification theory (an alternative theory of liability which holds the principal liable for acts committed by the agent outside of its duties, provided the principal expresses agreement) to a suit brought under the ATCA to determine a parent company's liability for its subsidiary's activities.

In May 1998, members of the Ilaje community attended a peaceful demonstration to draw attention to the disastrous environmental and economic harm local communities experienced due to the oil extraction activities of Chevron's Nigerian subsidiary. The event was organised on an oil platform off the Nigerian coast and ended with Nigerian security forces committing a number of abuses, including murder, torture and cruel, inhuman or degrading treatment.

The plaintiffs invoked several theories of liability, including agency. They alleged that the Nigerian government's security forces had acted as an agent of Chevron's Nigerian subsidiary, which in turn acted as an agent of the parent company, Chevron Corporation, and two Chevron companies domiciled in United States, Chevron Investments Inc. and Chevron USA, Inc.²⁹⁶ The plaintiffs argued that the parent company, Chevron, and its subsidiaries should be held liable for having provided material and financial support, having controlled the Nigerian security forces and having participated directly in the attacks.

The US court recognised jurisdiction under the ATCA and accepted the plaintiffs' proposed agency theory. The court ruled that an agency relationship could be inferred from the conduct of the parties and that the existence of the relationship is largely determined by the specific circumstances of the case.²⁹⁷ The Court recognised that sufficient evidence existed to establish that Chevron and its subsidiaries exercised "right of control" over the security forces they hired.

Although holding the principal legally responsible requires that the damage caused by the agent occurs in the course of the duties assigned to it by the principal,²⁹⁸ a contract breach by the agent does **not necessarily exonerate** the principal from liability. The Nigerian government could be considered as acting within the limits of the duties assigned to it, even if Chevron did not authorize the conduct in question in the following situations:

- A link could be reasonably made between the conduct and the duties Chevron had assigned to the government, or
- Chevron could reasonably expect such behaviour to occur given the violent past of the security forces.

²⁹⁶ *Bowoto v Chevron Texaco*, 2007 WL 2349336 (N.D. Cal. 2007), p. 15-16.

²⁹⁷ *Bowoto 2004*, 312 F.Supp.2d at 1239.

²⁹⁸ *Ibid.*, 1239-1240.

If the conduct goes beyond the scope of duties assigned to the agent, **agreement between the parties could be found in a prior authorisation or subsequent ratification**. If the parent company (principal) knew or should have known the facts **and** accepted the conduct of the subsidiary (agent) in question, it is to be held liable for the act committed by its agent. There are **two required elements**: knowledge and acceptance. The acceptance of previously unauthorized conduct can be established when:

- The parent company (principal) adopts the conduct of the subsidiary (agent) as an “official act” of the company,
- The parent company (principal) provides assistance to the subsidiary (agent) to conceal the fraudulent conduct (Chevron Corporation published false reports of the facts in question and concealed the financial ties linking the subsidiary with the military),
- The parent company (principal) continues to use the services of the subsidiary (agent) following the conduct in question, or
- The parent company (principal) fails to take the necessary steps to investigate or halt the conduct in question.²⁹⁹

A parent company (principal) can thus be held liable for the activities of a subsidiary (agent) acting outside the scope of the duties authorized by the parent company at the time of the disputed facts.

In November 2008, after examining the merits of the case, the jury did not recognize the liability of Chevron and its subsidiaries. The decision was appealed to the Ninth Circuit Court of Appeals and then to the Supreme Court in June 2011.

Even in the absence of an express agreement, an agency relationship may be created if the principal has expressly or implicitly endorsed or covered up its subsidiary’s acts after the fact.³⁰⁰

➔ **Doe I v. Unocal et al (Doe I)**

Californian courts establish personal jurisprudence from the moment a non-resident defendant has minimum contacts with the jurisdiction or the defendant operates in a “substantial, continuous and systematic” manner within the jurisdiction, including situations where the contact within the forum is unrelated to the dispute.

The plaintiffs argue that Total’s US subsidiaries were its agents and that Total maintained contact with the jurisdiction (the State of California) through its subsidiary entities in the US. To establish the existence of an agency relationship, the plaintiffs pointed to Total’s references to its subsidiaries’ activities in its Annual Report, indirect shareholding, the exercise of indirect control and supervision of its subsidiaries’ and holding companies’

²⁹⁹ *Bowoto v. Chevron Texaco*, Instructions to Jury, Case 3:99-civ-0506-SI, Doc. 2252, 28 November 2008, p. 29-33, 37-39. See also Restatement (Third) of the law of Agency, sec 4.06 (Ratification), comment d.

³⁰⁰ S. Joseph, *op.cit.*, p. 132.

activities.³⁰¹ **Refusing to recognize the subsidiaries** (both Californian and non-Californian entities which maintained contact with California) **as Total's agents** because they had **no representative activities** in the jurisdiction,³⁰² the court declined jurisdiction.

➔ **Wiwa v. Royal Dutch Petroleum/Shell** **Determining personal jurisdiction in a US court**

In 2000, the District Court of the State of New York accepted jurisdiction to hear the case involving Royal Dutch Petroleum Company, (Netherlands) and Shell Transport and Trading Company (United Kingdom) on the grounds that two of their agents were based in New York. Those were conducting business on behalf of their parent companies. Systematic and continuous activities in the forum, which fulfil the *doing business* criterion, need not necessarily be conducted by the foreign company itself. State of New York case law recognises personal jurisdiction where an agency relationship is established between the foreign company and an entity present in the State of New York. In this case, the New York-based Investor Relations Office and its manager James Grapsas devoted all of their time to Shell's commercial activities. Shell paid the full costs of running the Investor Relations Office, including salaries, rent, electricity and communications. Grapsas waited for approval from the defendants prior to making major decisions. The Investor Relations Office and James Grapsas were thus considered agents of Royal Dutch Petroleum Company and Shell Transport and Trading Company in New York.

Determining the liability of parent companies

In its 28th February 2002 ruling, the court found that Royal Dutch Petroleum Company and Shell Transport and Trading Company (the parent companies) controlled Shell Nigeria (the subsidiary) and that the parent companies could be held liable for Shell Nigeria's activities, insofar as the parent companies were not only **shareholders of the subsidiary**, but were also **directly involved in its activities**. The court ruled that, with respect to the activities in question, Shell Nigeria was the parent companies' agent.³⁰³

➔ **Presbyterian Church of Sudan v. Talisman Energy**³⁰⁴

In 2001, The Presbyterian Church of Sudan and several Sudanese individuals filed an ATCA complaint in US federal court against the Canadian company, Talisman Energy. The victims accuse the company of complicity with the government of Sudan, which has committed serious abuses (genocide, crimes against humanity and war crimes) against non-Muslim Sudanese residents. The plaintiffs defendants argue that these actions against the local population facilitated Talisman Energy's exploitation of a local oil concession.

³⁰¹ *Doe v. Unocal, op.cit.*, 2001.

³⁰² *Doe v. Unocal, op.cit.*, 1998, p. 1186 and following.

³⁰³ *Wiwa v. Royal Dutch/Shell, op.cit.*, 2002, note 14.

³⁰⁴ *Presbyterian Church of Sudan v. Talisman Energy, Inc and The Republic of Sudan, op.cit.*, p. 331.

The judge found that the US subsidiaries of Talisman, a foreign company, should be considered agents, because of the numerous links between them, including:

- The importance of the activities carried out by Fortuna, a subsidiary in New York, on behalf of the parent company. Fortuna was 100% owned by the parent company,
- The identity of their leaders,
- Fortuna's lack of financial independence, and
- Their location at the same address.

The court also based its decision on the parent company's listing on the New York Stock Exchange, ruling that the listing supported the recognition of personal jurisdiction, provided that other contacts with the jurisdiction were established.³⁰⁵

On 12th September 2006, the court declared the complaint inadmissible due to a lack of evidence and on 2nd October 2009, the Second Circuit Court of Appeal upheld the decision. The Court of Appeal ruled that the plaintiffs had failed to establish that Talisman Energy had acted in order to support the violations of international law committed by the Sudanese government. The victims failed to prove Talisman's payments were clearly intended to supply arms to the Sudanese government. In this case as in others, the evidence was insufficient and **proof of intent poses a major obstacle to victims.**

By considering the company in question's listing on the New York Stock Exchange in the *Wiwa* and *Presbyterian Church* cases, this ruling on agency brings hope, because many foreign multinational corporations meet this condition. This condition, however, must still be corroborated by other facts.

Criteria necessary to establish personal jurisdiction depend on the facts of the case, legislation and case law of the forum court. Thus, **the uncertainty surrounding the question of whether a court will seize jurisdiction over a foreign multinational corporation is considerable**³⁰⁶ and the risk that the ATCA's applicability may be confined only to domestic companies is real.

EU Member State courts

In cases under Regulation 44/2001, a parent company's liability for the actions of its subsidiary is determined **strictly according to the applicable national law**.

There are two traditional mechanisms: 1) piercing the corporate veil and 2) a parent company's direct liability for failure to exercise due diligence with respect to its subsidiary.

³⁰⁵ *Ibid.*, p. 330.

³⁰⁶ S.M. Hall, *op.cit.*, p. 408.

1. Piercing the corporate veil

The examples below derive from commercial law and competition law. Analyzing them provides an idea of the principles which could eventually govern a parent company's liability for human rights violations committed by its subsidiaries.

Commercial law

In the Netherlands, a parent company may be held liable for debts incurred by a subsidiary if:

- The parent company is the subsidiary's majority shareholder,
- The parent company knew or should have known that the creditors' rights would be violated,
- The violation is the result of an action by the parent company or the parent company's heavy involvement in its subsidiary's actions, or
- The parent company failed to take the creditors' interests into due consideration.³⁰⁷

In other words, piercing the corporate veil requires the parent company to be both deeply financially involved in the subsidiary and aware of rights violations committed by the subsidiary.

Belgian courts have rarely pierced the corporate veil, and never in the area of international human rights law.

In considering the economic reality of a multinational group, the Charleroi Commercial Court took the view that the parent company's influence over its subsidiary's management was sufficient to lift the corporate veil and face charges.³⁰⁸

Most Belgian doctrine provides a legal basis for charging a parent company for its subsidiary's actions in the event that the parent company lacks knowledge of its subsidiary's interests. To do so, the court interprets both parties' will, applies extra-contractual liability rules or the principle of good faith. This occurred in the case of a dispute between a subsidiary and its parent company in which the subsidiary wished for the parent company to be held liable for allegations against the subsidiary, on the grounds that it was clear to both the parent company and the subsidiary that the former controlled all of the latter's activities. Another invokable legal basis is appearance theory. When the third party is misled about the legal personhood of the other party, and the party could justifiably believe that it had contracted with the parent company, but in fact contracted with the subsidiary, the parent company can be held liable for the resulting harm. These same legal grounds

³⁰⁷ For the situation in the Netherlands, see N. Jägers and M.J. Van Der Heijden, *op.cit.*, p. 840 and following.

³⁰⁸ Charleroi Commercial Court, 5 February 1998, *R.P.S.*, 1998, p. 443. See also P. Van Omme-slaghe and X. Dieux, "Examen de jurisprudence (1979 à 1990). Les sociétés commerciales", *R.C.J.B.*, 1992, p. 629 and following.

allow companies to be declared sham entities and the corporate veil to be pierced in situations where the company has no autonomy from its parent company or where there is confusion regarding the companies' domicile.³⁰⁹

Competition law

From inception, **European courts** have held the parent company liable for offenses committed by its subsidiary within the EU when the latter despite having distinct legal personhood, “does not determine its market behaviour autonomously, but in essentials follows directives of the parent company” (paragraph No. 15).³¹⁰ The Court of Justice previously held that “the circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company” (paragraph No. 15).³¹¹

Some authors have noted that in order for that decision to be compatible with commercial law and to not deny the subsidiary's legal personhood, plaintiffs must “establish the parent company's direct participation in the actions and conduct in question and demonstrate that the subsidiary acted on specific and binding instructions from the parent company, thus depriving the subsidiary of its independence” (free translation).³¹²

In a later case, the Court found it necessary to consider the economic entity formed by the parent company (in this case CSC, a US company,) and its subsidiary (ICI, an Italian company), which was characterized by an “obviously united action” in the context of its relationship with the company Zoja. The Commission considered CSC and ICI to be jointly responsible for abusing their dominant position over Zoja.³¹³

More recently, on 10 September 2009, the Court of Justice held in *Akzo Nobel*³¹⁴ that a **parent company** which owns 100% of a subsidiary's capital is **presumed liable** for the subsidiary's actions **without any involvement, be it direct or indi-**

³⁰⁹ T. Tilquin and V. Simonart, *Traité des sociétés*, t. 1, 1996, Kluwer, Belgique, p. 575 and following.

³¹⁰ See ECJ, *Continental Can*, 21 February 1973, Rec. 1973, p.215. This case involved Europemballage's purchase of shares issued by a company incorporated in the Netherlands, whereas Europemballage's capital was wholly owned by the parent company American Continental Can. The European Commission held that the parent company was abusing its power and was the perpetrator of the infraction, given that the parent company was “the sole shareholder of Europemballage, which holds an 85% stake in SLW.” The court noted that Continental Can controlled two companies and could thus be charged for its subsidiaries' conduct.

³¹¹ *Ibid.* See also ECJ, *Affaire des fabricants de colorants*, Commission, 24 July 1969, OJ, No. L195, 7 August 1969 - ECJ, 14 July 1972, Rec., 1972, 619. Article 85 of the Rome Treaty applies to parent companies.

³¹² B. Oppetit, “Groupes de société et droit du travail”, *Rev. Soc.*, 1973, p. 69.

³¹³ M. Delmas-Marty, “La responsabilité pénale des groupements”, *Rev. Intern. dr. Pén.*, 1980, p. 52; ECJ, *Zoja*, Commission, 14 December 1972, OJ, No. L 299, 31 December 1972; ECJ, *Instituto Chimioterápico Italiano Spa*, 6 March 1974, Rec.1974, 223; ECJ, *Moët et Chandon*, 27 November 1981, OJ, No. L94, p.259.

³¹⁴ ECJ, *Akzo Nobel*, 10 September 2009, Aff. No. C 97/08P.

rect. In this case, the parent company was presumed to have “a decisive influence on the conduct of its subsidiary” and it is thus the parent company’s responsibility to prove the autonomy of its subsidiary in carrying out its operations. Although this decision applies only in the context of anti-trust law, future decisions by the European Court of Justice may evolve and apply this solution to other situations, including human rights violations.

Several difficulties exist:

- It is difficult to predict whether these commercial and anti-trust teachings can be easily exported to issues of extraterritorial human rights violations,
- In the case at hand, the burden of proof for piercing the corporate veil is borne by the plaintiffs,
- Decisions on whether the corporate veil can be pierced are decided on the facts of the case.

This could encourage parent companies to forgo control over their subsidiaries to avoid the corporate veil being pierced. The less a company is involved in the policy and operations of its subsidiary, the less likely it is to be held liable for the subsidiary’s actions.³¹⁵

2. Direct liability – due diligence³¹⁶

The concept of due diligence is both a soft law mechanism and a legal tool. It is the process by which companies act not only to ensure compliance with national laws, but also to prevent the risk of human rights infringements.

A soft law mechanism

Recurring human rights breaches by multinationals have led former UN Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie (see Section I), to promote the concept of due diligence. In the absence of international corporate legal liability mechanisms, Ruggie encourages multinational corporations to adopt the necessary measures to assess the impact of their activities on human rights, prevent breaches and remedy adverse impacts. Companies are encouraged to integrate this approach into their managerial policy.

³¹⁵ N. Jägers and M.J. Van Der Heijden, *op.cit.*, 2008, p. 842.

³¹⁶ It may be also be interesting to develop the *precautionary principle* in the context of corporate liability for environmental and human rights violations. The *precautionary principle* addresses probable risks which, while not yet scientifically confirmed, can be identified as likely using empirical and scientific knowledge. The principle is most heavily called upon in environmental matters, where its application would subject business operations to risk management. It is unclear how it would be applied by both public policy makers and private actors, particularly given that interpretations vary from state to state.

A legal concept

Due diligence is a legal concept in civil cases under U.S., or more broadly, Anglo-Saxon law. English Law has developed the similar concept of duty of care through case law. Both concepts sanction physical and legal persons for neglecting their due diligence obligations. The concept of due diligence is more of a procedural requirement whereas the concept of **duty of care** is a substantive requirement with a higher level of obligation.

In the broad sense, the concept involves **taking all necessary and reasonable precautions to prevent harm from occurring**. Otherwise, there is a lack of due diligence or duty of care. In our situation, recklessness, negligence or a parent company's omissions with regards to its subsidiaries constitute a violation of civil liability standards. To fulfil its due diligence obligations, a multinational corporation must assess the risk of human rights breaches and inform itself about its trading partners and the context in which it operates abroad.

Under US law, the concept presents a presumption in the company's favour because the burden of proof shifts to the opposing party. Due diligence usually serves as a defence for companies seeking to escape condemnation. This may be an obstacle to the favourable outcome of suits brought under the ATCA.

The following examples illustrate the due diligence obligations multinational corporations face when operating abroad.

➔ Lubbe v. Cape plc³¹⁷

A group of South African workers complained that the British parent company which controlled their subsidiary had taken no action to reduce the risks associated with mining. The case constituted a breach of **duty of care** which required the employer to provide a safe and healthy workplace for its employees.

The Court of Appeal accepted the plaintiffs' argument that the fact that the operations in question were not illegal under South African law does not mean that the defendant was not negligent. The parent company should have considered the available scientific knowledge in order to reduce the risks it incurred. In addition, even if the event giving rise to damage occurred in South Africa and there were serious reasons to believe the dispute could have been heard in local courts, the British courts held the parent company's staff director liable for the decisions that led to the deterioration of the workers' health. Because the company's

³¹⁷ *Lubbe et al. v. Cape plc*, *op.cit.*, 1998; *Rachel Lubbe et al. v. Cape plc*, *op.cit.*, 2000.

violations of its care of duty obligations occurred mainly in the United Kingdom, the court ruled that victims could bring action against Cape plc in the British High Court.³¹⁸ In 2001, the case was settled with the company offering compensation to the workers.

➔ The OCENSA Pipeline

A group of 70 Colombian farmers brought this case in British courts against BP's Colombian oil subsidiary, BP Exploration Company (Colombia) Ltd (BPXC). BPXC's construction of the OCENSA pipeline in the late 1990s severely damaged the farmers' land by contaminating soil and water resources, rendering the land unsuitable for farming. The case is pending. To render the trial most efficient and swift, the most representative cases will be selected in the near future. Some plaintiffs had entered into contract with the subsidiary and are acting in breach of the contract. Others allege that the company was negligent in its conduct by failing to take adequate steps to prevent the harm from occurring.

It will be interesting to follow the concept of negligence as the case develops. Another group of 53 Colombian farmers, however, brought action against BPXC in an earlier case alleging environmental damage resulting from the pipeline's construction. The case concluded following a confidential settlement agreement between the two parties and BPXC has not admitted its responsibility.

➔ Dutch and British courts in Action: The Shell Nigeria case³¹⁹

Two Nigerian farmers, Oguru and Efanga, residents of Oruma village in the Niger Delta state of Bayelsa, brought action with Milieudefensie (Friends of the Earth Netherlands) against Shell in Dutch courts. A leaking oil pipeline operated by Shell Nigeria contaminated farmland and drinking water near Oruma. Shell Nigeria also caused other harm, including causing fish farms to be unusable, forests to be destroyed and health problems among people in and around Oruma.

The leak was not the first major oil leak Shell dealt with in its Nigeria operations. Shell noted between 200 and 340 leaks per year between 1997 and 2008.³²⁰ Between 1998 and 2007 Shell Nigeria was responsible for 38% of Shell's oil spills in the world.³²¹

On 8 May 2008, the victims notified Shell of their intention to hold the company liable in Dutch courts. On 7 November 2008, Shell was served a subpoena which detailed the disputed facts. Before the court examined the merits of the case, Shell requested a ruling on whether Dutch courts had jurisdiction to hear the case. On 30 December 2009, the Civil Court

³¹⁸ N. Jägers, *Corporate Human Rights Obligations in Search of Accountability*, Intersentia, Antwerpen/ Oxford/ New York, 2002, p. 207; R. Meeran, *op.cit.* 2000 p. 258-261.

³¹⁹ This information is largely pulled from Milieudefensie, "Documents on the Shell legal case", www.milieudefensie.nl

³²⁰ Milieudefensie, "Factsheet oil spills in the Niger Delta", www.milieudefensie.nl

³²¹ Royal Dutch Shell plc, "Financial and Operational Information 2003-2007: Delivery and Growth", www.faoi.shell.com

of The Hague seized jurisdiction. The trial was set for 10 February 2010, but was postponed because the plaintiffs sought more time to prepare. Proceedings resumed on 24 March 2010, at which time the defendants plaintiffs filed a motion for disclosure,³²² requesting that Shell provides them with a number of key documents. These documents would provide additional evidence to establish Shell's liability for the actions of its Nigerian subsidiary. The motion also called for the disclosure of specific documents related to oil leaks, information Shell denied to disclose in June 2010.

The relationship between Shell and Shell Nigeria

Royal Dutch Shell plc. (Shell), a multinational, operates as a single entity. Decisions are made at headquarters and all subsidiaries and partners must comply. Shell's environmental policy, as evidenced by a guide and the adoption of a "Health, Safety & Environment Policy" and "Global Environmental Standards", is managed and verified for compliance from the company's headquarters. Thus, all decisions relating to the multinational's policies have the ability to influence Shell Nigeria's operational conduct.

As the sole shareholder, Shell exercises direct influence and absolute authority over the nomination of Shell Nigeria's CEOs. It was Shell's responsibility to appoint leaders with the experience and ability to repair or at least limit the harm resulting from oil production. This was the basis upon which Oguru, Efanga and Milieudefensie brought legal action against Royal Dutch Shell plc and Shell Nigeria.

The jurisdiction of Dutch courts

Shell Nigeria objected to appearing alongside Shell before a Dutch court and the court held that the two entities were not sufficiently connected for the court to be able to recognize jurisdiction over the subsidiary. Oguru, Efanga and Milieudefensie cited *Freeport v. Arnoldsson* case in which the European Court of Justice held that a lack of offices or business premises in a particular state does not preclude the company from being brought before the courts of that state. Article 6, paragraph 1 of Regulation No 44/2001, provides that in cases with multiple defendants, a defendant may be sued in the jurisdiction where one of the defendants is domiciled, on condition that "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". According to the ECJ, the fact that claims may be brought against several defendants on different legal grounds does not preclude the application of this provision.

Together with Mileudefensie, two Nigerians, Chief Barizaa Dooh and Friday Alfred Akpan, filed two additional complaints on 6 May 2009. The *Goi* and *Ikot Ada Udo* cases accuse Shell of similar offenses in Dutch courts.

On the *Ikot Ada Udo* case Shell was ordered to pay compensation to the plaintiff, for failing to adequately protect its pipelines from vandalism. However, in the *Goi* case, the

³²² Milieudefensie, "Nigerian oil victims demand transparency from Shell via court", press release from 24 March 2010.

court ruled that Shell could not be held liable for the failures of its subsidiary. An appeal was filed by the plaintiff, resulting in a ruling on the December 18th, 2015, through which the Court of Appeals of the Hague overturned the lower court's decision considering that Royal Dutch Shell could be held liable for oil spills attributable to its subsidiary. The ruling introduced two important evolutions for corporate responsibility law : (1) Procedurally, the Court ordered for the first time the disclosure of internal documents of the company ; (2) On jurisdiction, the court allowed the plaintiffs to jointly sue Shell in the Netherlands for oil spills that took place in Nigeria.³²³

Shell Nigeria before UK courts

On 2 March 2016, a UK judge ruled that Royal Dutch Shell can be sued before British courts for its involvement in oil leaks in Nigeria. The case was brought by lawyers from Leigh Day, representing the victims from the two Nigerian towns of Ocale and Bille. The plaintiffs allege that Shell has for decades neglected to clean-up oil spills causing contamination to farmlands and water in their region.

➔ Guerrero v. Monterrico Metals plc. & Rio Blanco Copper SA³²⁴

Monterrico, a UK-domiciled company, has several subsidiaries. One of them, Rio Blanco Copper SA, specializes in copper extraction in Piura, north-western Peru. Although copper extraction is underdeveloped in the region, Monterrico's project would be one of the 20 largest copper mines in the world. The plaintiffs, mostly farmers in Peru, voiced opposition to the project at a demonstration which lasted from late-July to early-August 2005. During the event, 28 demonstrators were forcibly taken to the site of the mine where they were detained and tortured for three days. Several women were sexually abused and one man died of his injuries. The companies do not dispute the excesses of police brutality during the demonstration nor the detention of the demonstrators.

The plaintiffs, represented by Leigh Day and EDLC, argued that Monterrico's on-site officers should have intervened to prevent such abuses and/or were liable for the bodily harm. The plaintiffs demanded redress from Monterrico in UK courts, citing:

- The direct involvement of Monterrico's two co-directors in the disputed events;
- The fact that Monterrico agreed to manage the risks inherent in the operation and management of its subsidiary;
- Monterrico's effective control over its Peruvian subsidiary, to the extent that they constituted a single entity;
- Monterrico affirmed its method of risk management and direct control over the subsidiary in its annual reports.

On 2nd June 2009, the UK court issued an injunction to freeze the parent company's bank accounts (Monterrico was delisting from the London stock exchange and transferring its assets and operations to China). The plaintiffs then asked the High Court of Justice to prolong

³²³ For more information on the case see: <https://milieudefensie.nl/>

³²⁴ *Guerrero v. Monterrico Metals plc. & Rio Blanco Copper SA* [2009] EWHC 2475 (QB).

the injunction. On 16th October 2009, the court acknowledged the existence of sufficient evidence and accordingly stated that the plaintiffs had cause of action. GBP 7.4 million (the amount of damages that could be awarded) was frozen in the company's bank accounts. The court noted in its opinion that Monterrico did not challenge the jurisdiction of UK courts under Article 2 of Regulation 44/2001 and the court itself cited *Owusu v. Jackson case*, emphasizing that Monterrico was domiciled in England at the time the suit was brought. The court thus rejected the doctrine of *forum non conveniens* on its own accord. The trial was scheduled to begin in October 2011 in London, but the parties reached a confidential settlement in July 2011 under which the victims would receive compensation payment.

The economic imbalance between multinationals and individual victims

In terms of financial resources, the inherent imbalance in a dispute between a multinational corporation and an individual victim is a central question which must be taken into consideration. In the context of a multinational corporation's liability for human rights breaches, a recurrent problem is the length of the proceedings and the resulting cost. Litigation can sometimes last more than 15 years and there is an imbalance between the resources available to a company to avoid court rulings which could adversely affect its reputation and those available to individual victims seeking redress. This inequality can affect the outcome of legal proceedings in favour of the company. The European Court of Human Rights' 15 February 2005 ruling in *Steel and Morris v. United Kingdom* illustrates this phenomenon.

➔ Steel and Morris v. United Kingdom³²⁵

Two unemployed British nationals, Helen Steel and David Morris, had ties to London Greenpeace, a small group unrelated to Greenpeace International, which campaigns principally on environmental and social issues. In 1986 London Greenpeace produced and distributed a six-page leaflet entitled "What's wrong with McDonald's" which claimed that the multinational sells unhealthy food, hurts the environment, imposes undignified working conditions and abusively targets children with its advertising.

London Greenpeace was not a legal person and it was thus impossible to sue the organisation in court. After investigating and infiltrating the group to identify those responsible for the campaign, McDonald's Corporation (McDonald's U.S.) and McDonald's Restaurants Limited (McDonald's UK) sued Helen Steel and David Morris for libel and demanded compensation before the High Court of Justice in London. Steel and Morris were **refused legal aid** and conducted their own defence throughout the trial and appellate proceedings, benefiting only from the assistance of volunteer lawyers. They claim they were **severely hampered by their lack of resources**, not only in terms of legal advice and representation, but also with administrative matters, research, preparation and the costs of experts and

³²⁵ ECHR, *Steel and Morris v. United Kingdom*, 15 February 2005, No. 68416/01.

witnesses. Throughout the trial, McDonald's Corporation was represented by lead and junior counsel with experience in libel law, and sometimes two solicitors and other assistants. The trial took place before a single judge and lasted from 28th June 1994 to 13th December 1996, 313 court days (the longest trial in English legal history). On appeal, the Court of Appeal rejected most of Steel and Morris's arguments including the lack of fairness but reduced the damages awarded by the trial judge from a total of GBP 60,000 to GBP 40,000. Steel and Morris were not allowed to appeal to the House of Lords and McDonald's has not sought to collect the damages.

Steel and Morris have filed suit against the United Kingdom before the European Court of Human Rights under Article 6§1 of the European Convention on Human Rights (right to a fair trial). Case law from the court indicates that whether a fair trial requires the provision of legal aid depends on the facts and circumstances of each case, upon the importance of what is at stake for the applicant in the proceedings, on the complexity of the applicable laws and procedures, as well as on the plaintiff's ability to effectively defend his or her cause. The Court concluded that Article 6§1 had been violated, noting that the "the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable **inequality of arms with McDonald's**."³²⁶

A look at the US trial procedure

With the exception of the UK,³²⁷ trials in EU Member State courts differ greatly from those in the US because they remain subject to the legislation of individual Member States. It is therefore difficult to present an overview of European trial procedures. For this reason the appendix concentrates on describing various aspects of US trial procedure. One thing can, however, be said concerning European Member States: the discovery procedure found in the US is generally absent.

It is important to note that **in US civil procedure, the victim's role is accusatory** and the role of the opposing parties is predominant over that of the judge.³²⁸ The parties manage the trial, decide how it unfolds and provide evidence of the facts they allege. The judge's role is merely that of a gatekeeper, ensuring that the parties comply with the trial procedure. Juries issue final decisions.

In our situation, victims of human rights violations by multinational corporations generally have significantly fewer material and financial resources than their opponents to investigate and substantiate the facts and harm they allege. To counter this imbalance, Article 26 of the Federal Rules of Civil Procedure authorizes the **discovery procedure**, which permits either party to require the other to furnish

³²⁶ *Ibid.*, § 72.

³²⁷ For a comparison with UK trial procedure, see M. Byers, *op.cit.*, 2000, p. 244.

³²⁸ On US trial procedure, see EarthRights International, *op.cit.*, 2006, p. 51 and following.

it with all relevant information. This mechanism allows the plaintiff to use court orders to obtain necessary evidence from both the defendant and third parties. Victims may also require companies to turn over certain documents, even if they directly incriminate the company.³²⁹ Failure to comply with the discovery procedure is grounds for the judge to hold a party in contempt of court, which may result in severe penalties.

Burden of proof in EU Member States

Outside of the UK, victims are most often responsible for demonstrating a multinational company's liability for a tort, even though the body of documents and other material evidence is in the hands of the parent company, its subsidiary or its sub-contractors abroad. The same applies to potential witnesses. There is no equivalent to the discovery procedure. The inequality between plaintiff and defendant is all the more striking given that defendants generally have unlimited financial and logistical means. Most Member States, however, offer a (partially) free system of legal aid. While some rules of US trial procedure are potential obstacles to suits brought under the ATCA, others, such as the discovery procedure, present **advantages vis-à-vis the rules in place in Europe**:

► ADVANTAGES

- The ability to bring **class action** on behalf of a group of individuals, or to bring action while protecting the plaintiff's identity,
- The ability to **modify or supplement a suit** based on information gathered through discovery,
- A trial may be held even in the defendant's absence, provided that personal jurisdiction is established (**default judgement**),
- Civil proceedings are independent from possible criminal proceedings (the adage *le pénal tient le civil en l'état* does not apply),³³⁰
- The **contingency fees** of counsel are calculated in proportion to the amount of any rulings or settlements,
- The existence and *pro-bono* involvement of **public interest lawyers** who work with law schools and private firms,
- The sizeable damages awarded by **juries**,
- The unsuccessful party does not have to bear the costs of the case (**no penalty for losing**),
- The ability to obtain both compensatory and punitive damages, as well as court orders requiring changes in practices. Punitive damages are intended both to punish the defendant and discourage others from such conduct, and

³²⁹ A. Blumrosen Bernard-Hertz-Bejot, "Conférence de consensus sur l'expertise judiciaire civile, Groupe d'analyse des textes - L'expertise judiciaire et civile en droit américain", 2007, p. 3.

³³⁰ This adage refers to two rules: the suspension of a civil trial and the civil authority of *res judicata* in criminal cases.

- No compensation for **frivolous and vexatious**³³¹ lawsuits. If a suit is declared frivolous and vexatious, the defendant may claim damages. A frivolous and vexatious suit may be one that is brought without reflection, carelessly or recklessly, or without legal basis.

► DISADVANTAGES / OBSTACLES³³²

- The difficulty in US courts of establishing personal jurisdiction over a company for the actions of its subsidiaries and secondary entities (and vice versa), particularly when the companies are parts of multinational corporations,
- The doctrine of *forum non conveniens*,
- The **act of state** and **political question** doctrines,
- The difficulty of enforcing rulings by US courts in foreign jurisdictions. Foreign governments have difficulty accepting the extraterritorial jurisdiction of US courts and the compensatory and punitive damages awarded in US courts are sometimes considered excessive. **US courts are reluctant to recognize and enforce foreign rulings.** These obstacles are all the more severe because there are few enforcement agreements between the US and other countries.³³³ These restrictions require plaintiffs to consider the foreign jurisdiction where they wish to enforce the US decision, in order to best formulate their complaint to ensure its enforcement in that country.
- The United States does not offer a constitutional or legal basis for legal aid in civil matters. There is no organised system of **legal aid**. The support that exists is provided *pro-bono* by certain attorneys and NGOs, but not by the federal government,
- With certain exceptions, there is no rule which allows successful plaintiffs to be **reimbursed for their legal costs**, and
- Lastly, the court cannot appoint certified interpreters unless the government is the plaintiff.

* * *

³³¹ B. Stephens and M. Ratner, *op.cit.*, 1996, p. 45, 179 and following, 208 and following, 391 and following; B. Stephens, *op.cit.*, 2002, p. 14 and following.

³³² Oxford Pro Bono Publico, *op.cit.*, p. 304 and 310.

³³³ *Ibid.*, p. 325 and following.

Regulation 44/2001 allows a multinational corporation to be held liable in the court of an EU Member State based on the alternative grounds of jurisdiction discussed herein.

For the rest, Regulation 44/2001 determines neither the law applicable to civil liability, nor the rules of procedure. These questions must be referred to the Rome II regulation and/or the national law of the forum court. While covering all applicable tort actions, **Regulation 44/2001 does not take into account the specific nature of our situation**. It represents, however, a clear opportunity for legal action within Europe and should not be overlooked.

With this in mind, it is clear that **a priori the ATCA presents many advantages over EU law**. It specifically grants jurisdiction to US federal courts to hear any civil action brought by a foreign victim of an international law violation. Case law has largely interpreted the different conditions for action, and has specifically asserted that US courts have jurisdiction to hear civil liability suits against multinational corporations for international human rights law violations committed in the context of their operations abroad. The ATCA has also accepted international law as the law applicable to the case and developed a liberal approach in terms of piercing the corporate veil. Current procedures are particularly favourable to situations such as ours, given the ability to sue a non-U.S.-domiciled multinational corporation, the existence of class action lawsuits, the discovery procedure and the contingency system for remunerating attorneys.

In practice, however, **ATCA trials are characterized by numerous difficulties and uncertainties which render the process unpredictable**. Some go as far as saying the ATCA process is compromised from the outset. It is difficult to meet the substantive conditions for civil action in our situation, particularly with regard to international law violations. The quasi-universal jurisdiction granted by the ATCA is limited by various procedural hurdle sunwillingness which require a territorial connection between the US and the dispute, either through personal jurisdiction or *forum non conveniens*, or which aim to avoid any interference with US foreign policy. ATCA trials are lengthy and costly for victims.

In addition, despite an increasing body of favourable case law affirming the right of victims of international law violations to a remedy in the U.S., **many doctrinal and jurisprudential controversies remain with regard to the application and appropriateness of legislation such as the ATCA**. With the support of industry lobbyists, the Bush Administration tried to limit the scope of the ATCA by challenging its foundations and/or limiting its application to the legislature's original intent. On 25th June 2009, President Obama appointed Harold Hongju Koh as the new Legal Advisor of the Department of State. Koh has consistently supported a broad application of the ATCA since the 1990s particularly when the Bush administration expressed opposition. Koh's strategic position in the Obama administration does suggest a move toward applying the ATCA.

Although many cases and issues are pending, to date, **no ATCA trial has come to completion**. The most emblematic case, *Doe v. Unocal*, concluded with a financial out-of-court settlement between the parties before the merits of the case came under judicial scrutiny. Despite a lack of actual sentences, some have stressed the value of the cases introduced under the ATCA, noting that the ATCA provides a forum where victims can publicly denounce the abuses they suffered, force companies to answer for their actions before an independent court and disclose relevant documents via the disclosure procedure. In addition, calling the reputation of corporations into question plays a preventive role.³³⁴

Despite these obstacles, it remains pertinent to **draw lessons** from the ATCA, particularly in terms of the content and principles it ascribes. It is also important to learn from the practices it generates for **building an appropriate model of civil liability and responding to the challenges of globalisation**. **European law offers opportunities for real success** in litigation based on European rules of jurisdiction and enforcement. Rulings by the High Court of Nanterre and the Versailles Court of Appeal in the case of the Jerusalem tramway are significant, as is the Dutch court's ruling in the case of Shell in Nigeria. The implications of these cases will become more clear as the rulings are put into practice.

Thus, waiting for the law to develop a truly effective legal system, it is important to **coordinate efforts between NGOs and attorneys, to further advocate** and to **increase litigation** relating to human rights violations committed by multinational companies.

Post-Scriptum

Although these sections focus on the legal framework and cases in Europe, the United States and Canada, other jurisdictions have also shown to have a progressive approach to the question of responsibility of businesses for extraterritorial violations of human rights, such as in Brazil.

➔ Brazilian courts in action

Odebrecht – Biocom Angola³³⁵

In March 2014, the Brazilian multinational “Odebrecht” was notified by the Brazilian Government of allegations of slave labour conditions in Angola at the site of construction of a plant for Biocom, an Angolan company partly owned by Odebrecht. Subsequently, the Brazilian Prosecutor General filed a lawsuit before the labour court of Araraquara, Brazil,

³³⁴ See H. Ward, “Governing Multinationals: the role of foreign direct liability”, Briefing Paper, Energy and Environment Programme, New Series, No. 18, February 2001; D. Kirkowski, “Economic Sanctions vs. Litigation under ATCA: US Strategies to Effect Human Rights Norms; Perspectives from Burma”, Working Paper, 2003.

³³⁵ 2nd Labour Court Araraquara, Process N° 10230-31.2014.5.15.0079, September 2015.

in June 2015 accusing Odebrecht of human trafficking and of maintaining Brazilian workers in slave-like labour conditions.³³⁶

The case resulted in the conviction of the Odebrecht Group on the basis of article 3 of the Brazilian law regulating the situation of Brazilian workers or workers transferred by their employers abroad. According to this legal provision, the person responsible for the labour contract shall ensure the respect of the worker's rights protected under Brazilian law, regardless of the legal standards applicable in the state where the worker is located. The court considered that in the case of employees transferred to work abroad, all the companies involved in the transaction are bound to ensure conditions of dignity and comfort at work as per Brazilian labour law. Having investigated Biocom's plant construction site in Angola, the court concluded that the lack of adequate hygiene, health and safety conditions amounted to degrading working conditions, which violated workers' dignity and subjected them to suffering, especially considering they were not in their home country.

The court ordered the company to pay 50 million reais (US 13 million) in damages to 500 workers.

Zara Brazil

Zara, one of the brands owned by Inditex, the world's largest clothing retailer in terms of number of stores, sources its products from a large network of suppliers throughout the world. In 2011 the Brazilian labour inspection authorities found violations of human rights in Zara's supply chain, whereby "orders from Zara ended up at illegal workshops, where undocumented immigrants from Bolivia and Peru were working and living under inhumane conditions."³³⁷ The Brazilian authorities reached an agreement with Zara who committed to carry out stronger monitoring and inspections on its suppliers. However, more recent reports from the labour inspection authorities identified continuing violations of workers' rights committed by Zara's suppliers, such as excessive overtime and occupational health and safety violations.³³⁸ As a consequence, Zara risks being included in the so-called 'dirty list' of Brazil's labour and employment ministry, which indicates the companies where slave-like conditions have been found. In response, Zara initiated a constitutional action contesting the constitutionality of this list.³³⁹

³³⁶ Bussiness and Human Rights Ressource Centre, "Odebrecht Lawsuit (re Forced Labour in Angola)", available at: <http://business-humanrights.org>

³³⁷ SOMO, 'Fashion Brand Zara once again associated with Brazilian labour rights abuses', 9 May 2015, www.somo.nl

³³⁸ Reporter Brazil, *Zara corta oficinas de imigrantes e será multada por discriminação*, 9 May 2015, available at: <http://reporterbrasil.org.br>

³³⁹ SOMO, 'Fashion Brand Zara once again associated with Brazilian labour rights abuses', 9 May 2015, www.somo.nl

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 - International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations*, Poland, Geneva 2010
 - International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations: South Africa*, Geneva 2010
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 - Business and Human Rights, *Corporate Legal Accountability Portal*
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www.earthrights.org
 - Environmental Defender Law Center, *Corporate Accountability*
www.edlc.org/cases/corporate-accountability
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PART II

The Extraterritorial Criminal Liability of Multinational Corporations for Human Rights Violations

It is well established that certain corporations have a propensity to engage in serious criminal activity. At various times in history they have been used by dictators, rebel armies and even terrorists to carry out their crimes.³⁴⁰ Frequently denounced violations by companies include the development and use of toxic chemicals in recent armed conflicts (former Yugoslavia)³⁴¹ and “pacts of connivance” – corrupt practices – between foreign companies and local governments.³⁴²

In South Africa, following hearings which began in November 1997 on the involvement of economic actors in the system of apartheid,³⁴³ the Truth and Reconciliation Commission (TRC) ruled unequivocally that companies had provided material support to the institutionalised crime. The TRC held that the companies played a central role in supporting the economy which kept the South African State running under apartheid and that companies derived substantial profit from the system of racial privileges. The TRC went so far as to say that some companies, particularly in the mining sector, contributed to the development and implementation of the apartheid system.³⁴⁴ A full ten years earlier, the United Nations General Assembly had already condemned apartheid’s widespread and systematic use of racial discrimination as a crime against humanity. The UN Convention of 1973 on the Elimination

³⁴⁰ For instance, Ford and Mercedes Benz were accused of complicity during the Argentinian dictatorship in the mid 70s, accused of letting their workers in the hands of the repressors and to have allowed in their factories military detachment. D. Vandermeersch, “La dimension internationale de la loi”, in M. Nihoul (Ed.), *La responsabilité pénale des personnes morales en Belgique*, Brussels, La Charte, 2005, p. 243.

³⁴¹ D. Baigun, “Reponsabilidad penal de las transnacionales”, Geneva, 4-5 May 2001, CETIM/AAJ, p. 3-4.

³⁴² See Global Witness, “Now it’s time for transparency”, Press Release of 24 March 2003, www.globalwitness.org

³⁴³ The Truth and Reconciliation Commission “had no power to condemn the perpetrators of criminal violations of human rights, but could, however, declare an amnesty.” Business Hearings” examined the role of economic, government and union actors. Several sectors of the economy were interviewed. For more on this process, see B. Lyons, “Getting to accountability: business, apartheid and human rights”, *N.Q.H.R.*, 1999, p.135 ff.

³⁴⁴ See the Truth and Reconciliation Commission, Final Report, Vol.4, Chapter 2, § 161.

and Repression of the Crime of Apartheid established that “organisations, institutions and individuals committing crimes of apartheid are criminal.”³⁴⁵

The ability of companies to violate international humanitarian law has thus far not resulted in their criminal liability before international courts. In the aftermath of the Second World War,³⁴⁶ however, national laws have increasingly recognised the principle of corporate criminal liability and numerous international conventions and regional instruments have called upon States to legislate in this direction. The 20th century has been marked by an increase in the number and size of corporations, such that social and political life now appears to be heavily influenced by their behaviour. Their increased involvement in social relations corresponds proportionally with an increased involvement in criminal activity.

Many people believe that establishing a regime under which corporations, and not only the individuals who work for or manage them, are held criminally liable, will render prosecutions and enforcement efforts more fair and efficient.³⁴⁷

The difficulty or impossibility of identifying the physical person(s) personally and criminally liable, despite serious analysis of a company’s management structure, internal organisation, memos, contracts delegating powers and written mandates, has often lead to a double impasse: the corporation’s impunity, or, the sentencing of supervisors – due to their position – although no fault of their own could be demonstrated.³⁴⁸ In a purely functional manner, the court has on many occasions found a company’s manager to be criminally responsible, even in situations where it was unanimously agreed that key factors in the company’s organisation, particularly with regard to multinational groupings of companies, make it impossible

³⁴⁵ See art. I (2) of the *United Nations Convention on the Suppression and Punishment of the Crime of Apartheid* adopted 30 November 1973, effective 18 July 1976. The direct criminal responsibility of persons can be engaged internationally on this basis. Several Protocol proposals, which were never achieved, were filed to create an international tribunal with jurisdiction over corporations with multinational companies to be targeted in particular. See A. Clapham, “The Question of Jurisdiction Under International Criminal Law Over Legal Persons”, in *Liability of Multinational Corporations under International Law* / ed. M. T. Kamminga and S. Zia-Zarifi, Kluwer Law International, The Hague/London/Boston, p. 173.

³⁴⁶ G. Stessens, “Corporate criminal liability a comparative perspective”, I.C.L.Q. 1994, (493), 493; R. Roth, “La responsabilité pénale des personnes morales”, in *La responsabilité. Aspects nouveaux* (Travaux de l’association Henri Capitant des Amis de la Culture juridique française), Tome L., L.G.D.J., 1999, pp. 683 ff.

³⁴⁷ Rontchevsky, “Rapport français” in *La responsabilité. Aspects nouveaux* (Travaux de l’association Henri Capitant des Amis de la Culture juridique française), Tome L., 1999, L.G.D.J., p.741.

³⁴⁸ M. Delmas-Marty, “La responsabilité pénale des groupements”, *Rev. Intern. dr. Pén.*, 1980, p.39-41; A. De Nauw, “La délinquance des personnes morales et l’attribution de l’infraction à une personne physique par le juge”, See under Cass., *R.C.J.B.*, 1992, p. 570.

to monitor all of the company's activities.³⁴⁹ Thus it seems necessary to establish **corporate criminal liability**, without eclipsing **individual criminal liability** when guilt is demonstrated.

In some respects, corporate criminal liability would be more “promising” than the civil liability:

- Criminal procedure offers the **benefit of theoretically relieving victims of the burden of proof**;
- Criminal procedure **has a greater deterrent** effect against future violations, particularly if the sanction imposed on the company is not limited to fines but also includes asset forfeiture or **the closure of** company branches involved in the offence; and
- Some statutes of limitations are longer in criminal matters, particularly in cases involving serious violations of international humanitarian law.

On the other hand, it should not be overlooked that the required evidentiary standards are higher and it is thus more difficult to demonstrate proof in criminal cases than in civil cases. In criminal cases, defendants may be acquitted due to doubt. In addition, the slowness of some criminal procedures sometimes prevents the case from reaching completion.

³⁴⁹ This tendency is most notable in Belgium. See Roger-France, “La délégation de pouvoir en droit pénal, ou comment prévenir le risque pénal dans l’entreprise?”, *J.T.*, 2000, p. 258.

CHAPTER I

Criminal Prosecution of Multinationals before the International Courts

A. Ad hoc International Criminal Tribunals

B. International Criminal Court

* * *

The international criminal courts are of two types: the International Criminal Tribunals (ICT), which are temporary tribunals, and the International Criminal Court (ICC), which is a permanent court.

A. The ad hoc International Criminal Tribunals

The ICTs are non-permanent courts created by the Security Council on the basis of Chapter VII of the UN Charter, regarding action with respect to threats to the peace, a breach of the peace or an act of aggression.

Several ICTs were created by the Security Council:

- The International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993
- The International Criminal Tribunal for Rwanda (ICTR) in 1994

More recently, the UN, with the States concerned, created hybrid criminal tribunals (the creation, composition and operation of which is assured by both the United Nations and the State in question):

- The Special Court for Sierra Leone (SCSL), in 2002
- The Extraordinary Chambers in the Courts of Cambodia (ECCC), in 2004
- The Special Tribunal for Lebanon (STL) in 2007

The first *ad hoc* tribunals were created after the Second World War to prosecute international criminals, mainly German and Japanese:

- The Nuremberg International Military Tribunal, established in 1945 by an agreement between the United States, the United Kingdom, the USSR and France
- The International Military Tribunal for the Far East, established in 1946

The statutes of the international tribunals (currently operational), responsible for the repression of serious violations of international humanitarian law, do not provide for the criminal prosecution of state or privately held legal entities. Their jurisdiction is limited to individuals (state officials or private individuals), co-authors, accom-

plices or instigators, and representing the legal entity.³⁵⁰ Prosecution is limited to the business leaders (and not the companies as moral entities).

Several trials that followed the end of the Second World War led to the conviction of industrialists for serious crimes or complicity in the commission of such crimes:

- 1947-1948: *The United States of America v. Alfried Krupp, and al.* This trial led to the conviction of several members of the Krupp family (weapons industry) for crimes against peace and crimes against humanity.
- 1947-1948: *The United States of America v. Carl Krauch, and al.* This trial resulted in the conviction of several German industrialists of the chemical group IG Farben, the producer of Zyklon B gas, for war crimes and crimes against humanity.

➔ The private economic parties before the ICTR

The ICTR Appeals Court confirmed on 16 November 2001, the sentence of life imprisonment – rendered in first instance on January 27, 2000 – against the former director of the Tea Factory Gisovu (Kibuye, western Rwanda), Alfred Musema, for the crime of genocide and extermination understood as a crime against humanity (Case ICTR-96-13-I). Alfred Musema, the largest employer in the area, lent vehicles, drivers and employees of his factory to transport the killers to the massacre sites in Rwanda.³⁵¹

In the Decision of the Court of First Instance ruling on the motion filed by the Prosecutor to obtain a formal request for a deferral to the International Criminal Tribunal for Rwanda (pursuant to Articles 9 and 10 of the Rules of Procedure and Evidence), rendered March 12, 1996 (ICTR-96-5-D), it was stated the following: “since his investigations target mainly people in positions of power, the Prosecutor considers that the criminal responsibility of Alfred Musema could be paramount. Indeed, Alfred Musema was director of the tea factory Gisovu (Kibuye prefecture). He used this position of director to aid and abet the execution of serious violations of international humanitarian law. More specifically, he is presumed to have been seen several times on the massacre sites [...]. In addition, vehicles of his factory are alleged to have been used to transport the killers to the massacre sites. His employees and drivers were also regularly present”.³⁵²

³⁵⁰ See Articles 6 and 7 of the *Statute of the International Tribunal for the Former Yugoslavia* (Statute adopted on May 25, 1993 by Resolution 827 of the Security Council), Articles 5 and 6 of the *Statute of the International Tribunal for Rwanda* (Statute adopted on November 8, 1994 by Resolution 955 of the Security Council). See also *United Nations Convention on the Suppression and Punishment of the Crime of Apartheid* of 30 November 1973 (entered into force July 18, 1976), *Ibid.*

³⁵¹ ICTR, *Musema v. Prosecutor*, case n°ICTR-96-13-A, November 6, 2001. Regarding the charges against him, see R. Boed, “Current developments in the Jurisprudence of the International Criminal Tribunal for Rwanda”, *I.C.L.R.*, Volume 2, Number 3, 2002, p. 283-295(13). In first instance, see ICTR, *The Prosecutor v. Musema*, case n°ICTR-96-13-T, January 27, 2000.

³⁵² Centre de droit international ULB, *Tribunal Pénal International pour le Rwanda – recueil des ordonnances, décisions et arrêts 1995-1997*, Bruylant, Bruxelles, 2000, p. 389. (free translation).

In relation to the moral authority of a company over its environment by its mere presence, the analysis of André Guichaoua, a French sociologist and professor at the University of Lille, speaking on May 6, 1999 in Arusha in his capacity as an expert witness was recalled. Professor André Guichaoua indicated that Alfred Musema had a definite influence on the population: “In my opinion, a director of a tea factory, with all that this position represents in the overall distribution of resources, had considerable influence on the local population and municipal authorities”. It is interesting to compare this analysis with the decision rendered by the ICTR in the *Prosecutor v. Jean-Paul Akayesu* case, of October 2, 1998 (Case No. ICTR-96-4): a passive witness who is viewed by the other perpetrators in such high esteem that his presence amounts to encouragement, can be convicted of complicity in crimes against humanity.³⁵³

This decision is not an isolated one. In the case of *The Prosecutor v. Ruzindana*, the Prosecutor stated on October 28, 1998 before the ICTR, that Obed Ruzindana, was a well-known and respected businessman in Kibuye of good social standing and in a position to deter potential perpetrators of massacres from committing such acts.³⁵⁴

The gradual recognition of the “sphere of influence”³⁵⁵ and moral authority of the industrialists and their companies, and thus their power over the course of events through their mere presence is the basis for the criminal liability which may be imputed to them when, present at the scene of the crime, they fail to act to try to prevent its commission.

The Prosecutor v. Nahimana, Barayagwiza and Ngeze case, commonly called the “media case” concerns the media campaign conducted by three people in Rwanda in 1994, intended to desensitize the Hutu population and encourage it to kill Tutsis.

Ferdinand Nahimana and Jean Bosco Barayagwiza were both prominent members of the initiative committee behind the creation of the *Radio Television Libre des Mille Collines* (RTLM) which broadcast from July 1993 – July 1994 virulent messages condemning the Tutsi as “enemies” and moderate Hutus as “collaborators”. Nahimana, a former university professor and director of the Rwandan Information Office (ORINFOR) was accused of being behind the creation of RTLM and was considered the company president. Barayagwiza, former Director of Political Affairs in the Ministry of Foreign Affairs, was considered the number two of RTLM.

Hassan Ngeze was the founder, owner and chief editor of the newspaper *Kangura*, which was published from 1990 to 1991 and was widely read throughout Rwanda. As with the broadcasts of RTLM, *Kangura* published hate messages, denouncing the Tutsis as enemies seeking to overthrow the democratic system and take power.

³⁵³ See also See ICTY, *Furundzija case*, § 209: “presence, when combined with authority, can constitute assistance in the form of moral support, that is, the *actus reus* of the offence. The supporter must be of a certain status for this to be sufficient for criminal responsibility.”

³⁵⁴ ICTR, *Prosecutor v. Obed Ruzindana*, ICTR-96-10-T et ICTR-96-1-T, June 1, 2001.

³⁵⁵ The term was also used in the Musema case in the appeal judgement. See ICTR, *Prosecutor c. Ruzindana*, June 1, 2001 (ICTR-96-10-T and ICTR-96-1-T).

On November 28, 2007, the Appeals Chamber declared Nahimana and Ngeze guilty of direct and public incitement to commit genocide, and Barayagwiza of genocide, incitement to genocide, extermination and persecution constituting crimes against humanity.³⁵⁶

In each of the cases discussed above, the leaders of the companies involved were considered either as a perpetrator or a direct accomplice of the crime. There are other cases in which the company is indirectly complicit in the crime, when it draws profits therefrom.

B. The International Criminal Court

The ICC, head-quartered in The Hague, is the first permanent international criminal court. It was created by the Treaty of Rome, signed on 17 July 1998 by the Diplomatic Conference of Plenipotentiaries of the United Nations and defining the Statute of the ICC.³⁵⁷

➤ What crimes are sanctioned?

The crimes within the jurisdiction of the ICC are defined in Articles 5 and following of the Rome Statute: genocide, crimes against humanity, war crimes and the crime of aggression. This list also includes certain crimes against the administration of justice (art. 70 and 71).

The jurisdiction of the ICC is limited to four types of crimes that affect the entire international community, considered the most serious. These are:

- The **crime of genocide**, defined in Article 6 of the Statute;
- **Crimes against humanity** (Article 7 of the Statute);
- **War-crimes** (Article 8 of the Statute);
- The **crime of aggression**.

Article 6 stipulates that the **crime of genocide** means any of the following acts committed with an intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

³⁵⁶ Sophia Kagan, “L’affaire des “médias de la haine” devant le tribunal pour le Rwanda: L’arrêt Nahimana et al.”, The Hague Justice Portal, www.haguejusticeportal.net

³⁵⁷ FIDH, *Victims’ Rights before the International Criminal Court: a Guide for Victims, their Legal Representatives and NGOs*, April 2007, www.fidh.org

Crimes against humanity consist in acts committed as part of a **widespread or systematic** attack directed against any civilian population, with knowledge of the attack such as murder, extermination, enslavement, torture. The list of Article 7 is not exhaustive.

The ICC also has jurisdiction to try persons suspected of **war crimes**, in particular when those crimes are part of a plan or policy or as part of a series of similar crimes committed on a large scale (art. 8). The Statute defines a war crime in Article 8. It lists 50 offences including rape, deportation and sexual slavery.

The **crime of aggression** also falls within the jurisdiction of the Court. During the Review Conference in June 2010 in Kampala, Uganda, a resolution was voted to amend the Rome Statute in order to include a definition of the crime of aggression based on the UNGA Resolution 3314 (XXIX) of 14 December 1974, which defines aggression as a “crime committed by a political or military leader which, by its character, gravity and scale constituted a manifest violation of the Charter.”³⁵⁸ The amendment will only enter into force after having been ratified by 30 states and only if the Assembly of States Parties so decides after 1st January 2017. Until now 26 States have ratified the amendment.³⁵⁹ Such limit imposed on the jurisdiction of the Court has been subject to criticism by NGOs.³⁶⁰

► NOTE

The crimes over which the Court has jurisdiction are not subject to any statute of limitations (Article 29). This means that there is no maximum time after the commission of the crime to initiate legal proceedings (upon condition that the crime occurred after 2002 and/or the date of ratification of the ICC Statute by the State. See *infra*).

🕒 Over whom does the ICC have jurisdiction?

– The statute provides that the Court has jurisdiction only over **individuals**.

Legal entities, such as businesses, are therefore currently excluded from the jurisdiction of the ICC. This choice was justified by the fact that the criminal liability of legal entities is not universally recognized.³⁶¹ However, it remains possible to individually prosecute the directors of a company.

– The ICC has jurisdiction over the authors, co-authors, principals, instigators, accomplices

³⁵⁸ ICC, “Review Conference of the Rome State concludes in Kampala”, Press Release, 12 June 2010, www.icc-cpi.int

³⁵⁹ See: <https://treaties.un.org>

³⁶⁰ FIDH, “Conclusion of Landmark ICC Review Conference: Difficult Compromise and Commitments to be Confirmed”, 14 June 2010, www.fidh.org

³⁶¹ K. Ambos, “Les fondements juridiques de la Cour pénale internationale”, Rev. trim. D.H., 1999, p. 749.

“The different types of liability recognized are individual liability (author), co-liability (‘jointly with another person’), and indirect liability (‘through another person’)” (art.25. 3.a).³⁶²

Because international crimes typically involve several persons, Article 25 of the Statute stipulates that the ICC has jurisdiction not only in respect of any individual who actually committed a crime provided for under the Statute (direct perpetrator), but also against all those who have intentionally ordered such crimes, solicited or induced others to commit them or provided the means therefore.³⁶³

The Rome Statute opts for a **broad definition of complicity**. Indeed, an individual will be criminally liable if he/she:

- Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted (Art. 25, 3, B), or
- For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (Art. 25, 3, C).

Article 25.3.D also specifies that a person who contributes in any way to the commission or attempted commission of a crime by a group of persons acting in concert will be convicted. This contribution must be intentional and either be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court, or be made in the knowledge of the intention of the group to commit the crime.³⁶⁴

- The defendants must be **at least 18 years old at the time of the alleged commission of a crime** (s. 26)
- **There are several grounds for excluding criminal responsibility (art. 31).**

An individual shall not be held criminally liable where:

- the person suffers from a mental disease or defect that destroys that person’s capacity to appreciate his conduct, or
- the person acts reasonably to defend himself or herself or another person, or
- the person was acting under duress or a threat.

The official capacity of the suspect is not a ground for exoneration (art. 27): the immunity which may benefit certain persons (such as agents of state entities) is inadmissible before the Court.

³⁶² K. Ambos, *op. cit.*, p.749. (free translation).

³⁶³ See FIDH, *Victims’ Rights before the ICC, op.cit.*

³⁶⁴ M. Bassiouni, “Note explicative sur le Statut de la Cour pénale internationale”, *Rev. Internat. dr. pén.*, 2000, p.17.

➔ What about the complicity of individuals implicated in the commission of international crimes committed by or with the complicity of a company?

Article 25.3.c) of the Statute of the ICC could, *inter alia*, apply to these persons (see above).

In a press release dated September 26, 2003, the Prosecutor of the ICC drew attention to a certain number of connections between crimes committed in Ituri (Democratic Republic of Congo) and several companies in Europe, Asia and North America, the illegal exploitation of resources in eastern DRC allowing for the financing of the conflicts in this region. The Prosecutor, Mr. Ocampo stated that his own investigations on violations of human rights in the DRC were based on the successive reports of the group of UN experts regarding the illegal exploitation of natural resources and other forms of wealth in the Democratic Republic of Congo,³⁶⁵ reports that sought to identify the role of business in the perpetuation of conflicts. In his statement, Mr. Ocampo explained that “The investigation of the financial aspects of war crimes and crimes against humanity is not a new idea. In the aftermath of the Second World War, German industrialists were prosecuted by the Nuremberg Military Tribunals for their contribution to the Nazi war effort. One of these Tribunals held that it was a settled principle of law that persons knowingly contributing – with their influence and money – to the support of criminal enterprises can be held responsible for the commission of such crimes.”³⁶⁶

Nevertheless, the investigations of the Office of the Prosecutor of the ICC in the DRC and the first cases involving crimes committed in the north and east of the country do not yet show any real consideration for the complicity of the economic actors in the commission of the alleged crimes.

② Who can trigger the jurisdiction of the ICC?

The Prosecutor may initiate investigations and prosecutions in three possible ways (art.13):

- States Parties to the Statute can refer situations to the Prosecutor;
- The Security Council of the United Nations may ask the Prosecutor to open an investigation into a situation;
- The Prosecutor may initiate investigations *proprio motu* on the basis of information received from reliable sources;
- Non-party States to the Statute may also refer to the Prosecutor.

³⁶⁵ *United Nations Reports on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC*. S/2001/357, april 12, 2001; S/2001/1072, November 13, 2001; S/2002/1146, October 16, 2002; S/2003/1027, October 23, 2003.

³⁶⁶ See L. M. Ocampo, “The Prosecutor on the co-operation with Congo and other States regarding the situation in Ituri”, *Press Release*, The Hague, September 26, 2003.

“Situation” means “the context of developments in which it is suspected that” a crime within the jurisdiction of the Court “has been committed.”³⁶⁷

The referral of a situation to the Court by a State Party (Art. 14)

A State Party may ask the Prosecutor to open an investigation into a particular situation. This possibility is granted only to States that have ratified the Rome Statute. Non-party states may, however, inform the prosecutor of certain crimes that have been committed, so that he can act *proprio motu*.³⁶⁸ The state that has referred a situation to the Prosecutor must attach to the referral certain information that can serve as evidence.

The referral of a situation to the Court by the Security Council (Art. 13.b)

The Security Council must act with intent to prevent a threat to peace and security (Chapter VII of the UN Charter). In this case, the ICC has jurisdiction even though the crimes were committed on the territory of a non party State (that has not ratified the Rome Statute) or by a national of any such State. The only requirement is that the situation involves a “threat to peace and security”.³⁶⁹

Following these two types of referrals, the Prosecutor shall decide to initiate an investigation if he considers there is a reasonable basis to proceed under the Rome Statute.

The opening of an investigation by the Prosecutor acting on his own initiative (Art. 15)

The Prosecutor of the ICC has the authority to refer a situation on his own initiative. The successful opening of such an investigation however, is conditioned upon the approval of a Pre-Trial Chamber (composed of three judges). In the event the Chamber considers that the evidence is insufficient and therefore does not provide its authorization, the Prosecutor may submit a new application later on the basis of facts or new evidence.³⁷⁰ However, if the authorization of the Pre-Trial Chamber is granted, the Prosecutor shall notify the opening of his investigation to all States Parties and the states concerned. They then have a period of one month (from receipt of the service) to notify the Prosecutor if proceedings have already been introduced at national level.

To determine whether to initiate an investigation, the Prosecutor will seek relevant information from **credible sources** such as states, intergovernmental organisa-

³⁶⁷ M. Bassiouni, *op. cit.*, p.18. (free translation).

³⁶⁸ D. Becharoui, *op. cit.*, p.353. (free translation).

³⁶⁹ M. Bassiouni, *op. cit.*, p. 18. (free translation).

³⁷⁰ K. Ambos, *op. cit.*, p.745.

tions. At this stage of the proceedings, victims, intergovernmental organisations, UN bodies may provide the Prosecutor with information that will help determine whether there are grounds to initiate an investigation.

In November 2009, the Prosecutor sought the authorization of the judges of the Pre-Trial Chamber to initiate an investigation into the situation in Kenya.

On March 31, 2010, the judges of Pre-Trial Chamber II authorized the Prosecutor of the ICC to investigate crimes against humanity allegedly committed in Kenya as part of post-election violence in 2007-2008. This is the first time that the ICC Prosecutor calls for the opening of an investigation on his own initiative *proprio motu*. The Prosecutor announced his intentions to act quickly and his hopes to finalize the investigation before the end of 2010.³⁷¹

Victims and NGOs may also, on this basis or in reference to article 54.3.e section, **send information to the Office of the Prosecutor to facilitate the opening of investigations *proprio motu***, or contribute to the ongoing investigations and prosecutions. In this context, the FIDH provided significant information to the Office of the Prosecutor, in particular in relation to on the situations in the Democratic Republic of Congo, Central African Republic and Colombia.

The referral of a situation to the Court by a non party state (art.12.3)

Non party States may refer a situation to the Prosecutor by means of an *ad hoc* declaration accepting the jurisdiction of the Court, as was the case for the Ivory Coast when the government made a statement accepting the jurisdiction of the Court in 2003 for crimes committed since September 19, 2002.

② Under what conditions?

The location of the commission of the crime and the nationality of the accused

If the crime was committed on the territory of a non party state or by a national of a non party state, the Court shall in principle not have jurisdiction over this crime. However, the non party state may recognize the jurisdiction of the Court on an *ad hoc* basis (12.3). It will therefore also have jurisdiction where a non-party state to the Rome Statute has consented to the exercise of its jurisdiction over a crime committed on its territory or by a national thereof.³⁷²

³⁷¹ Coalition for the International Criminal Court, www.iccnw.org

³⁷² D. Becheraoui, "L'exercice de la compétence de la Cour Pénale Internationale", *Rev. internat.*, 2005, liv.3-4, p. 347.

A situation may also be referred by the Security Council of the United Nations, under Chapter VII of the UN Charter.

The jurisdiction of the Court can be exercised only if:

- The accused is a national of a State Party or a state that otherwise has accepted the jurisdiction of the Court
- The crime was committed on the territory of a State Party or a state that otherwise has accepted the jurisdiction of the Court
- The UN Security Council referred the situation to the Prosecutor, regardless of the nationality of the suspect or where the crime was committed.

The principle of complementarity (Art. 17)

The ICC is not intended as a substitute for national courts. The **obligation to prosecute** genocide, crimes against humanity and war crimes rests **primarily with national courts**, the ICC intervenes only in cases of failure on their part or their state. The ICC is therefore complementary to national criminal jurisdictions (which distinguishes it strongly from *ad hoc* international tribunals). Therefore, it can prosecute and try persons, only where no national court has initiated proceedings or where a national court has affirmed its intention to do so but in reality **lacks the will or ability to conduct such prosecutions**. Lack of will is established where a state is trying to shield the person concerned from criminal responsibility for crimes within the Court's jurisdiction, or is conducting a mock trial in order to protect the person suspected of crimes, either by delaying the procedure or by conducting a biased procedure.³⁷³ Inability will be established when the state's judiciary has collapsed, disintegrated during an internal conflict, preventing the gathering of sufficient evidence.

The jurisdiction of the Court intervenes as a last resort.³⁷⁴ This principle allows national courts to be the first to investigate or initiate prosecutions.

The date of the facts

The ICC has jurisdiction only over crimes committed after the entry into force of the Rome Statute, i.e. after 1 July 2002.

For states which became parties to the Statute after this date, the ICC's jurisdiction will apply only to crimes committed after their ratification thereof. Section 124 of the Statute also allows a state that becomes a party to the Statute to defer the implementation of the Court's jurisdiction over war crimes for seven years. The deletion of this article is also on the agenda of the Review Conference in June 2010.

³⁷³ K. Ambos, *op. cit.*, p.746.

³⁷⁴ *Victims' Rights, op.cit.*

② Role of the victim in the proceedings

Unlike the international tribunals, the **victims before the ICC play an important role**. The Rome Statute provides an autonomous place for victims in the judicial process. This revolution is tied to the transition from justice based on the sentencing of the accused (retributive justice)³⁷⁵ to justice that places the victim at the heart of the lawsuit (restorative justice). The place of the victims in the proceedings of a trial before the ICC further demonstrates the efforts made to ensure that the perpetrators of serious crimes be held accountable for their actions.

The concept of the victim

Article 85 of the Rules of Procedure and Evidence defines the term “victim” rather broadly. This definition defines the physical victim extensively to include also **indirect victims**³⁷⁶:

- Any individual who has suffered harm as a result of the commission of a crime within the jurisdiction of the Court;
- Any organisation or institution, the property which is dedicated to religion, education, arts, science or charitable purposes, a historic monument, hospital and other premises used for humanitarian purposes that has suffered direct harm.

Unlike the definition of private individual victims, the definition of legal entity victims is restrictive. An association that does not meet the criteria of Article 85 shall not be able to assist victims on the basis only of its activities.

Regarding the damages, it is the role of the judge to determine, in a case-by-case basis, those to be taken into account, it being understood that these include damage to the **integrity of the person**, both **physical** and **psychological**, and **material damages**.

*The participation of the victim during the preliminary phase of the trial*³⁷⁷

Victims may send information to the Prosecutor of the ICC, regarding crimes within the jurisdiction of the Court, so that he may decide whether there are sufficient grounds on which to prosecute and the possibility of opening an investigation.³⁷⁸ They can thus **intervene by submitting their views as of the first referral to the Court**. The Prosecutor shall take into account their interests, particularly where he

³⁷⁵ See *Ibid* and J. Fernandez, “Variations sur la victime et la justice pénale internationale”, *Revue de la Civilisation Contemporaine de l’Université de Bretagne Occidentale*, 2006, p.2, www.univ-brest.fr/amnis

³⁷⁶ J. Fernandez, *op. cit.*, p.7.

³⁷⁷ We will discuss here only the preliminary phase.

³⁷⁸ See the decision of the Preliminary Chamber, on January 17, 2006, taken at the request of six people affected by the crimes committed in DRC

decides to prosecute.³⁷⁹ They also have the **right to participate in the proceedings** (Article 68 of the Statute, which defines the conditions for the participation of victims in the proceedings, provides that “Where the personal interests of victims are concerned, the Court shall permit their views and concerns to be presented and considered at stages of the procedure it considers appropriate...”³⁸⁰) and claim for reparation.³⁸⁰

Victims may also submit observations to the Court in an action challenging the jurisdiction of the ICC or the admissibility of prosecution.³⁸¹

FIDH supports the participation of victims of the DRC (and of other cases), and more generally the access of victims to the ICC. In domestic law, the rulings of the ICC “have the authority of *res judicata*”: the victims are entitled to plead before a domestic court for redress.

* * *

Any possibilities for the ICC to have jurisdiction over companies as moral persons?

During the preparatory work of the Rome Statute, certain debates have indeed focused on the criminal liability of moral persons (legal entities). The draft statute for the creation of an international criminal court prepared by M.C. Bassiouni³⁸² stated in Article XII that the court would have jurisdiction to try the “individuals”. In this proposal, the term “individuals” was used in its broadest sense and applied equally to natural and moral persons. As for the draft statute submitted by the International Law Commission, the term “persons” referred to in the text suggested a reference to natural persons only.³⁸³

The report of the **Preparatory Committee for the creation of an international criminal court** in 1996, contains proposals relating to the inclusion of companies, the principal of which was a recommendation for the international court to have jurisdiction on the: “**criminal liability [...] of legal entities**, with the exception

³⁷⁹ J. Fernandez, *op. cit.*, p.7.

³⁸⁰ See FIDH, *Victims' Rights before the ICC*, *op.cit.*

³⁸¹ Statute, Art. 19. 3 ; L. Walley, “Victimes et témoins de crimes internationaux: du droit à une protection au droit à la parole”, *R.I.C.R.*, mars 2002, vol. 84, p.57.

³⁸² M.C. Bassiouni, *Draft Statute: International Criminal Tribunal*, 1998.

³⁸³ Cristina Chiamenti, “Corporations before the International Criminal Court”, Global Law Working Paper 01/05, *Symposium: Transnational Corporations and Human Rights*, NYU Law, 2005.

of states, when the crimes were committed in the name of the legal entity or its agencies and representatives”.³⁸⁴

Certain delegations expressed reservations about these proposals, arguing that it would be more useful to limit the jurisdiction of the Court to individuals, especially as the companies are controlled by natural persons.

At the Diplomatic Conference of Plenipotentiaries of the United Nations on the Establishment of an International Criminal Court held in Rome from June 15 to July 17, 1998³⁸⁵, **France proposed to include the notion of criminal organisations and companies as legal entities in the Statute.**³⁸⁶

The participating states were largely opposed thereto, citing the primary objective of the proposed ICC, which is to try natural persons responsible for international crimes, and practical reasons such as: the definition of legal entities varies from state to state, the principles of complementarity and subsidiarity would meet with opposition from certain national legal systems that have limited legislation on the criminal liability of legal persons and the fact that the Court would face significant difficulties in gathering evidence.

Some delegations seeking to find a middle ground, proposed that the court should have jurisdiction over the civil or administrative liability of legal persons. This proposal was hardly discussed.

Despite the position and hope of certain civil society representatives, the inadmissibility of actions brought against corporations was not put on the agenda during the Review Conference of the Rome Statute held in Kampala in May / June 2010.

In addition, several Protocol proposals, never achieved, were filed in order to create an international tribunal with jurisdiction over legal persons in particular over corporations.³⁸⁷ Many civil society groups continue to lobby for the creation of such a tribunal.

³⁸⁴ See Report of the Preparatory Committee on the establishment of an International Criminal Court, Proposal 2, Part 3bis, Article B, § a. “Personal jurisdiction”, <http://daccess-dds-ny.un.org>

³⁸⁵ *Final act of the united nations diplomatic conference of plenipotentiaries on the establishment of an international criminal court*, A/CONF.183/10, July 17, 1998.

³⁸⁶ “[...] The court should have jurisdiction to prosecute legal persons [...]” and then follow several conditions: when the crime has been committed by a person exercising control within the legal person when the crime has been committed in the name of the corporation, with his explicit consent, and as part of its activities when the individual has been convicted of the crime.” The French proposal only concerned companies, and excludes states, legal persons under public law, public international organisations, or non-profit organisations.

³⁸⁷ See A. Clapham, “The Question of Jurisdiction Under International Criminal Law Over Legal Persons”, in *Liability of Multinational Corporations under International Law* edited by Menno T. Kamminga Saman Zia-Zarifi, Kluwer Law International, The Hague/London/Boston, p.173.

Therefore, in the case of crimes involving corporations, the victims must then prove the **existence of a relationship of complicity between the individual convicted by the ICC, and the corporation from which they are seeking compensation for damage suffered.**³⁸⁸

ADDITIONAL RESOURCES

- ICC
www.icc-cpi.int
 - Coalition for an International Criminal Court
www.iccnw.org
 - FIDH, *Victims' Rights before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, April 2007
www.fidh.org/Victims-Rights-Before-the-International-Criminal
 - FIDH, *FIDH paper on the International Criminal Court's first years*
www.fidh.org/FIDH-paper-on-the-International-Criminal-Court-s
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➤ Prey Lang, primary forest in central Cambodia, 2013

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³⁸⁸ E. David, “La participation des victimes au procès devant la Cour pénale internationale”, *Guest Lecture Series of the Office of the Prosecutor*, aout 2005, p.7.

CHAPTER II

The Extraterritorial Criminal Liability of European-based Multinational Corporations for Human Rights Violations

* * *

For practical and legal considerations similar to those evoked in the section relating to corporate civil liability (section II, part I), we limit ourselves to providing an overview of existing legislation in some of the EU Member States, the US and Canada in relation to extraterritorial criminal liability.³⁸⁹

This chapter will not describe the laws of the 28 EU Member States but will highlight the major differences between them to identify those States which currently offer the “most successful” corporate criminal liability regimes and thus should be favoured by victims with a choice of forum.

The main scenario considered in this part is that of a multinational company whose parent company is headquartered in an EU Member State. Through its investments, the company has committed human rights violations abroad.

Corporate Criminal Liability in EU Member States

In criminal cases, there is no equivalent to EC Regulation 44/2001 governing civil matters (see Section II, Part I on extraterritorial corporate civil liability). Notwithstanding some exceptions, each EU Member State organises its own legal approach to this issue and maintains extraterritorial criminal laws which allow the State to hold a parent company liable for acts committed by its overseas subsidiaries. The principle of corporate criminal liability has continued to gain head wave in the EU, although the Member States disagree on the precise rules to apply.

³⁸⁹ There have been numerous interesting studies made on the subject. See the recent publications of the International Commission of Jurists on corporate liability in South Africa, Poland and Colombia (referenced at the end of section II, part I). See also Dr. Jennifer A. Zerk, “Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas: A report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG’s Special Representative on Business and Human Rights”, Working Paper No.59, June 2010. See also Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse - A Comparative Submission Prepared for Prof. John Ruggie, UN SG Special Representative on Business and Human Rights*, 3 November 2008, www.law.ox.ac.uk/opbp.

➔ Complaints filed in Belgium and France against Total

Suits filed four months apart in Belgium and France against the French company Total form a “leading case” in this area. On April 25, 2002, four Burmese refugees filed a civil suit in Brussels naming the France-based parent company of Total (formerly Total Fina Elf) and its Burmese subsidiary METR (Total Myanmar Exploration and Production). In application of the *universal jurisdiction principle* (see below), Total was accused of complicity in crimes against humanity committed in the course of the multinational’s operations on the Yadana gas pipeline in Burma. On 26 August 2002, two Burmese refugees who had been victims of kidnapping and forced labour filed a similar suit in Paris in application of the *active personality jurisdiction principle* (the alleged perpetrator was a French national). For technical reasons, only company executives, not the firm itself, were targeted in this case. The Belgian and French courts carried out their legal examinations in parallel and without consultation until each suit was stayed.

Recent regional and international conventions on financial, economic and transnational crime invite, but do not require, signatories to introduce the criminal liability of legal persons into domestic law.³⁹⁰ Article 10, paragraph 4 of the United Nations Convention against Transnational Organized Crime calls for legal persons to be subject to effective, proportionate and dissuasive **civil, administrative or criminal sanctions**. Council of Europe recommendations³⁹¹ and several common positions and framework decisions adopted within the EU are couched in similar terms.

Most EU Member States, including both common law and civil law countries, have already adopted this principle. This guide does not attempt an exhaustive comparison of the corporate criminal regimes in place within the various EU Member States, but identifies discernable trends among them.

The principle of corporate criminal liability is notably recognised in **Austria, Belgium, Denmark, Estonia, Finland, France, Ireland, Norway, the Netherlands, Poland, Portugal, Romania, the United Kingdom, Luxembourg and Spain**.³⁹²

³⁹⁰ See in particular Article 10 of the United Nations Convention against Transnational Organized Crime, adopted by the General Assembly on 15 November 2000, and opened for signature by the Conference in Palermo on 12-15 December 2000, the UN Convention of 1988 “Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, Article 2 of the OECD Convention against Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Cooperation and Development on 21 November 1997. The Treaty on the fight against criminal corruption signed in Strasbourg on 27 January 1999 follows that convention with an obligation for States to adopt laws establishing the liability of legal persons for corruption (art. 18).

³⁹¹ Recommendations No. R (81) 12 of 25 June 1981 on white collar crime and No. R (88) 18 of 20 October 1988 on the liability of legal persons for infractions committed in the course of their operations.

³⁹² For an overview of the pertinent national legislation see “Additional resources” at the end of the part.

Greece and Italy consider the principle to be unconstitutional.³⁹³ **Germany** has adopted hybrid measures.³⁹⁴

Before addressing the principle of corporate criminal liability regimes in EU Member States, there is a central question, in both civil and criminal matters, of how a parent company can be held liable for human rights violations committed by a subsidiary “for the benefit” of the multinational. The multinational *per se* does not have legal personhood. Its different entities, i.e. the parent company and its subsidiaries, are **separate legal persons** by virtue of the principle of limited liability. When a multinational group’s legal and illegal activities are closely intertwined, particularly with regard to economic and financial crime, it is difficult to identify the respective roles of different legal entities within the multinational.

1. Applying the principle of corporate criminal liability

National laws generally avoid the question of how to deal with offences committed by a corporation which is part of a group of companies.³⁹⁵ Although subsidiary companies own themselves, exercise operational autonomy and are able to finance themselves, they are by definition financially dominated by the parent company which owns most or nearly all of their capital.³⁹⁶ As a result, they are often *de facto* deprived of all decision-making power. The parent company, however, can legitimately deny responsibility for crimes committed by its subsidiary under the pretext that it cannot be held “vicariously criminally liable”.³⁹⁷

Faced with the frequent disconnect between law (the development of independent legal entities) and reality (the lack of independence- i.e. autonomous management power- among legal persons created by a parent company) it is important to **pierce the corporate veil** surrounding a subsidiary’s legal personhood and hold the parent

³⁹³ Italy accepts a “quasi-criminal” liability. Through legislation from 8 June 2001, it “has created a curious liability for administrative persons that commit a crime.” See C. Ducouloux-Favard, “Où se cachent les réticences à admettre la pleine responsabilité pénale des personnes morales?”, in *Liber Amicorum* / Ed. G. Hormans, Bruylant, Bruxelles, p. 433.

³⁹⁴ German law allows for measures of a punitive character to be applied to delinquent companies, according to German administrative-criminal law. (§ 30 OWiG).

³⁹⁵ For a comparative study on corporate criminal liability see R. Roth, “La responsabilité pénale des personnes morales”, *op. cit.*, p. 692. E. Montealegre Lynett is the only reporter to mention specifically that in Colombia parent companies are liable for the acts of their subsidiaries. See E. Montealegre Lynett, “Rapport colombien” in *La responsabilité. Aspects nouveaux*, *op. cit.*, p.737.

³⁹⁶ According to Article L. 233-1 of the French Commercial Code, a company is a subsidiary of another when the latter owns more than 50% of the former. Under Article 6 of Belgium’s Companies Code (the new code for companies created by the Law of 7 May 1999 which entered into force on 6 August 1999), A parent company is that which controls another company and a subsidiary is that which is controlled by another company. On the notion of control, see Art. 7 to 9 of the Code.

³⁹⁷ The principal of personality in prosecution and penalties notably derives from Article 6 of the European Convention of Fundamental Freedoms and Human Rights. Only individuals causing a breach may be prosecuted.

company (ies) liable for the actions of its/their subsidiaries, to the extent that the subordination of the latter to the former is significant.³⁹⁸

In situations where several legal entities, for example a parent company, its subsidiaries and their subcontractors, acted together, each making a gain from the offence, one should consider the overlapping criminal liability of the several legal persons under the concept of **complicity**.³⁹⁹ A parent company can be charged with complicity for acts committed abroad by a subsidiary in situations where “the parent company provides indispensable or accessory assistance to commit the offence and the assistance is provided to accomplish its goals or defend its interests or if the acts are carried out on the parent company’s behalf [...]”.⁴⁰⁰ In this case, the subsidiary is not necessarily relieved of all liability because, “as a rule, an illegal order from a superior is not a justification or excuse, unless the subsidiary can establish its non-liability by proving that it was under moral constraint.”⁴⁰¹ If on the other hand the interference of the multinational’s parent company in the management of its subsidiaries is minimal, the distinction between the various legal persons will limit the charges of co-liability against the parent company. In each case, the facts must be evaluated.

To establish a parent company’s criminal liability for crimes committed by its subsidiaries and subcontractors abroad, **an adequate causal link must be established between the mode of participation and the commission of the predicate offence.**

2. The national laws of EU Member States

National corporate criminal liability law are not harmonised. The statutes put forth do not in any way ensure that the same offence charged in two different EU Member States will be similarly enforced.⁴⁰² In its Green Paper on the approximation,

³⁹⁸ Here, the expression is understood in a broad sense, without reference to the various theories laid out in the section of civil liability. Under Danish law, G. Tøftegaard Nielsen says subsidiaries will be automatically found guilty if they break a criminal law. Parent companies are mainly “shareholders” and are liable for the actions of their subsidiaries in circumstances which are not specified. See G. Tøftegaard Nielsen, “Criminal liability of companies in Denmark – Eighty years of experience”, in *La responsabilité pénale des personnes morales en Europe* / Ed. S. Adam, N. Colette-Bassecqz and M. Nihoul, La Charte, Bruxelles, 2008, p. 126.

³⁹⁹ EU Member States generally provide a dual model for individual criminal liability (primary perpetrator and accomplice). Some States, however, adopt a tripartite model (primary perpetrator, accomplice and instigator). The notion of complicity is not identical in the various criminal codes.

⁴⁰⁰ D. Vandermeersch, *op. cit.*, p.248.

⁴⁰¹ D. Vandermeersch, *op. cit.*, No. 10, p.249. With regards to crimes under international humanitarian law, rule of law and the power of authority are not valid justifications. They may, however, impact the severity of the penalty.


⁴⁰² See for example the convention established on the basis of Article K.3 of the Treaty on the European Union concerning the protection of EU financial interests, OJ C 316 of 27 November 1995, p. 49 -57. Article 3, concerning the criminal liability of business leaders, stipulates that “each Member State shall take necessary measures to allow heads of businesses or other persons with decision making powers and control within an enterprise to be declared criminally liable under the principles defined by each state’s domestic law in the case of fraudulent acts [...] by a person under their authority on behalf of the company.”

mutual recognition and enforcement of criminal sanctions in the European Union, the European Commission notes: “There are considerable differences between the Member States as regards sanctions for legal persons.”⁴⁰³ In order to ensure **fair competition** between companies domiciled in the EU Member States, it would be better if they harmonised their rules governing corporate criminal liability in order to guarantee fair competition between EU-based companies.⁴⁰⁴

Where appropriate, national laws have opted for a system of either: (a) generality or specificity, (b) strict liability or vicarious liability, (c) a disposition toward holding either individuals or corporations liable or (d) a disposition towards holding both parties liable to either a full or limited extent. In terms of penalties, each State enjoys complete freedom in selecting specific penalties for legal persons found guilty. Procedural issues raise several delicate questions. Before addressing these issues, the first question is whether the company in question is a legal person which may be held criminally liable.

② Is the company in question a legal person?

Under the rules of private international law, in terms of their organisation and legal personhood, subsidiaries and parent companies alike are subject to the laws of the State of which they hold nationality.⁴⁰⁵ Generally speaking, this refers to the laws of the country in which they are incorporated.

 In **Belgium**, as in other States, the law establishing corporate criminal liability, creates a sort of “custom criminal legal personhood” for companies not yet covered under civil legislation (e.g. commercial companies in the process of incorporating).⁴⁰⁶ The Belgian criminal code applies to private entities which exist in reality and are carrying out specific operations.⁴⁰⁷ The law applies primarily to economic entities which function despite a lack of legal personhood in the strict sense.⁴⁰⁸

⁴⁰³ European Commission, “Green book on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union”, 30 April 2004, COM/2004/0334 final, point 3.1.6. See also the European Commission report of 25 October 2004, on the Member States’ implementation of the Convention concerning the protection of EU financial interests COM (2004) 709.


⁴⁰⁴ See B. Boulouc, under Cass. crim., 9 December 1997, D., 1998, p. 296 and ff.


⁴⁰⁵ Nationality in this sense is defined as the “legal state from which the company receives its legal personhood and under the influence of which it is organized and operates.” This reasoning is thus circular. P. Van Ommeslaghe and X. Dieux, “Examen de jurisprudence (1979-1990). Les sociétés commerciales”, *R.C.J.B.*, 1992, p. 673. For more on the concept of nationality, see the section on “active personality” below.


⁴⁰⁶ M. Nihoul, “Le champ d’application”, in *La responsabilité pénale des personnes morales en Belgique* / Ed. M. Nihoul, La Charte, Bruxelles, 2005, p. 25.


⁴⁰⁷ D. Vandermeersch, *op. cit.*, p. 246-247. This applies to all companies listed under Article 2 of the Companies Code, whether they are subject to commercial or civil law and regardless of European economic and business interests. See A. Misonne, “La responsabilité pénale des personnes morales en Belgique – UN régime complexe, une mise en œuvre peu aisée”, in *La responsabilité pénale des personnes morales en Europe* / Ed. S. Adam, N. Colette-Basiecz and M. Nihoul, La Charte, Bruxelles, 2008, p. 67.


⁴⁰⁸ Rapport de la Commission de la Justice, *Doc. parl.*, Sénat, sess. ord. 1998-99, No. 1-1217/6, p. 7.

 In **France** it is possible for criminal courts to recognise the legal personhood of a group for the sole purpose of imposing a criminal penalty.⁴⁰⁹

 The **United Kingdom** also does not require abstract entities to hold legal personhood in the strict sense for them to be considered criminally liable.⁴¹⁰

 **Portugal:** The principle was introduced in the Criminal Code of 1982 by the Law 59/2007 which modified and extended the scope of article 11 of the code.

 **Luxembourg:** The law of march 3rd, 2010, which introduced several articles on the penal code and the code of criminal procedure, attaches the responsibility of legal entities to the existence of a legal personality.⁴¹¹

 **Spain:** The reform to the Criminal Code, approved by the Senate on 9 June 2010, introduced corporate criminal liability for the first time through article 31bis of the Code. This article was recently modified by the Organic Law 1/2015 of March 30, 2015.

The Spanish Supreme Court in its ruling 154/2016, dated 29 February, assessed for the first time corporate criminal liability on the basis of article 31bis of the criminal code. The ruling specified the conditions that must be met for this article to be applicable : (1) the crime must have been committed by an individual that forms part of the company concerned, and (2) the enterprise must have failed to establish measures to monitor and supervise its personnel in order to prevent such crimes from being committed, thereby making possible or facilitating the commission of the crime.⁴¹²

⁴⁰⁹ “A specially authorised doctrine holds that Article 121-2 of the French Criminal Code postulates the existence of a corporation that has been endorsed by the Court of Cassation in its famous decision of 28 January 1954.” (D., 1954, p. 217). See N. Rontchevsky, “Rapport français”, *op. cit.*, p.746.

⁴¹⁰ Thus, English law recognizes the criminal liability of abstract entities, the granting of legal personality according to the criteria that distinguish between “corporate entities” (associations with legal autonomy)” and unincorporated entities”(groups without autonomy). However, it appears that if the latter are devoid of legal personality, they can nevertheless be prosecuted for certain offences. See M. Delmas-Marty, “Personnes morales étrangères et françaises (Questions de droit pénal international)”, *Rev. soc.*, p. 255 ff. The question might therefore arise as to whether to rely strictly on the existence of legal personality in forum court’s State, or whether to incorporate the fact that even with non-legal persons, some groups subject to criminal penalties in their country of origin could be held criminally liable in the prosecuting State. In such a case, reference would have to be made to the criminal law of the foreign State.


⁴¹¹ See : Law of 3 mars 2010 &. Introducing criminal responsibility for legal entities on the penal Code and the Code of Criminal Procedure, 2. Modifying the Penal Code and the Code of Criminal Procedure and other laws, Journal Officiel du Grand-Duché de Luxembourg, A -n°36, article 2(1), available at: www.legilux.public.lu

⁴¹² Global Compliance News, The Spanish Supreme Court Confirms Corporate Criminal Liability, 7 March 2016, <http://globalcompliancenews.com>

A company's dissolution through merger or acquisition, however, guards the acquired company from liability for acts carried out prior to the merger, while the acquiring company also escapes liability due to the prohibition on vicarious liability under criminal law.⁴¹³ The resulting impunity is the same if several companies form a new company by transferring their assets to the latter.⁴¹⁴

② The principles of generality and specificity

Some States (including Belgium, France and the Netherlands) have opted for the **generality principle** under which corporations and individuals are subject to all national criminal codes and additional laws and decrees.⁴¹⁵ Others prefer the **principle of specificity** (including Portugal, Estonia, Finland and Denmark⁴¹⁶) **which allow legal persons to be charged only for those offences expressly enumerated in the national criminal code** (and/or additional laws or decrees).

 In 2004, ten years after the principle of corporate criminal liability entered into force, **France** replaced its generality regime with one grounded in the principle of specificity, in an effort to adapt its legal system to developments in the criminal world and to enhance the effectiveness of its prosecution efforts.⁴¹⁷ The implementation of a regime based on the principle of specificity appears inadequate, however, as cases frequently include a range of diverse and related offences.

② The material element (actus reus) of corporate liability

To establish a corporation's material liability for an offence (in other words, to hold legal persons liable for committing an act which is defined and punishable under law), it must be established that the violation was committed **in the course of the company's operations and on its behalf**. This principle is present in both

413 J.C. Saint-Pau, "L'insécurité juridique de la détermination du responsable en droit pénal de l'entreprise", *Gazette du Palais*, 9-10 February 2005, p. 136.

414 See S. Braum, "Le principe de culpabilité et la responsabilité pénale des personnes morales – remarques relatives au projet de loi luxembourgeois", in *La responsabilité pénale des personnes morales en Europe* / Ed. S. Adam, N. Colette-Basieczqz et M. Nihoul, La Charte, Bruxelles, 2008, p. 236.


415 Belgium's Law of 4 May 1999 involved a legal fiction in that, to the greatest extent possible, it equated corporations with individuals (*Doc. Parl.*, Sénat, "Exposé des motifs", 1-1217/1, session 1998-1999, p.1). See A. Masset, "La loi du 4 mai 1999 instaurant la responsabilité pénale des personnes morales: une extension du filet pénal modernisé", *J.T.*, 1999, p.655. **France** has adopted the principle of generality since the Law of 9 March 2004 (loi Perben II), No. 2004-204, OJ 10 March 2004, entered into force on 31 December 2005) amending Article 121-2 of the French Criminal Code. See H. Matsopoulou, "La généralisation de la responsabilité pénale des personnes morales", *Rev. Sociétés*, 2004, p. 283 ff. In the Netherlands, continental Europe's pioneer in this field, corporate criminal liability was introduced in 1950, for economic crimes only, and was then extended to all crimes in 1976.

416 In 1996, Denmark had more than 200 specific laws. H. de Doelder and K. Tiedemann, *La criminalisation du comportement collectif*, Kluwer, 1996, p.19.

417 Law No. 2004-204 of 9 March 2004, entered into force on 31 December 2005.

international and regional instruments and in national legislation.⁴¹⁸ It aims to avoid holding companies strictly liable for crimes committed by individuals who abuse the company's legal or material framework in order to commit offences to their own personal benefit. Companies can be held liable in one way or another for acts committed to secure an advantage or to avoid an inconvenience.⁴¹⁹ The question must be asked whether this condition may be satisfied not only by defending one's **economic interests**, but also by pursuing a **moral interest**.⁴²⁰

A company's profit or savings deriving from an offence is a key criterion of liability. Similarly, offences committed in a company's financial or economic interest or in order to ensure its operations create liability even if no profit is earned. As the plaintiffs in Belgium argued, regardless of the financial benefits, Total and its subsidiary TMEP reaped by operating the Yadana gas pipeline in Myanmar, the companies benefited from their complicity in gross human rights violations perpetrated by partners the company contracted to provide security for the pipeline.


 In **Belgium**, material liability (the material link between the facts and the legal person) depends not on the nature of the person who commits an offence (parent company or subsidiary, legal person or individual), but exclusively on the characteristics of the act. Belgian law is closer to section 51 of the **Dutch** Penal Code, which states in clear terms that punishable offences can be committed by individuals or legal persons. In this sense, the company may be held liable for the actions not only of **managers**, but of subordinate employees (or the sum of the acts of several individuals) as well.

Some States, however, have provided an exhaustive list of persons who can render a company materially liable.

⁴¹⁸ In Belgium, for legal person or person(s) to be held liable for unlawful acts there must be proof that the commission of the offence is intrinsically linked to the achievement of the corporation's purposes either in defending its interests, or on its behalf. See A. De Nauw and F. Deruyck, "De strafrechtelijke verantwoordelijkheid van rechtspersonen", R.W., 1999-2000, p. 902 and 903; A. Misonne, "Le concours de responsabilité", in *La responsabilité pénale des personnes morales en Belgique* / Ed. M. Nihoul, La Chartre, Bruxelles, 2005, p.92 à 96. In France, Article 121-1 of the Criminal Code also contains the phrase "on behalf of ...", which includes any type of benefit to the firm. Companies are held materially liable for offences carried out in their interest (what the interest is taken into account as the interests of shareholders do not necessarily correspond with those of employees or creditors), but also those committed in the course of operations necessary to ensure the organisation or its operations. N. Rontchevsky, *op. cit.*, p.741.

⁴¹⁹ For Belgium see M. Gollier and F. Lagasse, "La responsabilité pénale des personnes morales: le point sur la question après l'entrée en vigueur de la loi du 4 mai 1999", *Chron. dr. soc.*, 1999, p.523.

⁴²⁰ A "moral interest" could be that of an employer who practices racial discrimination in recruiting staff, in accordance with his racist opinions, but not conforming to any economic reality.

 In **France**, for example, Article 121-2 of the Penal Code specifies that only offences committed by individuals categorised as **organs**⁴²¹ or **representatives**⁴²² of a company on behalf of a company can render a company materially liable.

Most States, however, have opted for a blend of these two models.

② The moral element (*mens rea*) of corporate liability

Strict liability and vicarious liability

The general legal principle that criminal liability is established only when the material and moral elements intersect applies naturally to legal persons. In criminal law, there can be no liability without intent. A corporation is therefore a social reality which can exercise true and autonomous will, distinct from the sum of the individual intentions of its directors, representatives and agents.

In practice, however, courts evaluate a company's intentions through the attitudes of individuals working within the company.

Contrary to French law (vicarious liability⁴²³) and English law,⁴²⁴ the law in Belgium and the Netherlands does not identify which individuals can render a company criminally liable through “omission or commission” and the question is left to the court's discretion. One may deduce that with each fault by an employee the company's *mens rea* (intention) and criminal liability increase. The explanatory memorandum to the Belgian law notes that in order to establish the intent of a legal person, the court must rely on the conduct of individuals in **leadership positions**.⁴²⁵ Belgium's Senate Justice Commission further noted, but does not require, that the most common and revealing (though not exclusive) criteria establishing intent are found in the decisions and attitudes of the directors.⁴²⁶

421 The board is charged by law with managing and administering the company. It acts in the company's name, both individually and collectively.

422 In France corporate criminal liability requires “the intervention of one or several individuals qualified to legally act on behalf of the company”. N. Rontchevsky, *op. cit.*, p. 749. The UK and Germany (section 30 of the *Ordnungswidrigkeiten*) also limit the number of individuals who can render a legal person liable. The same is true in Canada.

423 In France, it must be proved that the board or one of its members committed both the material and moral elements of the offence.

424 “English law, for example, only imputes an agent's criminal intent to the corporation if the agent is the “alter ego” of the corporation, and courts usually define “alter ego” to mean an agent high up in the corporate hierarchy.” V. S. Khanna, “Corporate criminal Liability: What purpose does it Serve?” 109, *Harv. L. Rev.*, 1477, 1996, p. 1491.

425 Exposé des motifs, *Doc. parl.*, Sénat, sess. ord., 1998-1999, 1-1217/1, p.6. There has been a return to vicarious liability for legal persons. Managers can order, direct or simply accept offences.

426 Rapport de la Commission de la Justice du Sénat, *Doc. Parl.*, Sénat, sess. ord., 1998-1999, 1-1217/1, p.26.

While the **act** and **intent** components of any offence are by nature closely related in cases involving the criminal liability of individuals, the two components may stem from different individuals in cases involving corporate criminal liability. It is quite common for a company's "knowledge" and "will" to be compartmentalised in different business entities. With regards to a particular translation, the sum of the "knowledge" and "will" components within a company result in what is called *collective knowledge doctrine*.⁴²⁷

Among the different options available, the preferable solution may be the possibility for the *actus reus* (the material act) to emanate from a director or agent, whereas the *mens rea* (intent to commit a crime) could be established in one or more individuals who share the role of "director".⁴²⁸ For the purposes of this chapter, "director" shall be defined as any person who has *de facto* power to make decisions which result in the company taking action, provided the individual has made the decisions in the course of his or her duties and within the limits of his or her powers.⁴²⁹ This refers to "*de facto* directors", those who were the "company incarnate" at the time of the offence.⁴³⁰ Decision-making is generally an organic process, and decisions are often taken with the support of colleagues and with a diffusion of will so divided that it is difficult to attribute a decision to particular individuals. Qualitatively speaking, an expressed desire belongs more to the company than to the group of individuals. In other words, the expressed desire of the company is fundamentally distinct from that of each of its members.

The principle of joint liability

Establishing a company's criminal liability does not mean that individuals (physical persons) who allegedly commit an offence on behalf of a company will receive impunity. The Council of Europe Recommendation No. R (88) 18 promotes the principle of **joint liability** of individuals and legal persons. The new section 12.1 of the Corpus Juris 2000 also provides that "If one of the offences described herein (Articles 1 to 8) is committed for the benefit of a business by someone acting under the authority of another person who is the head of the business, or who controls it or exercises the power to make decisions within it, that other person is also criminally liable if he **knowingly** allowed the offence to be committed [...]"⁴³¹ One of the most interesting lessons in comparing the laws of EU Member States is that **the number of rules** in common targeting intentional

427 See *Doc. parl.*, Sénat, 1-1217/1, sess. ord., 1998-1999, p.5. See also A. De Nauw, "Le vouloir propre de la personne morale et l'action civile résultant d'une infraction", *RCJB*, 1995, p.247.

428 See M. Lizée, "De la capacité organique et des responsabilités délictuelles et pénales des personnes morales", *Revue de droit McGill*, 1995, vol. 41, p. 165.

429 M. Lizée, *op. cit.*, p.147.


430 J. Messinne, "Propos provisoires sur un texte curieux: la loi du 4 mai 1999 instituant la responsabilité pénale des personnes morales", *Rev. dr. pén.*, 2000, p. 689.

431 M. Delmas-Marty and J.A.E. Vervaele, *The implementation of the Corpus juris in the Member States*, Intersentia, 2000.

offences **is significantly greater than those targeting unintentional offences.**⁴³² This guide is primarily concerned with unintentional offences given that the moral element is often difficult to ascertain or even absent in cases of corporate violations.


Yet, it remains a recommendation only and does not mean that the concept of joint liability is harmonised within the national legislation of the EU Member States.


 In the **United Kingdom**, individuals are criminally prosecuted. The company's joint liability is not mandatory.

 In **France**, under Article 121-2 Section 3 of the Criminal Code, the criminal liability of corporations does not preclude that of individual perpetrators or of accomplices to offences. In the case of unintentional violations, the separation of liability is not mandatory.⁴³³

 In the **Netherlands**, joint liability is expected, but not mandatory.⁴³⁴

🔗 Penalties

 In **Belgium**, as enumerated in Article 7bis of the Criminal Code, penalties may include a fine, special confiscation, dissolution of the corporation (only when the corporation was created to provide a vehicle to commit certain offences), a temporary or permanent ban on certain activities or a temporary or permanent closure of one or several of the corporation's offices, branches or other establishments.

 In **France**, fines are applicable in all cases in which offences are committed. Other penalties, noted in Article 131-39 of the French Criminal Code, such as the company's disbarment from public procurement, apply only in cases expressly provided for by law.⁴³⁵ The dissolution of a company may be imposed for the most serious offences, including crimes and offences against persons, crimes against humanity or if working or housing conditions do not meet basic standards of human dignity. A conviction for crimes against humanity will result in the confiscation of all assets.

The common feature among penalties is an **affront to the group's business operations, or even its assets**. One should not ignore the direct effect penalties may have on employment following a temporary closure or a financial penalty so significant it would require the company to restructure itself. This consideration creates a *de facto* **undesirable collective liability**.

⁴³² R. Roth, *op. cit.*, p.686.

⁴³³ On joint liability in French Criminal law, see J.-C. Saint-Pau, *op. cit.*, p. 138.

⁴³⁴ See Article 51 of "Nederlandse wetboek van strafrecht".

⁴³⁵ See H. Matsopoulou, *op. cit.*, p. 289. A similar penalty exists under Romanian law. See F. Streteanu, "La responsabilité pénale des personnes morales en droit roumain – Une réforme attendue", in *La responsabilité pénale des personnes morales en Europe* / Ed. S. Adam, N. Colette-Bascacq and M. Nihoul, La Charte, Bruxelles, 2008, p. 277.

States may not always find it practical to enforce penalties against foreign companies. How should one enforce a sentence issued by Belgian courts against the French company Total for complicity in crimes committed in Burma? Fines may be executed by drawing from the company's assets in Belgium. Specific penalties such as dissolution and closure could be enforced on Belgian soil by targeting operational headquarters or company activities in Belgium (but being careful not to enforce the penalty against a distinct legal person). Because the foreign company, by nature, cannot be extradited, the effect of the penalties is limited to the company's assets on Belgian soil.⁴³⁶ To do otherwise would undermine the sovereignty of the State in which the parent company is incorporated.

If, however, the enforcement of a penalty against a foreign company in one State appears to be unlikely or impossible due to a lack of assets on the soil of the forum court's State, it is still possible to report the facts to the State where the company is headquartered.⁴³⁷ That State could act under active personality jurisdiction (see below) given the nationality of the perpetrator.

In sum, the challenges for victims are daunting. In order to identify the most appropriate jurisdiction (that which is least open to challenge under international law) **victims must first determine whether a corporation or individual director at the parent company may be held criminally liable in a particular forum court. Victims must also establish the nationality of the alleged perpetrators** in order to argue the principle of active personality. At the same time, the forum court's legislation in concert with various extraterritorial principles will determine whether the accused legal person may be held criminally liable.


⁴³⁶ During the preparatory work for the Belgian law, a commissioner stressed the importance of the international context: **closing a subsidiary in Belgium is meaningless if the parent company can easily shift its activities abroad**. See Rapport de la Commission de la Justice, *Doc. Parl.*, Sénat, sess. ord., 1998-1999, n°1-1217/6, p. 14-15.

⁴³⁷ "At the request of another State, the termination of or transfer of proceedings to a foreign authority are procedures by which a State can undertake or resume a prosecution which would normally be conducted in the other state." See D. Vandermeersch, *op. cit.*, p. 263; C. Van den Wijngaert, *Strafrecht, Strafprocesrecht en Internationaal Strafrecht*, Anvers, Maklu, 2003, p. 1159.

Determining a court's extraterritorial jurisdiction

Territoriality remains the guiding principle of criminal jurisdiction.⁴³⁸ Jurisdiction is **primarily granted to the courts of the place where the offence occurred**, regardless of the severity of the offence and the nationality of the protagonists involved.⁴³⁹

The courts of places where unlawful acts occur (mostly developing countries) generally fail to prosecute “European” companies suspected of human rights violations. The principle of territoriality, however, may still be useful in the context of the problem at hand.

 Particularly in **France** and **Belgium**, territoriality is closely associated with the **ubiquity principle** which is relevant for offences committed in part in a third country. In accepting the ubiquity principle, France makes no distinction between the place where the offence is initiated and the place where the damage occurs.⁴⁴⁰ Belgian law and doctrine hold that the Belgian courts have jurisdiction to try offences which are only partially carried out in Belgium.⁴⁴¹ “It is sufficient for one of the material elements (not purely intentional) to be carried out on the Belgian territory. There is no requirement that the offence be committed entirely in Belgium, or in the case of an offence which could have led to harm, that the harm occur.”⁴⁴²

⁴³⁸ See for example, Article 3 of the Belgian Criminal Code. On this principle, see H.-D. Bosly et D. Vandermeersch, *Droit de la procédure pénale*, 2001, 2^e Ed., La Charte, p. 56-57, 62-70.

⁴³⁹ The Permanent Court of International Justice’s *Lotus* ruling of 7 September 1927 in a dispute between France and Turkey, however, marks a turning point in this matter by declaring that the principle of territoriality in criminal law is not an absolute principle in international law. (CPJI, *Lotus - France c. Turquie*, 7 September 1927, Series A, No. 10).

⁴⁴⁰ M. Delmas-Marty, “Personnes morales étrangères et françaises (Questions de droit pénal international)”, *op. cit.*, p.256. The French Supreme Court has also stated that French courts have jurisdiction over crimes committed abroad by a foreigner if they are inseparably linked to crimes committed in France by the same perpetrator. See Cass. Crim., Fr., R, 27 October 2004, n°04-85.187, *Revue mensuelle LexisNexis JurisClasseur*, March 2005, p. 13-14.

⁴⁴¹ D. Vandermeersch, *op. cit.*, p.250. Cass., 23 January. 1979, *Pas.*, 1979, I, p. 582; Cass., 4 February. 1986, *Pas.*, I, 1986, p. 664; F. Tulkens and M. van de Kerckhove, *Introduction au droit pénal*, 6^e éd., Bruxelles, Kluwer, 2002, p. 232; C. Hennau et J. Verhaegen, *Droit pénal général*, Bruylant, Bruxelles, 2003, p. 75.

⁴⁴² D. Vandermeersch, *op. cit.*, p.250. See also H.-D. Bosly and D. Vandermeersch, *Droit de la procédure pénale*, La Charte, Bruges, 2003, p. 67-73. Moreover, some Belgian laws independently criminalise preparatory acts to a crime if these behaviours are committed on Belgian soil. Belgian courts are thus competent even if the offence takes place abroad. See, for example, Articles 136 *sexies* and *septies* of the Belgian Criminal Code on the creation, possession or transportation of instruments, devices and objects intended to commit a crime under international humanitarian law. The Belgian Criminal Code also criminalizes orders and proposals to commit a crime under international humanitarian law or incitement to commit such a crime, even if these acts are not carried out.

In addition to that of territoriality, six “derogatory” principles of jurisdiction can be identified in the various national laws:⁴⁴³

- the principle of **active personality** (the State has jurisdiction to judge crimes committed by its nationals);
- the principle of **passive personality** (the State has jurisdiction to judge crimes committed against its nationals);
- the principle of **universality**, applicable only to the most serious crimes, (perpetrators may be tried by any State in which they eventually set foot,⁴⁴⁴ regardless of the location of the crime and the nationality of the perpetrator or the victim);⁴⁴⁵
- the **principle of the flag** (the State has jurisdiction to apply criminal law to aircraft and ships flying the national flag);
- the **protective principle** (the State has jurisdiction to judge crimes deemed to constitute a threat to fundamental national interests); and
- the principle of representation.⁴⁴⁶

The following discussion focuses solely on the principles of active and passive personality and the principle of universality, the most commonly invoked sources of extraterritorial jurisdiction in the EU Member States.

There is no doubt that companies and/or their directors can be tried on these various bases of jurisdiction for criminal acts committed abroad. A criminal court hearing a case will **apply the criminal law of its State**, while still taking into account that prosecuting the case requires the alleged acts to be criminalised in the State in which they were committed (the principle of double criminality, see below).

1. The principle of active personality (relating to the alleged perpetrator’s nationality)

Certain international instruments, including the Convention Against Torture of 1984 (Art. 5.1 (b)), and the Convention for the Suppression of the Financing of Terrorism of 1999 (article 7) **require States to include the principle of active personality in their national laws to prosecute human rights violations**. Through certain Framework Decisions, the EU has also spread the principle of active per-

⁴⁴³ L. Reydam, *Universal Jurisdiction: International and Municipal legal perspectives*, Oxford, Oxford University Press, 2003, p. 21-22.

⁴⁴⁴ The laws of various States provide several situations in which the perpetrator’s presence on the soil of the prosecuting State is not necessary to invoke universal jurisdiction. See below.

⁴⁴⁵ L. Reydam, *Universal Jurisdiction: International and Municipal legal perspectives*, *op. cit.*, p. 5.

⁴⁴⁶ On the principle of representation, L. Reydam states that “according to the European Committee on Crime Problems the term refers to cases in which a State may exercise extraterritorial jurisdiction where it is deemed to be acting for another State which is more directly involved, provided certain conditions are met. In general, the conditions are a request from another State to take over criminal proceedings, or either the refusal of an extradition request from another State that it will not request extradition”. L. Reydam, *Universal Jurisdiction: International and Municipal legal perspectives*, *op. cit.*, p. 22.

sonality among its Member States for specific crimes such as terrorism and human trafficking.

Even outside of these instruments, however, the principle of active personality is widespread in the EU Member States. Many States view jurisdiction based on active personality as a **corollary to the rule of non-extradition of nationals**. In this sense, the application of active personality should have a different scope with regard to individuals and legal persons. Because legal persons are by nature not extraditable, the principle of active personality should apply fully to them. This section first explores the various forms this principle has taken in the criminal laws of several EU Member States. It then examines the cross-cutting issues that need to be addressed if active personality is to serve within the EU as a strong basis for prosecuting businesses that violate human rights in third countries.

Active personality in the EU Member States



In **Belgium**, the use of active personality depends on whether the facts in question are considered “ordinary offences” or serious violations of international humanitarian law.⁴⁴⁷

– All Belgian individuals and legal persons are subject to Belgian law and the jurisdiction of Belgian courts for “ordinary” misdemeanours committed abroad, provided the suspect is **present** on Belgian soil and the **double criminality requirement is met**.⁴⁴⁸ In the likely situation of a foreign victim, the role of the Belgian State will be secondary. Apart from the requirement that the alleged perpetrator remain on Belgian soil and not be extradited, Belgian courts may act only following a **complaint from the victim or his or her heirs**, or following the **receipt of an official notice from the foreign government of the place the offence occurred**.⁴⁴⁹

Consider a multinational company whose parent company is headquartered in Belgium and whose majority-owned subsidiaries commit human rights violations outside of Belgium. Provided that the act is criminalised both in Belgium and the


⁴⁴⁷ Article 6 and 7 of the Act of 17 April 1978 containing the Preliminary Title of the Code of Criminal Procedure, which was recently modified by the law 19-10-2015

⁴⁴⁸ The active personality regime is laid out in Articles 6, 7 and 9 of the Law of 17 April 1878 containing the Preliminary Title of the Code of Criminal Procedure. The assumption under Article 7 alone holds relevance to the problem at hand in this guide. Double criminality is not required when the preparatory elements of the offence - committed for the most outside Belgian territory – occurred on Belgian soil. See Cass. belge, 18 November 1957, Pas., 1958, I, p. 285.

⁴⁴⁹ In the latter case, the prosecution can be moved only at the request of the Belgian Public Prosecutor, in accordance with Article 7 § 2 of the Law of 17 April 1878 containing the Preliminary Title of the Code of Criminal Procedure. Note also that if the Belgian who has committed a crime abroad had a foreign co-perpetrator or accomplice, Article 11 of the same law provides that the latter may be prosecuted in Belgium jointly with the Belgian defendant, even after the conviction of the Belgian, provided he or she is captured on Belgian soil.

place the offence occurred, the parent company may be prosecuted in Belgium in order to provide redress when prosecution is unlikely or physically impossible in the country where the unlawful act took place. Of course, the success of such a lawsuit ultimately depends on whether or not the corporate veil can be pierced.

– In cases of serious violations of international humanitarian law, the active personality principle applies when the accused holds **Belgian nationality** or maintains his or her **principal residence** in Belgium. These criteria apply at either the time the offence is committed or the time prosecution begins.⁴⁵⁰ In the case at hand **the defendant is not required to be in Belgium**⁴⁵¹ (it will become clear, however, that this “reduced condition” is interesting only when the defendant is an individual), nor is **double criminality** required. There is no clear definition of what is meant by a corporation’s “principal residence in Belgium”.

 In **France**, courts have jurisdiction if it is established that an individual or legal person held or holds French nationality at the time a crime is committed abroad, or at the time prosecution begins in France. These two bases for jurisdiction maintain the court’s ability to prosecute defendants who acquire another nationality in order to escape criminal proceedings. Although **double criminality** is examined in all cases of crimes committed abroad by French nationals, it is required only in cases in which the French national is an accomplice rather than the primary perpetrator of the act.⁴⁵² Where the French national is an accomplice, the public prosecutor alone may open a prosecution,⁴⁵³ and only **following a complaint from a victim or his or her heirs, or following an official complaint from a government authority in the country where the act occurred**. French prosecutions on the basis of active personality are subject to prosecutions conducted by the State where the offence occurred, and with the exception of amnesties granted by the foreign State,⁴⁵⁴ will not be carried out if the foreign State issues a final decision regarding the same offence. A defendant’s presence on French soil is not required for a prosecution to proceed, and trials *in absentia* (in the absence of the suspected perpetrator of the infraction) are possible.

⁴⁵⁰ Art. 6, No. 1*bis* of the Preliminary Title of the Code Criminal Procedure as modified by the Law of 5 August 2003 on serious violations of international humanitarian law. *M.B.*, 7 August 2003.

⁴⁵¹ B. Swart, “La place des critères traditionnels de compétence dans la poursuite des crimes internationaux”, in *Juridictions nationales et crimes internationaux* / Ed. A. Cassese and M. Delmas-Marty, PUF, Paris, 2002, p.567 ff.

⁴⁵² Art. 113-6 and 113-5 of the French Criminal Code. See Cass. Crim. (fr.), 10 February 1999, *Bull. crim.*, No. 15, D. 1999, jurisprudence p. 491, note. A. Fournie.

⁴⁵³ Article 113-8 of the French Criminal Code holds that “in the cases enumerated in Articles 113-6 and 113-7, prosecutions may be carried out only by request of the Prosecutor.

⁴⁵⁴ Article 113-9 of the French Criminal Code.

➔ Complaint in France against the parent company and a subsidiary of the French-headquartered Group Rougier, suspected of committing multiple offences in Cameroon

On 22 March 2002, seven villagers from the Djoum region of Cameroon filed a criminal complaint and civil suit with the Dean of the Examining Magistrates of Paris. The suits allege destruction of property, forgery, fraud, possession of stolen goods and bribery of officials by the leadership of Société forestière de Doumé (SFID), a Cameroon subsidiary of Group Rougier (a global leader in the timber industry), and the group's France-headquartered parent company Rougier SA. The suits allege that the defendants illegally plundered forest resources to the detriment of the local population. After illegally harvesting various types of wood without license and after destroying fields to lay access roads, SFID refused to pay the looted villagers the financial compensation they claimed. The villagers faced considerable resistance from the local government, which they considered to be biased after apparently receiving benefits either directly or indirectly from SFID. A complaint lodged with Cameroon's Attorney General resulted in a *nolle prosequi* and was dismissed.

Because local corruption (an alliance between the subsidiary and the authorities) had apparently deprived the Cameroonian villagers of an effective remedy from an independent and impartial court, they seized jurisdiction in France by filing a complaint on the principles of both **territoriality** and **active personality**. Rougier SA, the primary target of the complaint is incorporated in France and thus a French national. The victims argued that Rougier SA could be held strictly liable for possession of stolen goods on the grounds that the company had deposited dividends from SFID although the parent company knew or should have known that the money was the fruit of illegal activities, and that timber stolen from Cameroon had been imported into France.⁴⁵⁵ In light of previous accusations levelled against SFID,⁴⁵⁶ Rougier SA could not have been unaware of its subsidiary's illegal activities.

The victims also argued that Rougier SA should be tried for its involvement in other crimes attributable to SFID, not only those for which the parent company was the primary beneficiary, but also taking into account the interdependence between the two companies. Rougier SA holds a majority stake in SFID and the accounts of the subsidiary are fiscally integrated into those of the parent company. In addition, at the time of the events (beginning in 1999), one person held the position of CEO for both SFID and the parent company, and both companies were managed by the same administrators.⁴⁵⁷ The plaintiffs argued that this significant “financial and managerial overlap” between legally separate companies meant that Rougier SA clearly dictated SFID's actions. The plaintiffs argued as a result, that because Rougier had

⁴⁵⁵ The principle of “territoriality-ubiquity” applies here. Article 113-2 of the French Criminal Code provides that any offence may be deemed to have been committed on French territory provided that a material element took place on French soil. According to French Supreme Court jurisprudence, crimes which begin abroad but are carried out in France fall under French jurisdiction.

⁴⁵⁶ In 2001, SFID was convicted on three charges of illegally exporting a protected tree species (assamela), falsification of documentation under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (The Washington Convention) and exceeding timber quotas.

⁴⁵⁷ Most of SFID's representatives and managers held French nationality.

reduced its subsidiary to taking orders, Rougier should be prosecuted under personal liability (not vicarious liability) for the acts of SFID. The subsidiary was simply an instrument through which the offence was committed. The alleged act itself was ordered by Group Rougier, for its interests and with its resources.

On 13 February 2004, the Examining Chamber of the Paris Court of Appeals dismissed the suit citing two procedural hurdles. Firstly, prosecutions of crimes (the facts of the case were described as such) committed by French nationals abroad may be initiated only at the request of the public prosecutor (Article 113-8 of the French Criminal Code). The public prosecutor had refused the terms of requests filed on 27 September 2002. Although one could not reasonably deny the harmful economic impact the events in question had on the local population, the public prosecutor held that the alleged events were not sufficiently serious to justify referral to an examining judge. Secondly, the Court of Appeals cited Article 113-5 of the French Criminal Code under which alleged **accomplices (Rougier SA) cannot be prosecuted in France unless the foreign jurisdiction issues a final ruling condemning the principal author of the crime or offence committed abroad**. Yet, it is precisely because of their inability to obtain a fair trial in Cameroon that the plaintiffs chose to “seize” the French courts. The Court found insufficient evidence of corruption in Cameroon, however, and rejected the plaintiffs’ argument. An appeal was filed but it was dismissed. Sherpa brought action before the European Court of Human Rights, but that appeal was declared inadmissible.⁴⁵⁸

Prospects

In order to increase the probability of prosecutions based on the principle of active personality, this condition French courts impose on extraterritorial investigations (i.e. the fact that a foreign jurisdiction has to condemn the principal author of the crime or offence first for it to be deemed admissible in France) should be revised. Conditioning the prosecution of a parent company in France on the prosecution of the principal author/accomplice abroad is problematic for several reasons. Firstly, there is a risk that such an approach will not adequately consider issues present in the judicial system of the country where the subsidiary is incorporated. Insufficient resources and corruption generally make it difficult to prosecute subsidiaries. Secondly, parent companies and subsidiaries are at times both complicit in serious human rights violations and at times the primary perpetrators are official representatives of the State in which the subsidiary is incorporated. Immunity from criminal prosecution in the courts of the third country again precludes any possibility of prosecuting companies guilty of involvement in violations. The approach adopted by the International Criminal Tribunal for Rwanda, which held that a person may be convicted of complicity even if the perpetrator cannot be identified, is preferable.⁴⁵⁹

⁴⁵⁸ See Sherpa, “Rapport d’activités 2006, actualisé au 2 mai 2007”, p. 2.

⁴⁵⁹ See TPIR, *Le Procureur c. Jean-Paul Akayesu*, 2 October 1998, Case No. ICTR-96-4, §§ 530-531. The Belgian Court of Cassation held that “Anyone who participates in a crime or offence shall be punished as a perpetrator or accomplice provided that all the conditions of criminal participation are met, even when the primary perpetrator escapes prosecution.” (See Cass.b., 5 November 1945, *Pas.*, 1945, I, p. 364). Although the perpetrator remains unknown, the accomplice is still subject to prosecution and conviction. (See Cass.b., 31 May 1897, *Pas.*, 1927, I, p.108). See also A. Clapham and S. Jerbi, “Categories of Corporate Complicity in Human Rights Abuses”, *New York*, 21-22 mars 2001, p.2.

Finally, it would be interesting to examine the discretion exercised by the public prosecutor. Should he not be required to allow victims to appeal his decision, particularly when there is no other country in which the complaint can be effectively heard? In such cases, it is feared that the State is sometimes judge and jury. The prosecuting authority is also a host State to, and sometimes majority shareholder in, a powerful company that creates wealth. Given the heavy financial penalties to which a prosecution could lead, it could be painful to prosecute the parent company of a multinational corporation based on the prosecuting authority's territory.

➔ DLH's logging activity and the perpetuation of conflict in Liberia


This case pits Global Witness, Sherpa, Greenpeace France, Friends of the Earth and a Liberian activist against the multinational DLH (Dalhoff, Larsen & Horneman), a timber company with worldwide operations. The plaintiffs filed a complaint before the Public Prosecutor at the Court of Nantes, France in late 2009.


The plaintiffs accuse the French arm of DLH (DHL France) of having contributed to the civil war in Liberia between 2000 and 2003 by sourcing Liberian companies which in turn provided support to the regime of Charles Taylor which was subject to international sanctions. DLH France was accused of buying wood from illegal logging concessions and thus possession of stolen goods, which is punishable under Article 321-1 of the French Penal Code. According to a Global Witness, "the complaint is based on solid evidence of the involvement of DLH's suppliers in illicit activities such as bribery, tax evasion, environmental degradation, arms sales in violation of the UN embargo and human rights violations."⁴⁶⁰ The case was dismissed by the prosecutor, on February 15, 2013, and required "no further action". The other cases, one against DLH Nordisk A/S (as perpetrator) and one against DHL A/S (as accomplice) were filed in Denmark.


The general principle of active personality is embodied in the criminal codes of **Germany, Austria, Denmark, Spain, Finland, Greece, the Netherlands, Portugal and Sweden.**

Two characteristics are common in the criminal provisions of the abovementioned countries. Apart from specific exceptions, **all crimes and misdemeanours** (misdemeanours must be of a certain degree of severity) **may be prosecuted on the basis of active personality, provided they are also punishable in the country in which they were carried out** (double criminality).

⁴⁶⁰ Global Witness, "International timber company DLH accused of funding Liberian War", 18 November 2009, www.globalwitness.org

 In **Denmark**, active personality jurisdiction extends to foreign residents and citizens in Denmark as well as in Finland, Iceland, Norway and Sweden, provided they are present in Denmark at the time proceedings are initiated, not at the time of the commission of the crime. Finland and Sweden⁴⁶¹ have similar regimes.

 **Greece** does not condition the exercise of active personality on double criminality if the offence is committed in an ungoverned territory. Portugal provides for a similar suspension of the double criminality rule when offences are carried out in a place where no punitive power is exercised.

 Broadly speaking, the **UK** rejects the principle of active personality and agrees to extradite its nationals.⁴⁶² Departures from this rule may be found, however in cases under the *Offences against the Person Act of 1861*⁴⁶³ and the *International Criminal Court Act 2001*.⁴⁶⁴

2. Cross-cutting issues

Several points should be clarified with regard to the principle of active personality:

- the meaning of nationality and how it is acquired;
- extending the principle of active personality to residents;
- double criminality; and
- requirements that the suspect be present on the territory of the forum court.

When applied to corporations, these issues are particularly complex.

a) The meaning of nationality and how it is acquired

The use of “nationality” as a connecting factor may be problematic in corporate

⁴⁶¹ Section 6 Chapter 1 of the Finnish Criminal Code. See also Section 11 Chapter 1 of the Finnish Criminal Code which lays out the principles of double criminality and *lex mitior*. On Finnish extraterritorial jurisdiction, see M. Joutsen, R. Lahti and P. Pölönen, *Criminal Justice Systems in Europe and North America: FINLAND, Helsinki, Finland*, 2001, p. 8-9: www.legal.coe.int - On Sweden, see Section 2 Chapter 2 of the Swedish Criminal Code.

⁴⁶² B. Swart, “La place des critères traditionnels de compétence dans la poursuite des crimes internationaux”, *op. cit.*, p. 567 ff. L. Reydam, *Universal Jurisdiction: International and Municipal legal perspectives*, *op. cit.*, p.202.

⁴⁶³ The “Offences Against the Person Act 1861” establishes jurisdiction over murder and manslaughter (Section 9) and bigamy (section 57) committed by Britons regardless of location. The prosecution of a British national in this case, however, may occur only if he returns voluntarily to the UK following the commission of the offence and prosecution is impossible in the State where the offence was committed.

⁴⁶⁴ The “International Criminal Court Act 2001” incorporates the core of the Rome Statute into national law. Sections 51 and 68 outline the scope of *ratione loci* and *personae*. Under this law, extraterritorial jurisdiction is limited to the prosecution of residents in the United Kingdom at the time of the crime, or those who have become residents after the crime and who continue to be residents at the onset of legal proceedings.

criminal liability cases because the nationality of legal persons is conferred differently than that of individuals.

The concept of nationality in relation to companies does not have the legislative basis in national laws which exists in the case of individuals, and is thus much more open to a pragmatic assessment on the basis of the extent of a company's attachment to a state".⁴⁶⁵

Determining a company's nationality involves identifying the "legal State from which the company receives its legal personhood and under the influence of which it is organised and operates."⁴⁶⁶ According to the International Court of Justice ruling of 5 February 1970 in *Barcelona Traction, Light and Power Company*, "international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office."⁴⁶⁷ In reality, public international law appears to have expressed no preference for any criteria at all. As in adopting rules governing the nationality of individuals, **it is up to each State to decide under what conditions a company with its "nationality"** must respect the rules that apply to all its nationals, regardless of where they work.⁴⁶⁸

Under the general rules of private international law, corporations hold the nationality of either the **place of registration** or the State in which they are **headquartered**. There are a variety of opinions on the deciding factor. The **control test**, which is based on the nationality of the majority shareholders or on the nationality of the persons who actually run the company, could also be used to establish the company's nationality.⁴⁶⁹ The same goes for the **place of the company's core activity**.⁴⁷⁰

⁴⁶⁵ Watts & Jennings, *Oppenheim's International Law*, vol. 1, 9th ed., 1996, p. 861. See L. Reydam, *Universal Jurisdiction: International and Municipal legal perspectives*, *op. cit.*, p.23.

⁴⁶⁶ See P. Van Ommeslaghe and X. Dieux, "Examen de jurisprudence (1979-1990). Les sociétés commerciales", *R.C.J.B.*, 1992, p. 673.

⁴⁶⁷ ICJ, *Barcelona Traction Light and Power Company (Belgique v. Espagne)*, 5 February 1970, *Rec.* 1970, p. 43.

⁴⁶⁸ The criterion of effectiveness which the International Court of Justice raised in the *Nottebohm* case about individuals, was dismissed with regard to legal persons. The 5 February 1970 ruling of the International Court of Justice in the *Barcelona Traction* case is explicit in this regard: "With particular regard to the diplomatic protection of corporate entities, no absolute test of minimal ties has been generally accepted" (*Rec.*, 1970, p. 43).

⁴⁶⁹ Nguyen Quoc Dinh, *Droit international public*, Paris, L.G.D.J., 6^e éd. (P. Daillier et A. Pellet), 1999, p. 492. See for example the Federal Council Decision of 30 October 1996, in L. Calfisch, "La pratique suisse en matière de droit international public, 1996", *Rev. suisse de droit international et de droit européen*, vol. 7, 1997, p. 673, cited by A. Clapham in "The Question of Jurisdiction under International Criminal Law over Legal Persons", *op. cit.*, p. 188.

⁴⁷⁰ M. Henzelin, *Le principe de l'universalité en droit pénal international – Droit et obligation pour les États de poursuivre et juger selon le principe de l'universalité*, Bruylant, Bruxelles, 2000, p.26.

The application of the nationality criteria, even when clearly established by law, can be controversial.⁴⁷¹



Under **Belgian law**, (Art. 58 of the Companies Code), the company's **actual headquarters** determines the applicable law. All companies with their actual headquarters in Belgium "are regarded as Belgian even if they were validly incorporated in a foreign country and they have always operated under the laws of that country."⁴⁷² In contrast, a company incorporated in Belgium, but which has its actual headquarters in a foreign country is supposed to be a "citizen" of that State, even in cases where the law of the foreign State imposes a different rule (e.g. the headquarters rule).⁴⁷³ The actual headquarters can be defined as the place where the company's legal; finance and management departments are located.⁴⁷⁴



French law similarly argues that a corporation with its actual headquarters in France is French, even if it is controlled by foreigners.⁴⁷⁵

Because the rules governing the nationality of companies vary widely from country to country, applying the principle of active personality to corporations could **create numerous conflicts of jurisdiction**.⁴⁷⁶ Several States have also extended the principle of active personality to persons who acquire nationality after the commission of an offence. In 1990, the Council of Europe responded by stating that "when establishing jurisdiction over legal persons on the basis of the principle of active personality, the legislature should clearly identify the standards by which it considers those persons to be its citizens".⁴⁷⁷ The Council added that in the absence of such clarifications, "for the sake of predictability, the location of a legal person's headquarters appears to be the only acceptable criterion."⁴⁷⁸

b) Extending the principle of active personality to residents

The current trend is to extend active personality jurisdiction beyond the question of nationality to links resulting from the suspect's **habitual residence** or **principal residence** in the State attempting to exercise extraterritorial jurisdiction.⁴⁷⁹

471 See *infra* the *Trafigura* case in Côte d'Ivoire where the judge invoked the absence of national ties with France when the accused individuals (i.e. the chairman of the company) had French nationality.

472 D. Vandermeersch, *op. cit.*, p. 246.

473 R. Prioux, "Les sociétés belges et les sociétés étrangères", in *Dernières évolutions en droit des sociétés*, C.U.B., Bruxelles, Ed. du jeune Barreau de Bruxelles, 2003, p. 311 and 312.

474 G.-A. Dal and A.-P. André-Dumont, "Personnalité juridique des sociétés", in Centre d'Etudes Jean Renauld, *Le nouveau Code des sociétés*, Bruylant, Bruxelles, 1999, p.205.

475 A. Huet and R. Koering-Joulin, *Droit pénal international*, Paris, PUF, 2^e éd., 2001, p.208; M. Delmas-Marty, "Personnes morales étrangères et françaises (Questions de droit pénal international)", *op. cit.*, p. 258.

476 M. Henzelin, *Le principe de l'universalité en droit pénal international ...*, *op. cit.*, p. 26.

477 Council of Europe, "Compétence extraterritoriale en matière pénale", 1990, p. 29-30.

478 *Ibid.*

479 A. Cassese, *International Criminal Law*, Oxford, 2003, p. 282.



The **Scandinavian countries** generally apply the active personality residence principle.



The **Swiss** Criminal Code allows the residence principle to be applied in certain cases where the extradition of the perpetrator is not justified.⁴⁸⁰



The **United Kingdom** and **Belgium** apply the residence principle to alleged perpetrators provided they are suspected of violating international humanitarian law.⁴⁸¹



Finally, in a genocide case, the **German Federal Supreme Court** held that German courts have jurisdiction when the defendant has lived in Germany for several months, has established a base in Germany for his or her activities and has been arrested in Germany.⁴⁸²

This extension is logical when the State where the crime was committed experiences difficulty in obtaining extradition.

➔ Identifying the primary residence of a multinational: Total in Burma

In a 5 May 2004 decision in the “Total in Burma” case, the Belgian Court of Cassation ruled that “Total, the multinational, may not, as is argued, be deemed to have “its primary residence in Belgium due to the incorporation of its co-ordination centre in Brussels,” when it is established pursuant to Royal Decree No. 187 of 30 December 1982, that the co-ordination centre is registered as a limited liability company under Belgian law and that it carries its own legal personhood and therefore cannot be regarded as the head office or place of business of the separate company TotalFinaElf.”⁴⁸³ The court added that, under Articles 24 and 62bis of the Belgian Code of Criminal Procedure, it is the location of the **headquarters** or **place of business** which determines the rules of jurisdiction and admissibility for prosecuting crimes and misdemeanours committed outside of Belgium. The court ruled that the conditions required to implement the principle of active personality, as enumerated in the Belgian law of 5 August 2003 relating to serious violations of international humanitarian law, had not been met and thus that Total SA’s headquarters was not in Belgium, but in France.

⁴⁸⁰ M. Henzelin, *Le principe de l’universalité en droit pénal international* ..., *op. cit.*, p. 25.

⁴⁸¹ The “War Crimes Act 1991” introduced the ability to prosecute any British citizen or UK resident for certain crimes committed between 1935 and 1945 in Germany or in German-occupied territory (Judges Higgins, Kooijmans and Buergenthal mention this example in their separate opinions appended to the Judgement of 14 February 2002 by the International Court of Justice in the case concerning the arrest warrant of 11 April 2002). See “International Criminal Court Act 2001” above. For Belgium, see Article 6, 1bis of the Preliminary Title of Code of Criminal Procedure.

⁴⁸² Bundesgerichtshof, 13 February 1994, 1 BGs 100.94, *Neue Zeitschrift für Strafrecht* 1994, p. 232. Cited by President Guillaume in an individual opinion appended to the ICJ’s 14 February 2002 ruling in the case concerning the arrest warrant of 11 April 2000.

⁴⁸³ Cass. b., 5 May 2004, réf. P.04.0482.F/3 (TotalFinaElf).

The work done in preparation of the law of 5 August 2003 offers no clarity on the scope of a legal person's primary residence, and by analogy, to a multinational group. Although it is difficult to draw parallels with companies, the guidelines put forth to determine the primary residence of individuals are "fact-based".⁴⁸⁴

Because the notion of "principal residence" is a factual concept, the plaintiffs used actual evidence to argue that Total Group's principal residence was that of its co-ordination centre in Brussels. By virtue of their name, co-ordination centres co-ordinate and serve as a hub for the administrative and financial activities of multinationals. In terms of finance, Total Group's co-ordination centre in Brussels houses the group's centralised payments operations, banking administration, cash management operations and finance and investment operations for the group's companies. Focusing on the group's centralised co-ordination centre rather than the headquarters of several individual companies which make up the group and were involved in the alleged infractions provided the plaintiffs with what they held to be a unifying, legitimate and pertinent connecting factor. While debatable, the Court of Cassation's ruling stemmed from its confirmation **that under no circumstances may a multinational group be targeted as a whole**. Moreover, although both the parent company of Total Group and its subsidiary in Burma were specifically mentioned in the complaint, the parent company's residence could not be established in Belgium because, although it was the headquarters of the group, the Belgian company was a legally separate company.

With regard to the legal certainty of the legal persons involved, it would be more appropriate to employ **the concept of domicile**, rather than that of nationality, as an alternative connecting factor, as defined in Article 60 of EC Regulation No 44/2001 of 22 December 2000 on jurisdiction, recognition and enforcement of judgments in civil and commercial matters. Domicile is defined as the place of a legal person's **registered office, headquarters or principal place of business** (see Section II-Part I).

Once again, the scope of these terms is not entirely clear and it appears that they partially overlap. It is unclear how they differ and whether they are a preferable approach to that of the "actual headquarters" criteria which some States use to determine the nationality of legal persons. The various approaches employed in different EU Member States complicate legal proceedings and serve to maintain jurisdictional conflicts.

⁴⁸⁴ See the preparatory work for Article 3 of the Law of 19 July 1991 as seen in the motives for the law on serious violations of international humanitarian law. *Doc. parl.*, Ch. Repr., *Sess.extr.*, 51 0103/00, p.4-5, as well as the Goris Report, 28 July 2003, on the project of the law on serious violations of international humanitarian law, *Doc. parl.*, Ch. Repr., *Sess.extr.*, 51 0103/003, p.36-37.

c) Double criminality

In general, prosecutions for offences committed abroad are subject to the principle of double criminality, in application of the “legality of crimes and punishments” rule (a fundamental principle under which a court cannot sentence a person if the offence is not proscribed by law). The concept of double criminality requires to verify “whether the event which the proceedings examine is **punishable both under the law of the State where the offence was committed and under the law of the State in which jurisdiction is seized**.”⁴⁸⁵

In criminal proceedings against companies, the question remains whether double criminality concerns only the **illegality of the crime abroad** (double criminality *in abstracto*) or the **ability to hold a particular suspect liable** as well (double criminality *in concreto*)⁴⁸⁶. Some argue in favour of the second alternative in which corporations cannot be held liable abroad and that only individuals may be prosecuted for violations.⁴⁸⁷ **The difficulty for victims, again, lies in the fact that not all countries have agreed to hold legal persons criminally liable**, and that among those countries that do, some hold corporate criminal prosecutions to be the exception, rather than the rule.

When the offence is particularly serious, some Member States do not condition the use of active personality on the existence of double criminality.



This is the case in **France** when a French national is the primary perpetrator of a crime in a third country.⁴⁸⁸



Belgium also grants active personality jurisdiction in its courts, without requiring double criminality, in cases of serious violations of international humanitarian law. Because these offences are constitutive of *jus cogens*, it is often believed that

⁴⁸⁵ D. Vandermeersch, *op. cit.*, p.258. In Belgian and French doctrine, the qualifications of the crime do not have to be identical under the two sets of legislation.

⁴⁸⁶ According to this second principle, it is important to verify whether the suspect can be prosecuted and punished under the law of the State where offence was committed, taking particular account of the principles of liability (is corporate criminal liability permitted in the third State?) and reasons to nullify the act, penalty or prosecution. See D. Vandermeersch, “La dimension internationale de la loi”, *op. cit.*, p.259. See also the opinion of A. De Nauw delivered to Parliament on the proposed law modifying the Law of 5 August 1991 on the importation, exportation and transit of arms, munitions and materials and technology of military use, completing the Preliminary Title of the Criminal Code of Procedure. Doc. parl., Ch., sess. ord. 2000-01, No. 0431/009, p. 8; C. Van den Wijngaert, *Strafrecht, Strafprocesrecht en Internationaal Strafrecht*, Anvers, Maklu, 2003, p. 1103 and 1104.

⁴⁸⁷ Referral and the extent of a magistrate’s investigative powers are determined by the facts stated in the act of referral; he is seized *in rem*, not *in personam*. In other words, if corporate criminal liability does not exist in the law governing the act, it is sufficient for the magistrate to rely on the classical principle of the individual responsibility to justify the continuation of an investigation it has initiated. D. Vandermeersch, *op. cit.*, p.260.

⁴⁸⁸ Article 113-6 of the french Penal Code.

their prohibition applies by necessity to all persons – both natural and legal – regardless of the inclusion of specific offences under various national criminal laws.⁴⁸⁹



Greece and Portugal also do not require double criminality when the territory on which the offence was committed lacks a “State organisation” or the “power of law enforcement”.

➔ **Complaint in France against the leaders of Total for kidnapping crimes committed by a subsidiary in Burma**

For a time, US, French and Belgian courts simultaneously investigated human rights violations linked to the Yadana pipeline in Burma operated by joint venture partners Unocal (US), Total (France), MOGE (Burma) and PTT (Thailand). Total, which originally faced civil proceedings in California alongside Unocal,⁴⁹⁰ benefitted from a 1997 amicus curiae brief filed on behalf of France in Los Angeles federal court. The brief argued that “France respectfully objects to the exercise of personal jurisdiction by this court over Total, a corporate citizen of France, on the ground that it would conflict with the sovereignty and laws of France” and therefore the “maintenance of this action against Total in the United States courts will conflict with France’s foreign policy interests.”⁴⁹¹ On 26 August 2002, two Burmese refugees filed a complaint in Paris under the principle of active personality against two leaders of Total, for kidnapping crimes.

The factual and legal basis of the complaint⁴⁹²

From its inception in 1992, the pipeline project has been strongly criticised by several human rights organisations⁴⁹³ who argued that at every stage of its work, Total SA (like Unocal) would have to maintain a close partnership with the dictatorial regime of Myanmar. The militarisation of an area 63km long (starting in 1995) for the purpose of “securing” the pipeline required population displacement, forced labour to construct Burmese Army infrastructure (camps, roads, airstrips) and the requisition of civilians to clear the way for future roads and to demine certain zones by stepping on explosive devices. Testimonies from Burmese civilians and military personnel who fled the country tend to show that **Total had precise knowledge of these killings** and that the company oversaw some of the work for which soldiers were paid through the Burmese company MOGE.

⁴⁸⁹ Article 6 of the Act of 17 April 1978 containing the Preliminary Title of the Code of Criminal Procedure.

⁴⁹⁰ For more on this subject, see the section on corporate civil liability.

⁴⁹¹ The amicus curiae is reproduced in an addendum to the work of F. Christophe, *TotalFina: entre marée noire et blanchiment*, Villeurbanne, Editions Golias, 2000.

⁴⁹² For the circumstances of this case, see L. Hennebel, “L’affaire Total-Unocal en Birmanie jugée en Europe et aux Etats-Unis”, 2006, No. 26, 41 p., <http://cridho.cpd.r.ucl.ac.be>

⁴⁹³ See *inter alia* FIDH, “La Birmanie, TOTAL et les droits de l’Homme: dissection d’un chantier”, October 1996; “Total en Birmanie. Total pollue la démocratie - stoppons le TOTALitarisme en Birmanie”, transnational group of organisations, including FIDH, 4 July 2005, www.fidh.org. See also Earthrights International, “Total Denial”, 1996; Earthrights International, “Total denial continues”, May 2000; Earthrights International, “Total Denial: More of the Same”, September 2001, www.earthrights.org

It was in this context that the two plaintiffs, refugees in Thailand, say the Burmese army forced them to leave their villages in late 1995 to work on the construction of the Yadana pipeline. They were forced to “work under the constant threat of violence from the battalions that trained them if they did not perform the tasks assigned to them, and claim to have witnessed abuse and violence committed by these battalions against other workers on the same site.”⁴⁹⁴ One witness claims to have seen about 300 workers build a heliport for Total’s dedicated use.⁴⁹⁵ Citing in particular the testimony of deserted soldiers and Unocal executives, the plaintiffs reproached Total for having **recruited and paid the junta’s battalions** (workers nicknamed them “Total battalions”), monitoring facilities⁴⁹⁶ and having **knowingly benefitted from forced labour** on the worksite despite repeated protests from the International Labour Organisation and the United Nations Commission on Human Rights that the crime of forced labour in Burma was systemic and occurring on a massive scale.

In the **absence of a specific offence under French law**, the plaintiffs argued that the forced labour they had suffered for the benefit of Total was tantamount to the crime of kidnapping as defined by the French Penal Code: Forced requisition by the military to perform unpaid work between 1995 and 1998, with the requirement to work and reside on the project site without food or health care (which is an aggravating circumstance under the crime of kidnapping), for a given time and without any possibility of escape (threats of abuse).⁴⁹⁷

The principle of “the exception” which governed corporate criminal liability in France at the time the complaint was filed, however, precluded Total from being prosecuted. The law did not provide that corporations be held liable for kidnapping. Without excluding the individual liability that resulted from the court’s investigation, including that of multiple operational leaders and private contractors employed locally by the company, the plaintiffs identified several individuals as being responsible for the violations. These individuals included Thierry Desmarest, Chairman and CEO of Total SA and the person primarily responsible for the Yadana project as director of the Exploration and Production division from July 1989 to 1995. The plaintiffs also identified Herve Madéo, director of Total’s subsidiary, Myanmar Exploration and Production (METR) from 1992 to 1999, as being responsible.

The investigation began in October 2002 and in October 2003 the examining court heard Madéo as an “assisted witness” (an intermediate between that of a mere witness and an indicted person). On 11 January 2005, the Examining Chamber of the Versailles Court of Appeals⁴⁹⁸

⁴⁹⁴ Extract from CA Versailles, Ch. de l’instruction, 10^e Ch.-Section A, 11 January 2005, p. 8.

⁴⁹⁵ Memoire addressed to the President and Counsellors of the 10th Chamber, Section A of the Examining Chamber of the Versailles Court of Assizes, hearing of 14 December 2004 at 11:00, Case No. 2004/01/600, p. 11 ff.

⁴⁹⁶ The facilities monitoring was provided under an agreement between the Burmese authorities and the French company.

⁴⁹⁷ CA Versailles, Ch. de l’instruction, 10^e Ch.-Section A, 11 January 2005, p. 10.

⁴⁹⁸ The prosecutor held that according to the results of the investigation, the victims were not “detained and confined” – as the complaint cited – but were instead victims of “forced labour”, which is not criminalized under French law.

rejected a motion for dismissal by the Nanterre prosecutor.⁴⁹⁹ During oral argument, the French lawyers of the two Burmese plaintiffs referred to the US proceedings, noting that “Unocal, which is less engaged in this project than Total, chose to settle rather than risk a trial. This means that the evidence brought forth by the plaintiffs created a fear of conviction.”⁵⁰⁰

The court, however, dismissed the case on 10 March 2006, citing a lack of adequate criminality. The ruling states that “the elements which constitute the crime of kidnapping were not present in this case.” Under French law, forced labour, when successfully proven, could only be a “factual element likely to corroborate the crime of kidnapping [...], and not the crime itself”. In fact, **“despite France’s international commitments, forced labour does not constitute any criminal offence under domestic law.”** Furthermore, “because criminal law requires a narrow reading, a line of reasoning which assimilates forced labour into the crime of kidnapping is impossible in the absence of express statutory provisions.” The court added that “despite reports from international organisations, human rights organisations, and the parliamentary committee on oil companies, the legislature clearly did not intend to legislate on this issue.” The court stressed however that “the allegations of the eight plaintiffs who said they were victims of forced labour [...] are consistent with each other and were confirmed by several witnesses,” concluding that **“the facts reported cannot be doubted.”**⁵⁰¹

The transactional process

Before the case was stayed by the Court and as part of an agreement made public on 29 November 2005, Total, like Unocal, agreed to establish a solidarity fund of 5.2 million Euros to be used largely for local humanitarian efforts in Burma, namely housing, health and education.⁵⁰² Although the Group reiterated a categorical denial of the forced labour allegations, the fund provides up to 10,000 Euros⁵⁰³ in compensation to each plaintiff and all other persons who can justify having been in a similar situation in the area near the construction site of the Yadana pipeline. All efforts to move funds were to be carried out under the supervision of international humanitarian organisations unanimously selected by the parties.

Although the agreement implicitly sought to have the charges dropped, the court was in no way bound by the transactional process. The withdrawal of the complaint following the agreement, however, may have compromised its future. On 10 March 2006, the court said in its dismissal, “due to this withdrawal, hearing the plaintiffs, even as witnesses like other people named in the complaint, [...] will be impossible,” because they are still “in hiding on

⁴⁹⁹ See CA Versailles, Ch. de l’instruction, 10^e Ch.-Section A, 11 January 2005, p. 16.

⁵⁰⁰ P. Grangereau, “Travail forcé en Birmanie: Unocal préfère transiger”, *Libération*, 14 December 2004. Unocal concluded a settlement in March 2005 under which the Burmese plaintiffs dropped their civil suit in US court in exchange for a 30 million dollar payment to the group. For more information, see the civil liability section of this guide.

⁵⁰¹ The order was not published, but large excerpts were quoted in the press. See M. Bastian, “Non-lieu pour Total, même si le travail forcé a existé en Birmanie”, *dépêche AFP*, 22 June 2006; X., “Travail forcé en Birmanie: non-lieu de la justice française pour Total”, *L’Echo*, 21 June 2006.

⁵⁰² Total, “Myanmar: Total et l’association Sherpa concluent un accord prévoyant la création d’un fonds de solidarité pour des actions humanitaires”, Total press release, 29 November 2005, www.total.com/fr/

⁵⁰³ Six victims joined the two original plaintiffs.

Thai soil” where they are refugees. Such hearings would have been essential to “corroborate the crime,” given that the eight Burmese plaintiffs are the only ones able to provide “factual elements establishing the kidnapping”.⁵⁰⁴

Because international crimes are involved, the compliance of these settlement agreements with international human rights law could be put into question. FIDH is interested in this particular issue and has asked the UN Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, to examine the issue of settlement agreements from the perspective of victims’ right to reparation.⁵⁰⁵

2. The principle of passive personality (relating to the nationality of victims)

Among other international instruments, the Convention against Torture of 1984 (Article 5, 1, c) and the Convention for the Suppression of the Financing of Terrorism of 1999 (Article 7, 2, a) mention passive personality, but only as an optional form of jurisdiction and only with regards to nationals. This principle’s integration into the criminal laws of EU Member States has been parsimonious.⁵⁰⁶

Passive personality jurisdiction in criminal matters is a type of **protective jurisdiction**, traditionally based on the idea that an attack on a country’s national is equivalent to an attack on the country itself. In the initial hypothesis put forth in this guide, given that victims should hold the nationality of an EU Member State when they suffer an offence, passive personality is considerably less helpful than active personality. In most cases victims hold the nationality of a third country, that of the country where the multinational suspected of violations has chosen to invest. Therefore, after briefly presenting the various forms passive personality can take, this section primarily explores the relevance of extending the principle to habitual residents and refugees (as some States have allowed).⁵⁰⁷

Passive personality in the EU Member States



In **Belgium**, Title 1 of the Code of Criminal Procedure provides that Belgian courts have jurisdiction over **crimes** committed abroad against Belgian citizens, in particular when the maximum penalty under the law governing the place of the

⁵⁰⁴ See M. Bastian, “Non-lieu pour Total, même si le travail forcé a existé en Birmanie”, *op. cit.*


⁵⁰⁵ See FIDH, “Upholding Human Rights and Ensuring Coherence”, Position Paper, October 2010, www.fidh.org


⁵⁰⁶ CoE, “Compétence extraterritoriale en matière pénale”, 1990, p. 26-31.


⁵⁰⁷ No international convention, however, mentions a passive personality option for victims residing in a State without holding that State’s nationality.

crime exceeds five years imprisonment.⁵⁰⁸ The principle of passive personality requires **double criminality** and the **presence** of the accused on Belgian territory. The victim may also bring civil proceedings on this basis.

However, in the case of a violation of international humanitarian law, Belgian courts have jurisdiction when, **at the time of the crime**, a victim is either a Belgian national or a resident alien who has actually, regularly and legally been in Belgium for at least three years, or else a refugee who habitually resides in Belgium. This is the case even if the accused is in Belgium and even if the violations are not criminalised in the country where they were committed.⁵⁰⁹ In these situations, however, prosecution may be brought only by the federal prosecutor, and not through civil action.⁵¹⁰ Again, because corporations are largely “rooted” in a particular place, and thus easier to find even if they relocate, they cannot operate in true confidentiality and the conviction of a corporation *in absentia* is less delicate than that of an individual.

 In **France**, Article 113-6 of the French Criminal Code introduces the principle of passive personality with conditions similar to those used for active personality. Article 113-7 of the French Criminal Code also states that victims must hold French nationality **at the time of the offence** for passive personality jurisdiction to be applicable.

 **Germany, Austria, Estonia, Greece and Portugal**, *inter alia*, also provide for extraterritorial jurisdiction for all crimes (and misdemeanours) committed against their nationals.⁵¹¹

 **Finland and Sweden** extend the scope of passive personality jurisdiction to foreigners permanently residing in Finland and to foreigners domiciled in Sweden.⁵¹² In Sweden, however, jurisdiction applies only to acts committed in an area lacking a State judiciary.


⁵⁰⁸ The scope of passive personality is defined in Articles 10, 12 and 13 of the Act of 17 April 1878 containing the Preliminary Title of the Code of Criminal Procedure.


⁵⁰⁹ Article 10, 1bis of the Preliminary Title of the Code of Criminal Procedure.


⁵¹⁰ The federal prosecutor may order a judge not to investigate in four situations: 1) the complaint is manifestly without foundation; 2) the acts referred to in the complaint do qualify as serious breaches of international humanitarian law; 3) the complaint would not be admissible as a public action; 4) an international court or independent and impartial national court with jurisdiction is more competent to handle the complaint. In the first three cases, a decision to dismiss, however, is entrusted to the Chamber of Indictments of the Brussels Court of Appeal which rules at the behest of the federal prosecutor. In the fourth case, the federal prosecutor must notify the Minister of Justice who himself informs the International Criminal Court of crimes committed after 30 June 2002.


⁵¹¹ § 7 of the German Criminal Code; Article 7 of the Greek Criminal Code; Article 5(d) of the Portuguese Criminal Code.


⁵¹² Section 5 of the Finnish Penal Code. The act must be punishable by at least six months' imprisonment; Section 3, Chapter 2 of the Swedish Penal Code.

 **Italy** includes stateless persons residing in Italy in its definition of “Italian citizen”, while limiting the exercise of passive personality jurisdiction to cases in which the accused is located in the country (as in Belgium for ordinary crimes and in Portugal).

 In **Spain**, the principle of passive personality is limited to specific crimes explicitly enumerated by the law⁵¹³.

 In **Denmark**, the principle of passive personality exists only in exceptional cases, and then it is extended to residents.⁵¹⁴

 In the **Netherlands**, the principle of passive personality is recognised only when an international agreement binding the Netherlands contains an obligation to apply it. It has nevertheless been introduced for all serious violations of international humanitarian law.⁵¹⁵

 Finally in the **United Kingdom**, the principle of passive personality for violations of particular intensity, such as treason or assassination is recognised.

Cross-cutting issues

Although not always explicitly stated in criminal law, it appears **that a victim’s nationality, residence or domicile must be acquired or established before the offence is suffered to be able to lodge a complaint** in the State to which the victim appears to be linked. This guide makes great use of this hypothesis in the cases contained within. Therefore, it is important to first consider the concept of “victim”, then assess how the extension of passive personality to refugees and habitual residents is largely ineffective if these attributions must be established at the time of the unlawful event.

a) The concept of victim

 **In France**

In a ruling dated 31 January 2001, the Cour de Cassation (the highest Court in the French judiciary) held that the principle of passive personality required a “**direct victim**” of French nationality and that the French nationality of indirect victims (such as the family of the deceased direct victim) does not permit the establishment of extraterritorial jurisdiction. The case involved the assassination of the President of the Republic of Niger, a crime committed outside France. Although

⁵¹³ Article 23 (4) of the Organic Law 6/1985 of the Judicial Power, with the modifications Introduced by the Organic Law 1/2014.

⁵¹⁴ “[E]xcept when an offence of a certain severity is committed against a Danish or a person resident in the Danish State outside the territory of any State” (Strfl. §8(3)).

⁵¹⁵ Section 2 of the Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act). Territorial presence is required.

the president held Nigerian citizenship, his widow and children were French citizens residing France and therefore sought compensation before the French courts. Although the “**indirect victims**” compared their plight to that of a direct victim with French nationality, and they cited the discrimination to which they were subject, the Court of Cassation ruled that “the provisions of Articles 6 and 14 of the European Convention on Fundamental Freedoms and Human Rights cannot be interpreted as being likely to challenge a French criminal court’s rules and laws on international jurisdiction.”⁵¹⁶ This decision was upheld by a ruling of the Court of Cassation on 21 January 2009 in a case concerning the 1975 disappearance of the President of the Cambodian National Assembly, Ung Boun Ohr.

Thus, under no circumstances would victims of corporate violations who flee their country to legally reside and obtain citizenship in France be permitted to lodge a complaint on the basis of passive personality, as indirect victims of harm sustained by family members that remain in their country of origin (unless the latter also hold the nationality of the prosecuting State).

b) Extending the principle of passive personality to refugees



Belgium alone specifically grants passive personality jurisdiction for offences committed against refugees who habitually reside in the State.⁵¹⁷

However, the restrictive conditions attached to passive personality jurisdiction inherently prevent all recognised refugees in Belgium from using this basis to lodge complaints in Belgium against aggressors in the country they left. This is not only because individuals logically receive refugee status only after having suffered a violation, not at the time of the violation, but moreover because once individuals are granted refugee status, they are strongly discouraged from returning to their country of origin. In returning to their country of origin, they could lose their refugee status and be **dangerously re-exposed to a great risk of rights violations**.

In drawing parallels between refugees and citizens with regards to passive personality, Belgium intended to confirm the primacy of its existing international obligation under Article 16.2 of the Geneva Convention of 28 July 1951 relating to the status of refugees, which states that “A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts [...]”⁵¹⁸ This novel approach is, however, affected

⁵¹⁶ Cass. fr., 31 January 2001, *Bull. crim.*, 2001, No. 31, p.81.

⁵¹⁷ Article 10 of the Act of 17 April 1978 containing the Preliminary Title of the Code of Criminal Procedure.

⁵¹⁸ On the scope of this provision, see A. Grahl-Madsen, *Commentary on The Refugee Convention 1951*, Published by the Division of International Protection of the United Nations High Commissioner for Refugees, 1997, p.66-67; J.-Y. Carlier, *Droits de réfugiés*, Bruxelles, Ed. Story-Scientia, 1989, p.110; J.C. Hathaway, *The Law of Refugee Status*, Vancouver, Butterworths, 1992; F. Flauss, “Les droits de l’homme et la Convention de Genève du 28 juillet 1951 relative au statut des réfugiés” in *La Convention de Genève du 28 juillet 1951 relative au statut des réfugiés 50 ans après: bilan et perspectives*, Bruxelles, Bruylant, 2001, p.102; D. Alland and C. Teitgen-Colly, *Traité du droit de l’asile*, PUF, Paris, 2002, p. 554.

by several pragmatic considerations. Where the passive personality regime for nationals is strictly applied to refugees, the requirement to be a refugee at the time of the violation ensures that no refugee candidate will have a “strategic” reason to target Belgium as a host State providing a forum for effective legal redress for the human rights violations the exile sought to escape. Fearing an effect on Belgium’s appeal for asylum applications, the Belgian Parliament clearly stated a desire to prevent “asylum shopping”. One way to curb this potential risk while improving refugees’ access to justice would be to ensure that all EU Member States enact legislation granting passive personality to persons who are refugees at the time prosecution begins.

➔ The controversial dismissal of the complaint against Total by four Burmese in Belgium

The issue of extending passive personality to refugees was hotly debated in the context of the complaint four Burmese refugees lodged in Belgium against X, Total SA, T. Desmarest and H. Madéo. The Law of 16 June 1993 concerning the punishment of serious violations of international humanitarian law (the law of ‘universal jurisdiction’ which was amended several times), under which the complaint was validly lodged on 25 April 2002, was repealed by the entry into force of the Law of 5 August 2003 which aimed to put an end to the supposedly improper use of the universal jurisdiction law. While providing for the immediate implementation of the new law, the legislature found it useful to adopt an interim measure to preserve, within the limits of international law, the jurisdiction of Belgian courts in certain cases (forty complaints had been lodged under the old law) where the examining court had established a link with Belgium.⁵¹⁹ This referred in particular to the plaintiff’s Belgian nationality ties at the time of the prosecution’s commencement.

In accordance with established procedure, the Court of Cassation was prepared to dismiss the complaint against Total given that, *inter alia*, none of the plaintiffs held Belgian nationality. The plaintiffs, however, petitioned the Court of Cassation to hold a preliminary hearing in the Constitutional Court to determine the constitutionality of the transitional legal arrangement. The plaintiffs argued that by ratifying the Geneva Convention of 28 July 1951, Belgium committed itself, under Article 16.2 of the Convention, to grant equal access to the courts for nationals and refugees habitually residing on its territory. The plaintiffs held that dismissing the complaint from a recognised refugee with habitual residence in Belgium clearly, effectively and discriminatorily denied them a “right of access to justice” which was nonetheless maintained for citizens. They noted that refugees no longer claim protection from their home country (by taking refuge in Belgium, they sever all ties with the officials of their home country). Taking this argument into account, the Court of Cassation in its 5 May 2004 ruling agreed to pose the plaintiffs’ question to the Constitutional Court.⁵²⁰

⁵¹⁹ Explanatory Memorandum to the Draft Law on Serious Violations of International Humanitarian Law, Ch. Repr., sess. extr., 51^e sess., *Doc. Parl.*, No. 0103/001, p.10; Report on behalf of the Commission of Justice by Mr Stef Goris, Ch. Repr., sess. extr., 51^e sess., *Doc. Parl.*, No. 0103/003, p.10-11.

⁵²⁰ Cass. b., 5 May 2004, RG P.04.0482.F, www.cass.be

On 13 April 2005, the Constitutional Court agreed that the difference in treatment of which the defendants complained was discriminatory in nature.⁵²¹ In its opinion, the Constitutional Court held that the Belgian courts' dismissal of the complaint, when one of the plaintiffs was a recognised refugee in Belgium at the time the prosecution began is inconsistent with Article 16 of the Geneva Convention Relating to the Status of Refugees. The Constitutional Court added that according to recommendations from the United Nations High Commissioner on Human Rights released 2 August 2004, Belgium should "guarantee the rights victims acquire to a meaningful remedy, without any discrimination, to the extent that the mandatory rules relating to general international law on diplomatic immunity of the State do not apply."⁵²² Among its primary considerations, the Committee expressed concern about the effects immediately applying the Act of 5 August 2003 would have on complaints lodged under the Act of 16 June 1993, with regards to compliance with Articles 2, 5, 16 and 26 of the International Covenant on Civil and Political Rights.

In its 29 June 2005 ruling, the Court of Cassation decided nonetheless to dismiss the complaint against X, Total SA, Desmarest and Madéo from Belgian courts.⁵²³ The court ruled that **it could not compensate for the legislature's shortcomings** and as a result, could not transpose to refugees the transitional legal arrangement for complaints lodged by Belgians, even by analogy. The court added that the legality of prosecutions in this case would be questionable if not dismissed by the court. The court concluded that Articles 6 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms do not compensate for a lack of legal basis, given that "these provisions do not prohibit the legislature from using nationality as a criterion of personal jurisdiction with respect to offences committed outside of the territory." Consequently, the Court of Cassation terminated proceedings against Total, Desmarest and Madéo and the legislature adapted the controversial transitional legal arrangement to conform to Belgium's international obligations as confirmed by the Constitutional Court.⁵²⁴

Following a number of procedural hurdles, the Total case was finally put to rest in October 2008, without the merits of the allegations ever being addressed.⁵²⁵

⁵²¹ C.A., 13 April 2005, n° 68/2005, www.arbitrage.be The Court concludes in its ruling that "in that it would require Belgian courts to dismiss the case although the plaintiff was a recognized refugee in Belgium at the time legal proceedings commenced, Article 29, §3, paragraph 2 of the Law of 5 August 2003 relating to serious violations of international humanitarian law violates Articles 10, 11 and 191 of the Constitution." For an overview of this case, see N. Benaïssa, "La loi de compétence universelle. Commentaire des arrêts rendus les 23 mars et 13 avril 2005 par la Cour d'arbitrage", *J.T.*, 2005, p. 389-391.

⁵²² See CCPR, *Observations finales – Belgique*, 12 August 2004, CCPR/CO/81/BEL; CCPR, *Quatrième rapport périodique – Belgique*, 16 May 2003, CCPR/C/BEL/2003/4.

⁵²³ Cass. b., 29 June 2005, www.cass.be

⁵²⁴ Law of 22 May 2006 amending some provisions of the Law of 17 April 1878 containing the Preliminary Title of the Code of Criminal Procedure, and a provision of the Law of 5 August 2003 relating to serious violations of international humanitarian law, M.B., 7 July 2006. Voir aussi Ch. Repr., sess. ord., *Doc. Parl.*, 51 2305/003, p.7-8.

⁵²⁵ See N. Benaïssa, "La loi sur la compétence universelle, acte III", *J.T.*, n°6241 – 35/2006, 4 November 2006, p. 663; A. Kettels, "L'affaire TotalFina: quand le pragmatisme prend le pas sur la réalité intellectuelle", *J.L.M.B.*, 2006/34, p. 1508-1509.



The traditional criteria for jurisdiction, territoriality and personality, are not fully sufficient for punishing human rights violations by multinationals. States where crimes are committed are often inactive. The principle of active personality provides little or no relief when:

- 1) the State in which jurisdiction is seized does not recognise corporate criminal liability (or if the liability of legal persons is limited) and
- 2) the parent company is not a resident or national of an EU Member State. Beyond the legal hurdles, it is important to understand that a State in which parent companies are based may be reluctant to exercise extraterritorial jurisdiction due to “conflicts of interest” (particularly financial interests).

In its current state, **passive personality only rarely offers new opportunities for victims to prosecute**. It is thus useful to explore the universal jurisdiction laws Member States have adopted and to analyze the extent to which they address the shortcomings outlined above. The Total case is an excellent illustration of the phenomenon. Only the complaint filed in Belgium on the principle of universal jurisdiction allowed the company to be held criminally liable. The principle of the exception in place in France at the time the complaint was lodged, however, created difficulty in prosecuting Total there.

3. The principle of universal jurisdiction

Universal jurisdiction is generally based on the principle of *aut dedere, aut judicare*, under which **States are obliged either to extradite perpetrators arrested on their soil (or transfer them to an international court) or to prosecute and judge them themselves**. Universal jurisdiction allows all the national courts in the world to prosecute and sentence perpetrators of serious international crimes, regardless of the location in which crimes are committed and the nationality of perpetrators or victims of crimes. The source of this jurisdiction lies in the nature of the crime in question, which is important insofar that the international community as a whole is affected.

At first glance, the principle of universality creates an obvious possibility for victims of serious violations of human rights committed by multinational enterprises in a third country to lodge a complaint in any State invested with such jurisdiction. This principle requires neither a territorial link (in most cases the requirement of the suspect’s presence) nor a particular nationality among suspects and/or victims. It should be noted, however, that whereas the definitions of international crimes are characterised by the scope, systematic nature and destructive spirit of serious violations of fundamental rights such as the right to life and the bans on torture and degrading and inhumane treatment, violations attributed to multinational enterprises

are not committed in this context (violations of civil and political rights are carried out at the company level, not at the host country level), or are of a different nature (violations of economic and social rights).

Three international conventions explicitly provide for universal jurisdiction:

- The four Geneva Conventions of 1949, Art. 49, 50, 129 and 146;
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of 1984, Art. 5(2); and
- The International Convention for the Protection of All Persons against Enforced Disappearance of 2006, Art. 9(2).

Implementing the principle of universal jurisdiction is either a treaty obligation that a country has accepted, or a country's own initiative. Thus, a variety of universal jurisdiction rules exists among EU Member States.⁵²⁶ This next section provides a summary of these systems to more precisely identify the crimes for which universal jurisdiction is exercised. This will be followed by a review of technical and practical issues which have hindered or could hinder the use of universal jurisdiction to prosecute a company.

War crimes and torture in treaty obligations

War crimes and **torture** merit particular attention because they are serious human rights violations which **create treaty obligations for countries to utilise universal jurisdiction**.⁵²⁷



Universal jurisdiction deriving from treaty obligations exists in **Germany, Austria, Belgium, Denmark, Finland, France, Portugal and Sweden**.⁵²⁸





Greece and **Italy** respectively refer to the Geneva Conventions of 12 August 1949 on war crimes and the United Nations Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment.


⁵²⁶ For a comparative overview, see FIDH, *A Step by Step Approach to the Use of Universal Jurisdiction in Western European States*, June 2009, www.fidh.org


⁵²⁷ Regarding war crimes committed during international armed conflict, see the Common Article (respectively 49(I), 50(II), 129(III) and 146(IV)) to the four Geneva Conventions of 12 August 1949, and Rule 85§1 of the First Additional Protocol of 1977. In its 1986 Judgement against Nicaragua, the ICJ ruled that §220 Article 1 of the Geneva Conventions is customary law, which means that it must be also be respected by those States not party to the conventions. All states have the right to require other States to observe the conventions when the perpetrator of a serious crime is on their soil. Regarding torture, see Articles 5§ 2 and 7§1 of the Convention against Torture and Other Cruel, Inhuman or Degrading adopted by the UN General Assembly 10 December 1984 and entered into force 26 June 1987. See also J. Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture; A Handbook on the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, p. 132.

⁵²⁸ For an overview of the pertinent national legislation, see “Additional resources” at the end of this part.

 The **Netherlands** introduced a clause whereby States are obliged either to extradite perpetrators arrested on their soil (or transfer them to an international court) or to prosecute and judge them themselves (*aut dedere, aut judicare*) once obliged to do so by an international convention. The Netherlands exercises jurisdiction only if an extradition request from a third country has been received and rejected.


 The **United Kingdom** observes a similar approach to that of the **Netherlands**. Universal jurisdiction is authorised by special legislation only when expressly required by treaty to do so.⁵²⁹

 **Ireland** and **Luxembourg** both recognise the universal jurisdiction of their courts for war crimes and torture, *inter alia*.

 In **Spain**, Article 23(4) of the LOPJ which, before 2014 provided for universal jurisdiction was recently modified by the Organic Law 1/2014 which limited and conditioned the scope of universal jurisdiction to the following cases:

- crimes against humanity and genocide if committed against a spanish national, resident or anyone present in spanish territory a foreigner whose extradition has been denied.
- Torture if the crime is committed against a spanish national.
- Enforced dissapereance if the victim is a spanish national.

Consequently, it is clear that the former principle of universal jurisdiction has been now reduced to the principle of passive personality in cases of grave international crimes.

 In **France**, Article 689-2 of the Code of Criminal Procedure grants French courts universal jurisdiction to prosecute persons suspected of **torture** as defined by the 1984 Convention on the basis of universal jurisdiction. In contrast, French courts do not recognise the direct applicability of the Geneva Conventions and due to a failure to codify war crimes in domestic law France cannot prosecute such crimes under universal jurisdiction. In addition, because France has not yet transposed the Rome Statute into domestic law,⁵³⁰ universal jurisdiction cannot be exercised for crimes against humanity or genocide, with the exception of the specific situations of Rwanda and the former Yugoslavia (see below).

⁵²⁹ The United Kingdom continues to adhere strongly to the idea that all crimes are local, resulting in its prominent use of extradition. No prosecution on the basis of universal jurisdiction has been identified. During the drafting of the conventions against torture, genocide and apartheid, the United Kingdom opposed universal jurisdiction. L. Reydam, *op. cit.* L. Reydam, *op. cit.* See the Geneva Conventions Act (1957) (war crimes), *Geneva Conventions (Amendments) Act* (1995), the *Aviation Security Act* (1982), the *Taking of Hostage Act* (1982), and Section 134 (Torture) of the *Criminal Justice Act* (1988). The condition for initiating prosecution is that the suspect voluntarily returns to the United Kingdom. This is not specifically required, but it is the only interpretation consistent with British legal tradition.

⁵³⁰ SeeFIDH, “Mise au pas du Parlement: le gouvernement défend l’impunité des bourreaux”, 25 May 2010, www.fidh.org

Presence on a country's soil is required for a prosecution to move forward only when the appropriate international treaty demands it, which occurs in a majority of cases. Articles 5, 7 and 8 of the **Convention against Torture** hold that prosecution is mandatory only when the suspect is present on the soil of the forum court. The **Geneva Conventions** and official comments on them, however, are silent on this point, but most international and national jurisprudence **requires prosecution when the suspect is present**.⁵³¹ Although prosecutions are never required when a suspect is not present on the soil of a country, some courts hold that prosecutions *in absentia* are permissible.⁵³² Some, however, stress the importance of a specific extradition request to avoid conducting a trial in the absence of the accused.⁵³³ This situation is particularly interesting when it involves the prosecution of a company. State authorities have a greater incentive to prosecute when companies are fully absent from their soil and there is no risk to the national economic interest. Individuals – especially leaders – would be denied criminal refuge as hiding in a country unlikely to prosecute (because it has not ratified the relevant international conventions) would not pose an obstacle to criminal proceedings in another State. There is disagreement concerning the admissibility of prosecution *in absentia*,⁵³⁴ however, and the risk of multiple prosecutions could negatively affect the system as a whole.

➔ **Complaint in Belgium against the French parent company of the former Elf Group suspected of complicity in serious violations of international humanitarian law committed in Congo-Brazzaville**

On 11 October 2001, three plaintiffs from the Congo lodged a civil complaint in a Brussels examining court against Sassou Nguesso, President of Congo-Brazzaville, for war crimes, crimes against humanity, torture, arbitrary arrest and kidnapping in the Congo, but also against the French parent company of the multinational oil company Total (formerly Elf) for involvement in the abovementioned offences. The plaintiffs sought to establish Total's participation in these crimes by demonstrating the company's financial and logistical support to Sassou Nguesso's repressive military regime.

⁵³¹ See M. Sassoli, "L'arrêt Yerodia: quelques remarques sur une affaire au point de collision entre les deux couches du droit international", *R.G.D.I.P.*, 2004, p. 804-805. ICJ 14 February 2002, *Case concerning the arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgique)*. See Ch. the accusation of CA Bruxelles, 16 April 2002, ruling on the receivability of the complaint against A. Yerodia; Ch. the accusation of CA Bruxelles, 16 June 2002, on the receivability of complaints against A. Sharon and L. Gbagbo. For a series of national examples requiring the suspect's presence, primarily for war crimes, see R. Rabinovitch, "Universal Jurisdiction in absentia", *Fordham Intern. Law Journ.*, 2005, vol. No. 28, p. 507-510; C. Bassiouni, "International Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practices", 42 *Va. J. Int'l L.*, 2001, p. 136-137 and 139-149.

⁵³² See R. Rabinovitch, "Universal Jurisdiction in absentia", *op. cit.*, p. 499-530; A. Poels, "Universal Jurisdiction in absentia", *N.Q.H.R.*, 2005, p. 65-84; C. Reyngaert, "Universal criminal Jurisdiction over Torture: a State of Affairs after 20 years the UN Torture Convention", *N.Q.H.R.*, 2005, p. 590 ff.; *Principes de Bruxelles contre l'impunité et pour la justice internationale*, Principe 13 § 2

⁵³³ A. Poels, "Universal Jurisdiction in absentia", *op. cit.*, p. 84.

⁵³⁴ M. Sassoli, "L'arrêt Yerodia: quelques remarques sur une affaire au point de collision entre les deux couches du droit international", *op. cit.*, p.806.

The complaint was the first in Belgium to draw links between the Belgian Law of 4 May 1999 establishing the criminal liability of legal persons and the former Law of 16 June 1993 (amended on 10 February 1999) on the repression of serious violations of international humanitarian law.⁵³⁵ The complaint cited absolute universal jurisdiction with no requirement for minimal ties with Belgium, or even the presence of suspects on Belgian soil. This approach created exceptional opportunities for prosecution. Multinational corporations that were either directly or indirectly responsible for serious violations of international humanitarian law abroad could be brought before Belgian courts, regardless of the location of the parent company's headquarters or other entities which depend upon the parent company.

The French company was primarily criticised for having provided helicopters to armed militias. The plaintiffs cited the public testimony of French deputy Noël Mamere submitted at a 28 February 2001 hearing before the 17th Criminal Chamber of the Tribunal de Grande Instance of Paris (in *Denis Sassou Nguesso v. Verschave FX and Laurent Beccaria*). Mamere spoke of ethnic cleansing operations carried out in the southern districts of Brazzaville between December 1998 and late-January 1999. "These facts are proven, there were witnesses. Families were massacred; young Lari men were systematically accused of being part of the ninja militias (in opposition to Sassou Nguesso's Cobras). From January to August 1999, entire regions in the south were virtually erased. I have no figures to give you, because I do not know the exact magnitude of the support Elf (Aquitaine) provided to Sassou Nguesso. I think you will hear more evidence of frightening things, such as massacres carried out from the helicopters upon which it was easy to read the Elf logo[...] Clearly, Elf did not limit itself to supporting Sassou Nguesso, the company also assisted Lissouba. It helps those who can serve its interests. This company acts only according to its interests [...] Evidence [...] clearly demonstrates the role of what might be called the armed wing of France's African policy, the Elf Group."

Having met the criteria set forth in the transitional provisions of the new Law of 5 August 2003, the case appears to still be active.

In the meantime, the Assize Court of Brussels has ruled in a case involving logistical support economic actors provided in the commission of war crimes. Between 9 May 2005 and 29 June 2005, Belgium held its second trial for war crimes committed 11 years prior during the Rwandan genocide. Two notable traders from Kibungo and Kirwa were sentenced to 12 and 9 years imprisonment for having participated in the preparation, planning and carrying out of massacres largely committed by the Interahamwé genocide militias (Hutu extremists). After the killings broke out, claiming some 50,000 lives in the Kibungo region, the two traders made their trucks and supplies available to the militias for their murderous expeditions.

⁵³⁵ *M.B.*, 5 August 1993 (entered into force on 15 August 1993) and *M.B.*, 23 March 1999 (entered into force on 2 April 1999), p.9286. The Law of 5 August 2003 on serious violations of international humanitarian law (*M.B.*, 7 August 2003) amended and replaced the Law of 16 June 1993.

The repeal of the Law of 16 June 1993 and its replacement by the Law of 5 August 2003 had no effect on the proceedings. Given that the accused were on Belgian soil, the prosecution should be carried out in accordance with the 1949 Geneva Conventions on war crimes.

Other serious violations of international humanitarian and human rights law

Some EU Member States allow their courts to prosecute certain crimes, despite the **absence of international treaty obligations**. For the purposes of this guide, these offences are divided into two categories:

- **Serious violations of international humanitarian law** other than war crimes (for which there exists an obligation to prosecute under the Geneva Conventions, see above): **crimes against humanity** and **genocide**, and
- **Serious crimes** usually of an **international dimension**, such as the development and proliferation of weapons of mass destruction, money laundering, sexual abuse, human trafficking, bribery, etc.



In particular, **Austria, Belgium, Greece, Luxembourg and Portugal**⁵³⁶ have such provisions in their criminal legislation. Their legitimacy lies in the nature of the crimes prosecuted. In most cases, **the accused must be present on the soil of the prosecuting State**.

It should be noted that although crimes against humanity and genocide have no equivalent to the Geneva Conventions on war crimes,⁵³⁷ the use of universal jurisdiction to prosecute these offences is now widespread. Many States have created identical prosecutorial regimes for all serious violations of international humanitarian law. See *infra* on universal jurisdiction.





German law provides for universal jurisdiction in crimes against humanity and genocide (similar to the jurisdiction rules for war crimes). The same is true in the **Netherlands and Spain. Italy, Finland, Luxembourg, Portugal and Sweden** grant universal jurisdiction only for the crime of genocide, and **Greece** only for crimes against humanity.⁵³⁸

⁵³⁶ See “Additional Resources” at the end of this part.

⁵³⁷ Article VI of the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide **obliges only the State in whose territory the act was committed to prosecute**. Other states cannot refuse to extradite perpetrators of genocide on the grounds that they constitute political offences (Article VII), which ensures the universal prosecution of genocide through the collaboration of all States with the *loci delicti* State, to enable it to prosecute. ICJ, *Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, 11 July 1996, Rec., 1996, p. 615-616, § 31.

⁵³⁸ *Ibid.*

 In **France**, universal jurisdiction for serious violations of international humanitarian law is grounded in the laws governing the country's co-operation with the ICTY and ICTR⁵³⁹ as well as the law incorporating the Rome Statute with regard to the crimes of genocide, crimes against humanity and war crimes.

 Finally, in **Belgium**, unlike the Law of 16 June 1993 which it repealed, the Law of 5 August 2003 on serious violations of international humanitarian law no longer grants explicit universal jurisdiction for genocide and crimes against humanity. An expansion of the active and passive personality jurisdiction regime was introduced for the abovementioned crimes, but Belgium ignored its obligations to exercise universal jurisdiction under treaties the country has signed.

4. Three questions common to different types of extraterritorial jurisdiction

- 1) **The suspect's presence on the soil of the prosecuting State:** in most cases, in order to prosecute for acts carried out in a third State, the suspect must be present on the soil of the prosecuting State. The question remains how this condition should be interpreted with regard to a corporation.
- 2) **The modes of lodging the complaint:** These also deserve special attention because the prosecution is often unprepared to prosecute human rights violations committed abroad.
- 3) The issue of criminal "**forum non conveniens**".

② The concept of a suspect's presence: individuals and legal persons

For **individuals** – corporate executives or other members of the company – there are two elements unanimously constituting presence. In the first, passing through the territory of the prosecuting State is usually sufficient to meet the condition of presence. In the second, unless presence is required at the time of trial, the condition of presence is not met if it is the result of extradition. In this case, **voluntary presence** is required.

⁵³⁹ These laws grant jurisdiction over all crimes falling under *ratione materiae, loci et temporis*, under the jurisdiction of ad hoc courts, once suspects are found to be in France. In the Barbie case, the Supreme Court ruled that the concept of crime against humanity is of an international order in which concepts of borders and rules of extradition have no place. See Cass. (fr.), *Fédération Nationale des Déportés et Internés Résistants et Patriotes et autres c. Barbie*, Journ. Dr. Intern., 6 October 1983, p.779. The concepts of crime against humanity and genocide were not introduced until the French Criminal Code of 1994 (see Article 212-1 (crimes against humanity) and 211-1 (genocide)).

Criteria differ from one State to the next

However, there are **differences among States on the question of when this test should occur**. The same State sometimes uses different criteria depending on the offence in question. States offer several approaches: 1) the time the complaint is lodged, 2) the time the proceedings begin (see the French position, below),⁵⁴⁰ the time of the trial (see the Spanish position, below)⁵⁴¹ or a “less determined” moment.⁵⁴² In actuality, this condition is defined by national principles of procedure, and although additional principles are sometimes drawn from international human rights standards, they are not drawn from international law itself.⁵⁴³

OVERVIEW THE FRENCH POSITION

In France, Article 689-1 of the Code of Criminal Procedure requires that the suspect “be located” on French soil prior to the commencement of any proceedings. It results from a ruling issued by the Court of Cassation on 9 April 2008 in the case of disappearances from Brazzaville Beach and from a ruling issued by the Criminal Chamber of the Court of Cassation on 21 January 2009 which gives trial judges sovereign discretion to determine whether the suspect is on French soil at the time of the prosecution’s commencement.⁵⁴⁴ Once the accused is found to be on French soil and once proceedings have been initiated, they may continue even if the perpetrator leaves the country (see the case of the Mauritanian lieutenant *Ely Ould Dah* sentenced in absentia on 1 July 2005 to 10 years imprisonment by the Nîmes Court of Appeal for acts of torture committed in 1990). On the *Ely Ould Dah* case, in its final conclusions and recommendations addressed to France, the Committee against Torture recommended that “when the State establishes its jurisdiction over torture cases

⁵⁴⁰ See Redress & FIDH, “Legal remedies for victims of ‘international crimes’ – Fostering an EU approach to ‘Extraterritorial Jurisdiction’”, Final Report, April 2004, p.61.; Redress & FIDH, “EU Update on International Crimes”, 1 June 2006, p. 6. In the **Netherlands**, the accused’s presence is a prerequisite for prosecution (and throughout the trial stage) in most cases, particularly when applying the Law on International Crimes (Explanatory Memorandum, p.38). Trial *in absentia* is permitted in some other cases (Art. 278-280 of the Code of Criminal Procedure (*Wetboek van Strafvordering*)).

⁵⁴¹ In **Denmark**, **Greece** and the **United Kingdom**, suspects are generally required to be present only during trial given that trials *in absentia* do not occur (Section 847 of the Law on the Administration of Justice). However, until the trial stage, prosecution could theoretically occur for certain crimes under international treaty law, regardless of the accused’s location. See Redress & FIDH, “Recours juridiques pour les victimes de ‘crimes internationaux’”, *op. cit.*, p. 55, 64 and 75. In **Germany**, for serious violations of international humanitarian law, the Prosecutor decides if the prosecution can continue when the suspect is neither in Germany nor likely to be there. See Section 153f of the Code of Crimes against International Law.

⁵⁴² In Belgium, the condition of territorial presence is generally satisfied if the alleged offender has been seen or found after the crime of which he is suspected and even if he left Belgium before opening of the prosecution: the notion of presence is therefore conceived in the broad sense. Brussels (mis. acc.), 9 November 2000, *Rev. dr. pén. crim.*, 2001, p.761.

⁵⁴³ C. Reyngaert, “Universal criminal Jurisdiction over Torture”, *op. cit.*, p. 591.

⁵⁴⁴ Cass. Ch. crim., 9 April 2008, No. 07-86.412; Cass. Ch. crim., 21 January 2009, No. 07-88.330.

in which the accused is present on any soil under its jurisdiction, it should adopt the measures necessary to ensure that person's detention and presence, in accordance with its obligations under Article 6 of the Convention."⁵⁴⁵

OVERVIEW THE SPANISH POSITION

Spain's *Ley Orgánica del Poder Judicial* does not expressly require the presence of a suspect on Spanish soil to exercise universal jurisdiction. Thus, in the Pinochet case, the *Audiencia Nacional* found Spanish courts competent when Pinochet was in the United Kingdom. Except under exceptional circumstances, however (see arts. 791(4), 789(4) and 793 of the Spanish Code of Criminal Procedure), trials *in absentia* are not permitted. The *Tribunal Supremo's* 25 February 2003 ruling in the *Ríos Montt* case, however, **contextualises the lack of a presence requirement until trial**. In this case, the Spanish high court ruled that in accordance with the principles of State sovereignty and non-interference, Spanish courts cannot exercise jurisdiction over cases allegedly constituting genocide unless there is a connecting factor with Spain. Spanish courts "do not specify the time at which the perpetrator must be located on Spanish soil, but imply that this element would be crucial prior to establishing a Spanish court's jurisdiction. The launch of an investigation in the accused's absence could nonetheless still be possible."⁵⁴⁶

The time at which presence is required will likely depend on whether presence is a **condition for the establishment of criminal jurisdiction** in order to avoid jurisdictional conflicts. If so, the condition must be met at the time of the prosecution, or upon the lodging of a complaint. If presence is a **procedural requirement**, however, and necessary only to avoid a trial *in absentia*, preliminary investigations may be initiated in the suspect's absence.⁵⁴⁷ While investigations *in absentia* are relatively common and uncontroversial in international law, trials *in absentia* may provoke debate.⁵⁴⁸

To the best of the authors' knowledge, the scope of a **corporation's "presence"** has not yet been fully clarified by criminal jurisprudence. Touching upon this issue, Henzelin notes that in certain cases, a foreign company is considered under the Alien Tort Claims Act as being on US soil "from the moment it carries out some of its activities there." According to Henzelin, frequent trips by a representative of

⁵⁴⁵ CAT, *Observations finales – France*, 24 November 2005, CAT/C/FRA/CO/13/CPRCRP.51, § 14.

⁵⁴⁶ Redress & FIDH, "Legal Redress for Victims of International Crimes", *op. cit.*, p. 57.

⁵⁴⁷ Swart, "La place des critères traditionnels de compétence dans la poursuite des crimes internationaux", p. 567 ff. in A. Cassese and M. Delmas-Marty (dir.), *Juridictions nationales et crimes internationaux*, Paris, PUF, 2002.

⁵⁴⁸ R. Rabinovitch, "Universal Jurisdiction *in absentia*", *op. cit.*, p. 519. See also V. Bouchard, "Procédures par contumace et par défaut au regard de l'Article 6, paragraphe 1, de la Convention européenne des droits de l'homme", R.S.C., 2002, p. 517-535.

a foreign company to the United States are sufficient to create the minimum ties necessary to establish jurisdiction in US courts.⁵⁴⁹

In terms of criteria for criminal liability, several options exist for establishing the presence of a company in an EU Member State.

- 1) The company has its **headquarters** in the Member State (a situation similar to nationality, see above);
- 2) The company owns a **place of business** in the Member State (a situation similar to residence, see above); or
- 3) The company simply **conducts business** in the Member State.

Requiring that conditions corresponding to residence be met seems inappropriate given the way the concept of presence is applied with respect to individuals. To establish “presence”, individuals do not need to maintain continued residence on the soil of a country, but simply pass through the country occasionally. Thus, the question remains whether Total’s partial ownership of its subsidiary results in the parent company’s *ipso facto* “material presence” in Belgium, regardless of any complicity by the Belgian subsidiary in the offences committed in Burma.

Requiring presence on a State’s soil is logical from the perspective that there is possibility of apprehending alleged perpetrators in order to judge them. In this sense, it is reasonable to argue that a subsidiary, branch or representative office meets the condition of presence within a prosecuting State only if it has provided assistance to the foreign parent company to commit an offence in a third country.⁵⁵⁰

➔ The Total case in Belgian courts

In its 5 May 2004 ruling, the Belgian Supreme Court held, however, that the presence of Total’s co-ordination centre – the central administration providing all functions necessary to represent the industrial and commercial group – was insufficient to establish the multinational’s material presence on Belgian soil. The co-ordination centre’s participation in Total’s operations in Burma, however, cannot be so easily denied. Holding that the co-ordination centre is a separate legal person, however, the court is likely to simply dismiss the idea that the parent company itself is present on Belgian soil. The possibility of lifting the corporate veil, thus, was not considered.

⁵⁴⁹ M. Henzelin, *Le principe de l’universalité en droit pénal international...*, *op. cit.*, p. 185.


⁵⁵⁰ See D. Vandermeersch, *op. cit.*, p. 252-253. The author states that when the accused’s presence on Belgian soil is required, that should mean that prosecutions should be limited to companies with their actual headquarters in Belgium and to foreign companies whose operational headquarters in Belgium participated in the commission of the offence.

② Ways to lodge complaints: the participation of victims

In terms of initiating proceedings, the criminal justice systems of EU Member States differ from one another with regard to the principles of opportunity (i.e. the discretionary power of the Prosecutor to sue, most often in cases of serious crimes) and legality (i.e. the fact that the Prosecutor can systematically be obliged to sue any offence for which he/she is made aware of).

The principle of opportunity is applied in Belgium, France, Denmark, Ireland, United Kingdom, Luxembourg and the Netherlands. Germany, Austria, Spain, Finland, Sweden, Greece, Italy and Portugal apply the principle of legality.⁴³⁴

It is now a common phenomenon for victims to participate in criminal proceedings in order to obtain redress for personal injuries resulting from an offence. Whether victims and organisations are able to initiate criminal proceedings without intermediation has a direct effect on their access to justice. Restrictions on the ability of victims to directly cause an investigation to be opened, combined with the principle of opportunity (prosecutorial discretion) can seriously hamper victims' access to courts. In some States the rules for initiating prosecution on the basis of extraterritorial jurisdiction differ from those applicable to common or "territorial" crimes.⁵⁵²

 **Spain** is exemplary in this field. Criminal prosecution is guided by a "juez central de instruccion" that can be seized by the **prosecutor**, the **victim**⁵⁵³ and also by **any private citizen** or **association** bringing "class action" (a suit brought before criminal court by a private citizen, in the interest of either an individual or society as a whole). Spain is the only EU Member State to introduce class action in criminal matters. Prosecutorial discretion is also non-existent in Spanish prosecutions.⁵⁵⁴

⁵⁵¹ The respective prosecutors of these States obligated to prosecute when an offence is brought to their attention (through the lodging of a complaint), unless the courts do not have jurisdiction over the events or if the allegations are clearly unfounded. See the European Commission *Green Paper on the Approximation, mutual recognition and enforcement of criminal sanctions in the European Union*, COM/2004/0334 final, 30 April 2004, p. 29, pt. 3.1.1.1.

⁵⁵² Redress & FIDH, *Legal Redress for Victims of International Crimes*, *op. cit.*, 2004, p. 7.

⁵⁵³ It should also be noted that Spanish law criminal complaints by victims lead to ipso facto civil claims unless the plaintiff expressly requests otherwise (Article 112 of the Spanish Law on Criminal Procedure).

⁵⁵⁴ Redress & FIDH, *"Legal Redress for Victims of International Crimes"*, *op. cit.*, 2004, p. 57.

According to the legal tradition of the country concerned, victims generally have an opportunity to bring legal action as a civil party,⁵⁵⁵ or else the prosecutor alone can bring victims on as representatives of the executive branch.⁵⁵⁶



Germany has a hybrid system. Although victims are unable to bring legal action, they may eventually join the proceedings as auxiliaries to the prosecutor.⁵⁵⁷

The **ability to bring legal actions as a civil party**, which allows a direct appeal to a court, is somewhat controversial. Although it often seems necessary to combat the public prosecutor's inertia,⁵⁵⁸ it has also been warned that the lodging of symbolic, ideological or political complaints risks turning the judiciary away from its original purpose.⁵⁵⁹

The ability to bring **legal actions as a civil party** is undoubtedly useful because it bypasses the prosecutor's frequent exercise of discretion (the principle of mandatory prosecution is rare) over whether an extraterritorial crime will be prosecuted. A prosecutor's decision may be influenced by both political and financial considerations. Crimes committed abroad require substantial resources (trial judges, translators, a budget for letters rogatory, etc.). In addition, the prosecutor usually decides the budget and the resources which will be allocated to a potential trial. With regard to the will of the executive to prosecute multinational based in the country, it is possible that the executive would abstain, given that such prosecutions would undermine the country's economic interests.


⁵⁵⁵ In Belgium, France, Italy and Luxembourg. A. Poels, "Universal Jurisdiction *in absentia*", N.Q.H.R., 2005, p.79.

⁵⁵⁶ In Austria, Denmark, Finland (Section 12 (2) of the Finnish Criminal Code), Greece, Ireland, the Netherlands, the United Kingdom and Sweden. In Sweden and Denmark, the decision to prosecute an extraterritorial crime is made by an administrative (political) authority. See Section 5 of Chapter 2 of the Swedish Criminal Code, and Section 8 (4-6) of the Danish Criminal Code. In Ireland too, the Law on the Geneva Conventions states that the Minister of Foreign Affairs has the sole authority to determine whether the Act applies to a particular case.

⁵⁵⁷ On this prosecution, see Redress & FIDH, "Legal Remedies for Victims of International Crimes", *op. cit.*, p. 45; M.E.I. Brienens and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Universeit van Tilburg (Nijmegen, Pays-Bas, 2000: Wolf Legal Productions (WLP)), Chapter 9; J. Doak, "Victims' Rights in Criminal Trials: Prospect for participation", *Cardiff University Law School*, 2005, p. 308-310.


⁵⁵⁸ Most investigations are initiated following a concerted effort by victims. See Redress & FIDH, "Legal remedies for victims of 'international crimes', *op. cit.*

⁵⁵⁹ L. Reydamas, *op. cit.*, p.108; D. Vandermeersch, "La compétence universelle" in *Juridictions nationales et crimes internationaux* / Eds. A. Cassese and M. Delmas-Marty, PUF, Paris, 2002, p. 589 ff.; J. Wouters en L. De Smet, "De strafrechtelijke verantwoordelijkheid van rechtspersonen voor ernstige schendingen van het internationaal humanitair recht in het licht van de Belgische Genocidewet", in *Bedrijven en mensenrechten – verantwoordelijkheid en aansprakelijkheid*, Antwerpen, Maklu, 2003, p. 309-338.

 **Italy** applies the mandatory prosecution principle which, according to the Constitution, implies that the public prosecutor has the obligation to exercise criminal action. This principle, although tempered by the possibility for the Prosecutor to dismiss cases provided that there is an inconsistency between facts, a procedural obstacle or the absence of legal characterization, allows associations – acting on behalf of victims – to alert the Prosecutor on alleged corporate-related human rights violations. The recent Eternit trial is a good example.

 **Germany, Greece and the Netherlands** also expressly allow for prosecutions to be dropped for political reasons.⁵⁶⁰

These elements are significant. Given victims' fear of being exposed through court proceedings, recognising a right for civil associations to represent victims' interests, or "class actions" such as that applicable in France for certain crimes,⁵⁶¹ would undoubtedly be a useful measure for countries to adopt.⁵⁶²

 In 2003, **Belgium** limited the scope of civil actions available to plaintiffs for violations of international humanitarian law.⁵⁶³ Civil action is now possible only when the company and/or its leader are of Belgian nationality or reside on Belgian soil (active personality).⁵⁶⁴ In other situations, only the Federal Prosecutor may initiate investigations.

 Similarly, **France** adopted a legislation which incorporates crimes under the Statute of the International Criminal Court into French national law. Such legislation grants a monopoly to the prosecutor therefore denying victims the ability to bring civil action.⁵⁶⁵

The national standards which stipulate that only the prosecutor may decide to prosecute (according to the principle of prosecutorial discretion) also tend to grant recourse to victims whose appeals are denied.⁵⁶⁶ Through these provisions, States comply

⁵⁶⁰ Section 153, German Code of Criminal Procedure; Art. 67, 242 of the Dutch Code of Criminal Procedure.

⁵⁶¹ See art. 2-4 of the French Criminal Code. FIDH used this possibility in the Ely Ould Dah case and in a number of other cases brought in France on the basis of universal jurisdiction. See CA Montpellier, *FIDH et al. c. Ould Dah*, 25 May 2001.

⁵⁶² See the *Brussels Principles against Impunity and for International Justice*, Principle 16 § 3.

⁵⁶³ Suits have been filed against George W. Bush with respect to the second military intervention in Iraq.


⁵⁶⁴ It should be noted that barring serious violations of international humanitarian law, plaintiffs remain civil parties in Belgium. Thus, a violation of human rights committed abroad is grounds to bring civil suit on the basis of both active and passive personality.


⁵⁶⁵ See the legislation passed on 13 July 2010 incorporating crimes of the International Criminal Court statute as well as civil society's concerns: "La CFCPI consternée par le vote de l'Assemblée nationale", 13 July 2010: <http://www.fidh.org/Justice-internationale-La-CFCPI>


⁵⁶⁶ See L. Reydam, *op. cit.* In the Netherlands, for example, victims may appeal the Public Prosecutor's decision not to prosecute (Art. 12 and 13a of the Dutch Code of Criminal Procedure). Similarly, see Sections 277, 278 and 287-2b of the Portuguese Code of Criminal Procedure and Articles 408-410 of the Italian Code of Criminal Procedure and Articles 43(1), 47 and 48 of the Greek Code of Criminal Procedure.

with international guidelines which hold that the rights of victims, particularly those who are victims of serious human rights breaches, must receive special attention.⁵⁶⁷

② Hierarchy and subsidiarity in the principles of extraterritorial jurisdiction: towards a “forum non conveniens” in criminal matters?

 The first section of the **Belgian Code of Criminal Procedure** provides an explicit mechanism similar to *forum non conveniens*.⁵⁶⁸ The federal prosecutor may dismiss a case if the investigation shows that in the interests of properly administering justice and Belgium’s international obligations, the complaint should be brought before international courts or the courts of the jurisdiction where the acts were committed, the courts of the perpetrator’s nationality or the courts of the place where the perpetrator is located, provided that the courts maintain independence, impartiality and fairness, particularly as the latter may highlight Belgium’s relevant international commitments in the alternative jurisdiction.

 Deriving from Spanish jurisprudence, **German law** embodies a similar principle of subsidiarity with regard to serious violations of international humanitarian law.⁵⁶⁹

 In its rulings in *Rios Montt* and *Fujimori*, the **Spanish Supreme Court** held that territorial jurisdiction takes priority over all other forms of jurisdiction “when several real and effective active jurisdictions exist”.⁵⁷⁰ In the *Fujimori* decision, the Supreme Court held that in order to prosecute in Spain on the basis of universal jurisdiction, there must be “serious and reasonable evidence” showing that the offences “have thus far not been effectively prosecuted in the State with territorial jurisdiction”.⁵⁷¹ The article on the basis of which Spanish courts had in the past exercised universal jurisdiction has today been limited to a specific number of situations. For instance, Article 23.5(a), (b) prevents Spanish courts from exercising jurisdiction in situations where proceedings involving an investigation and the effective prosecution of a criminal offence have been initiated within the jurisdiction of another country or in an international court.⁵⁷²

⁵⁶⁷ See Rule 7 of Recommendation No. R (85) 11 of the Committee of Ministers to Member States the victim’s position under criminal law and criminal procedure adopted 28 June 1985, Article 12 of Resolution No. 2005/35 of the UN Commission on Human Rights E/CN.4/RES/2005/35, the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, UN GA, Res. 40/34. See also Rule 89 § 1 and 92.2 of the International Criminal Court’s Rules of Procedure and Evidence (ICC-ASP/1/3).

⁵⁶⁸ See Articles 10, 1*bis*, Paragraph 3, 4 and 12*bis*, Paragraph 3, of the Preliminary Title of the Code of Criminal Procedure.

⁵⁶⁹ § 153 (f) of the Code of Criminal Procedure (StOP); C. Reyngaert, “Universal criminal Jurisdiction over Torture...”, *op.cit.*, p. 603. To see this principle applied, see below.

⁵⁷⁰ See Audiencia Nacional (Spain), *Rigoberta Menchu Tum et al. v. Montt et al.*, 13 December 2000; Redress & FIDH, “Legal Remedies for Victims of International Crimes”, *op.cit.*, p. 58.

⁵⁷¹ Redress & FIDH, “Legal Remedies for Victims of International Crimes”, p. 58. In fact, Spanish courts recently confirmed these principles in a case brought by Palestinians against Israelis. Tribunal Supremo, *Miguel Colmenero Menendez de Lurca*, Auto 550/2010, 4 March 2010.

⁵⁷² Art. 23.5 (a) and (b) of the LOPJ, recently modified by the Ley Organica 7/2015.



Belgian, Spanish and German courts allow the use of the third criterion of “effective jurisdiction” to decline jurisdiction, even if the host State displays an unwillingness to genuinely prosecute the case.⁵⁷³ The existence of a better forum in such a situation is but a theoretical possibility.

➔ **Trafigura Beheer BV & Trafigura Limited in Côte d’Ivoire**

The offloading of 500 tons of toxic waste in Abidjan (Côte d’Ivoire) by the ship *Probo Koala* during the night of 19-20 August 2006, had disastrous human and environmental consequences (for more information on the context of the case and the precise details, see Section II, Part I on extraterritorial corporate civil liability). The following companies were involved: Trafigura Beheer BV (the parent company based in the Netherlands), Trafigura Ltd. (its English subsidiary that chartered the ship), Puma Energy (Trafigura Beheer BV’s Côte d’Ivoire subsidiary), Société Tommy (an Abidjan marine supply firm specialised in emptying tanks, maintenance and bunkering) and Waibs Shipping (engaged by Trafigura to co-ordinate the *Probo Koala*’s reception and waste disposal operations). They all face prosecution in Côte d’Ivoire, the Netherlands and France.

Court proceedings in Côte d’Ivoire

Following an investigation carried out by Côte d’Ivoire judicial authorities, several persons were charged, including Puma Energy’s representative, Waibs’ director, Tommy’s manager, and the co-founder of Trafigura, Claude Dauphin and his manager for Africa, Jean-Pierre Valentini, who were both arrested at Abidjan airport as they were leaving the country following a visit to establish the facts of the incident.

The two Trafigura representatives were held in custody from the time of their arrest on 18 September 2006 to 14 February 2007. On 19 March 2007, despite every indication of Trafigura’s liability, on whose account, and to whose benefit the toxic waste had been dumped, the Indictment Division of the Abidjan Court of appeal dropped the charges against Dauphin and Valentini, citing lack of evidence on the following grounds:

- concerning the charges of complicity in poisoning, “*the investigation failed to reveal any act committed personally by the defendants Dauphin, Claude and Valentini, Jean-Claude.*”
- concerning the violation of the law protecting public health and the environment from the effects of toxic and nuclear industrial waste and harmful substances, the Indictment Division of the Abidjan Court of appeal held that “*the investigation showed that Dauphin, Claude and Valentini, Jean-Claude, had committed no reprehensible act, and that they had found themselves at the centre of these proceedings because they had travelled to Côte d’Ivoire of their own free will in order to help limit the damageable consequences of the acts committed by Ughorugbo Salomon Amejuma (the director of Tommy) and others.*”⁵⁷⁴

⁵⁷³ C. Reyngaert, *op. cit.*, p.602. Redress & FIDH, *op. cit.*, 2004, p. 58.

⁵⁷⁴ Decision by the Indictment Division of the Abidjan Court of appeal, 19 March 2008, p. 25-26.

The charges against Puma Energy's director were also dropped. The Indictment Division of the Abidjan Court of Appeal eventually sent twelve persons before the Assize Court for their involvement in the dumping of toxic waste.⁵⁷⁵

The trial opened on 29 September 2008. On 22 October 2008, the Abidjan Assize Court recognised the toxic nature of the substances discharged and the danger they posed to human beings. The director of Société Tommy (which collected and unloaded the toxic waste) was sentenced to 20 years' imprisonment. The Waibs employee who had referred Société Tommy to Trafigura's Côte d'Ivoire subsidiary (Puma Energy) was sentenced to 5 years' imprisonment. The State of Côte d'Ivoire was found to bear no responsibility for the criminal act. The customs officials, former harbour master and former director of the *Affaires maritimes et portuaires* had all been indicted but were acquitted.⁵⁷⁶

Legal proceedings in France

On 29 June 2007, 20 Ivorian victims, with the support of attorneys from the FIDH Legal Action Group (LAG), lodged a complaint with the Paris Prosecutor's office against the management of Trafigura, Dauphin and Valentini, for dumping harmful substances, manslaughter, bribery and violation of the special provisions concerning cross-border movements of waste.⁵⁷⁷

On 16 April 2008, the Vice-prosecutor of the "Public health – economic and social delinquency" division **dismissed the case** on the grounds that the proceedings were "*entirely of foreign origin*", citing the following reasons:

- an absence of the accused persons' permanent ties with French territory, namely Dauphin and Valentini, who were chairman and board member of the Trafigura group, respectively;
- the subsidiaries and commercial entities belonging to the Trafigura group were established outside of French territory; and
- the existence of other legal proceedings at the same time.

It should be noted that by virtue of the principle under which jurisdiction is based on the defendant's identity, as laid out in Article 113-6 of the French Criminal Code, **the perpetrators' French nationality is sufficient to establish the jurisdiction of French courts.** Whether the persons involved are domiciled in or have permanent links with French territory is of no significance. The other legal proceedings do not address the same acts or person and are thus also of no significance. *See discussion supra on the meaning of nationality.*

On **16 June 2008**, attorneys cited Article 40-3 of the French Criminal Code to appeal the case's dismissal on the grounds that the jurisdiction of French courts is established by the

⁵⁷⁵ See the FIDH-LIDHO-MIDH, "Two years after the disaster, those responsible remain unpunished and the victims destitute", Press Release, 14 August 2008, www.fidh.org

⁵⁷⁶ See the joint FIDH press release, with its member organisations in Côte d'Ivoire and France, and Greenpeace and Sherpa, "The Abidjan Assize Court hands down its verdict, in the absence of the main authors", 28 October 2008, www.fidh.org

⁵⁷⁷ See press release by FIDH and its member organisations in Côte d'Ivoire and in France, "Appeal for the establishment of responsibility and for justice for the victims of the dumping of toxic waste in Côte d'Ivoire", 21 December 2007, www.fidh.org

simple fact that the perpetrators hold French nationality. The appeal noted that any argument based on the existence of other ongoing proceedings or on the difficulty of carrying out investigations from France is void. On July 27, 2008 Mr Gino Necchi, Avocat general, confirmed the filing of the appeal under the number 2008/05998, however, to date, there has been no response to the appeal.

Legal proceedings in the Netherlands

The criminal proceedings initiated in the Netherlands concern events that occurred in Amsterdam, prior to the dumping of toxic waste in Côte d'Ivoire⁵⁷⁸. They involve Trafigura, the captain of the *Probo Koala* and the City and Port of Amsterdam.

The trial was postponed several times. A hearing took place in May 2010 and will resume in September 2010. Trafigura is accused of violating European legislation on waste disposal, and is liable to a maximum fine of 450,000 Euros and/or six years' imprisonment. Trafigura is also accused of falsifying documents relating to the composition of the waste, and of failing to inform APS (a Dutch-Danish waste recycling firm) of the toxic nature of the waste to be treated.

APS is accused of having unloaded and reloaded part of the *Probo Koala's* toxic cargo when it put in at Amsterdam in July 2006. When the waste turned out to be more toxic than announced, the charterer refused to pay for its treatment. Claude Dauphin, Trafigura's CEO, has been charged with illegally exporting toxic waste.

On 19 December 2008, the Amsterdam Court of Appeal dismissed the criminal charges against Trafigura's CEO. However, on 6 July 2010, the Dutch Supreme Court decided that Claude Dauphin could still be prosecuted, asking the Court of Appeal to deliver a new judgment as regards the prosecution of Trafigura's CEO, considering that all the evidence had not been taken into account. On 30 January 2012, the Court of Appeal of Amsterdam decided that the Public Prosecutor may prosecute Trafigura's president Claude Dauphin for leading the illegal export of the waste from the *Probo Koala* to Ivory Coast.

On 5 February 2009, APS was found guilty of breaking the environment protection laws, and fined 450,000 Euros. One of its former executives was sentenced to 240 hours' community service, with a suspension of half of the sentence.

An important development in the proceedings occurred at a 19 May 2010 hearing before the Amsterdam Court of Appeal when Greenpeace produced testimony by the Ivorian truck drivers who had transported the toxic waste from the *Probo Koala*, asserting that Trafigura had paid them to make false statements during the civil proceedings in London (see Section II, Part I on corporate civil liability).⁵⁷⁹ The trial began on June 2nd 2010.

⁵⁷⁸ Greenpeace, which is party to the proceedings, has challenged the limitation of the case to events that occurred in Amsterdam. An appeal is pending.

⁵⁷⁹ See the article published in *Libération* on 18 May 2010, "Probo Koala: the charterer Trafigura called to witness" www.liberation.fr

On the July 23rd 2010, Trafigura was condemned to pay 1 million euro for EU shipments of waste Regulation and for failing to mention the type of transported waste. However, it was acquitted for forging of documents. Besides, the employee of Trafigura who had coordinated the stopover, Naeem Ahmed, was given a six-month suspended prison sentence and condemned to pay a fine of 25.000 euros; the Ukrainian captain of the cargo boat, Seriy Chertov, was given a five-month suspended sentence.

The public prosecutor's department of Amsterdam, Trafigura and Naeem Ahmed appealed against this decision. On 1 July 2011, the Dutch Court of Appeal annulled the verdict against Naeem Ahmed on the basis that the Court of First Instance did not have jurisdiction.⁵⁸⁰ The Public Prosecutor has appealed this decision. The 23 December 2011 the Amsterdam Court of Appeal upheld the €1 million fine against Trafigura. However it confirmed that the municipality of Amsterdam was immune to prosecution. An appeal to the Supreme Court was subsequently filed, and is still pending.

Trafigura and the Public prosecutor's department of Amsterdam both lodged an appeal against the decision of the 23rd of July 2010 as regards the facts that took place in the Netherlands. The Public prosecutor's department of Amsterdam asked the Court to reconsider on the discharge concerned the city of Amsterdam, the port manager, and the APS company, responsible for waste treatment, and required the payment by Trafigura of a €2 million fine. The appeal trial opened on the 14th of November 2011. Concerning the individual responsibility of Claude Dauphin, president of Trafigura, the court decided, on January 30th, 2012, that Claude Dauphin could be prosecuted for the alleged illegal export of waste by Trafigura. However, no decision on the merits was reached, since the Dutch Public Prosecutor's Office and Trafigura reached an out-of-court settlement in November 2012. Trafigura agreed to pay €300,000 compensation and paid a €67,000 fine in return for the withdrawal of the case against Claude Dauphin.

Lawyers representing 110,937 Ivorians have called upon Trafigura in respect to a new lawsuit in The Hague for causing "bodily, moral and economic injuries to the plaintiffs. They ask for the payment of €2,500 in compensation, as well as the cleaning of the waste."⁵⁸¹ However, in November 2015, victims will still be awaiting payments.⁵⁸²

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⁵⁸⁰ Amnesty International, "*The Toxic Truth About a Company Called Trafigura, a ship called the Probo Koala, and the dumping of toxic waste in Côte d'Ivoire*", 2012, The Netherlands,

⁵⁸¹ Bussiness and Human Rights Resource Centre, "Trafigura lawsuits (re Côte d'Ivoire)" <http://business-humanrights.org>

⁵⁸² *Ibid.*

Prosecutions based on universal jurisdiction still face strong resistance from countries unwilling to take on the political and diplomatic costs of such cases. This is especially true when complaints target companies on their territory, resulting in a threat that the companies will relocate. Following two complaints filed in Belgium against multinational companies and their directors for serious human rights violations, the Federation of Enterprises in Belgium denounced the Belgian Law of 16 June 1993 as rendering Belgium an inhospitable climate for companies doing business in different parts of the world. The scope of the law's application was largely reduced, and the court declined jurisdiction in the complaint against Total in Burma.

The technical difficulties resulting from domestic legal rules on corporate criminal liability and extraterritoriality should not be overlooked.

An appropriate conventional framework is “required in order to provide the legal certainty necessary to dispense justice at the international level”⁵⁸³ and to ensure the feasibility of prosecutions. Although companies that commit serious international crimes should be investigated and prosecuted without waiting for victims to complain, this has never been the case. The role of victims and the NGOs that support them is crucial.

ADDITIONAL RESOURCES (AND REFERENCES)

For a comparison of the criminal liability regimes in place in Europe:

- H. de Doelder and K. Tiedemann, *La criminalisation du comportement collectif*, Kluwer, 1996.
- S. Geeroms, “La responsabilité pénale des personnes morales: une étude comparative”, *Rev. int. dr. comp.*, 1996.
- Association Henri Capitant des Amis de la Culture juridique française, *La responsabilité, aspects nouveaux*, Tome I, L.G.D.J., 1999.
- M. Wagner, “Corporate Criminal Liability – National and International Responses”, *Background paper for the International Society for the Reform of Criminal law – 13th International Conference Commercial and Financial Fraud: A Comparative Perspective*, Malta, 8-12 July 1999
- M. Delmas-Marty and J.A.E. Vervaele (dir.), *La mise en œuvre du Corpus Iuris dans les États Membres*, Vol.1., Antwerp/Groningen/Oxford, Intersentia, 2000.
- S. Adam, N. Colette-Bassecqz and M. Nihoul, *La responsabilité pénale des personnes morales en Europe – Corporate Criminal Liability in Europe*, Bruxelles/Bruges, La Charte/Die Keure, 2008.

⁵⁸³ D. Vandermeersch, “La dimension internationale de la loi”, *op. cit.*, p. 273.

On the recognition of corporate criminal liability in EU Member States:

- **Austria:** VbVG *Verbandsverantwortlichkeitsgesetz* (The federal law on the liability of organisations in criminal matters) for violations committed since 1 January 2006. See also M. Hilf, “La responsabilité pénale des personnes morales en Autriche – Le régime de la nouvelle loi autrichienne sur la responsabilité des entreprises” in *La responsabilité pénale des personnes morales en Europe* / S. Adam (dir.), N. Colette-Basecqz and M. Nihoul, La Chartre, Bruxelles, 2008.
- **Belgium:** Art. 5 of the Belgian Criminal Code, established by the Law of 4 May 1999 creating corporate criminal liability (*M.B.*, 22 June 1999, p. 2341). This law entered into force on 2 July 1999.
- **Estonia:** Art. 14 and 37 of the new Criminal Code of 2002.
- **Finland:** Section 9 of the Criminal Code (following the reform of 1 September 1995 (1995/743)).
- **France:** Art. 121-2 of the new Criminal Code, which entered into force on 1 March 1994. It was recently modified by the Law of 9 March 2004.
- **The Netherlands:** See art. 51 of the *Nederlandse wetboek van strafrecht* (Dutch Criminal Code), Introduced by the Law of 22 June 1950 on economic crime, and revised by the Law of 23 June 1976. See also J. D’Haenens, “Sanctions pénales et personnes morales”, *Rev. dr. Pén. Crim.*, 1975. J. Vervaele, “La responsabilité pénale de et au sein de la personne morale aux Pays-Bas. Entre pragmatisme et dogmatisme juridique”, *Rev. sc. crim.* (Fr.), 1997, liv. 2, p. 325-346. D. Roeff, T. De Roos, “De strafrechtelijke aansprakelijkheid van de rechtspersoon in Nederland: rechtstheoretische beschouwingen bij enkele praktische knelpunten”, in X., *De strafrechtelijke en civielrechtelijke aansprakelijkheid van de rechtspersoon en zijn bestuurders*, Anvers, Intersentia, Série ‘Ius Commune Europeanum’, No 25, 1998, p. 49-121. A. De Nauw and F. Deruyck, “De Strafrechtelijke verantwoordelijkheid van rechtspersonen”, *R.W.*, 2000, p. 897-898.

On the principle of universal jurisdiction

- FIDH, “FIDH Paper on Universal Jurisdiction – A Step by Step Approach to the Use of Universal Jurisdiction in Western European States”, June 2009, www.fidh.org
- FIDH, *Fostering a European Approach to Accountability for Genocide, Crimes against Humanity, War Crimes and Torture*, April 2007, www.fidh.org

In EU Member States:

- **Germany:** Para. 6 of the *Strafgesetzbuch* (Criminal Code). See also Section 1 of the Code of Crimes against International Law (*Völkerstrafgesetzbuch* or VStGB), adopted on 30 June 2002. G. Werle and F. Jessberger, “International Criminal Justice is coming Home: The new German Code of Crimes against International Law”, *CrimL. L. F.*, 2002, 191, p. 214. This Code is a model and could serve as a source of inspiration for other European countries. M. Delmas-Marty, “Le droit pénal comme éthique de la mondialisation”, *R. S. C.*, 2004, p. 8. Prosecution *in ab sentia* is permitted, but only with the goal of preserving evidence for a possible future trial. (StPO §276, StPO §285 (1)).

- **Austria:** Para. 64 (64.1 to 64.8) and 65 of the Strafgesetzbuch or StGB (Criminal Code). With regard to genocide in particular, universal jurisdiction is granted by jurisprudence. See International Law Association, “Final Report on the exercise of Universal jurisdiction in respect of gross human rights offences”, prepared report by M. Kamminga, 2000, p. 24.
- **Belgium:** Art. 12bis of Chapter II of Title 1 of the Code of Criminal Procedure (replaced by the Law of 18 July 2001 and amended by the Law of 5 August 2003 (entered into force on 7 August 2003) and Article 378 of the Law Programme of 22 December 2003 (entered into force on 31 December 2003)). See also Art. 6, 3-10, al. 1-4 and Art. 10 *quater* of Title 1 of the Code of Criminal Procedure.
- **Denmark:** *Strfl.* § 8(1) (5) and Sections 2, 5(2) and 6 of the Military Criminal Code (Act. No. 216 of April 1973).
- **Spain:** Art. 23.4 of the LOPJ of 1 July 1985.
- **Finlande:** Section 7 – Chapter 1 of the Criminal Code (amended by 650/2003).
- **France:** Art. 689-1 of the Code of Criminal Procedure and Cassation or 26 March 1996, *Bull. crim.*, No. 132.
- **Greece:** Art. 8h and 8k of the Criminal Code.
- **Ireland:** Section 3 of the Irish Law on the Geneva Conventions, 1962, which was amended by the Law on the Geneva Conventions of 1998; Sections 2 and 3 of the Irish Law of 2000 on criminal justice (United Nations Convention against Torture).
- **Italy:** Art. 7(5) of the Criminal Code. With regard to torture, see also Article 3(1)(c) of Law No. 498 of 3 November 1988 (Legge 3 novembre 1988, n°498) and Article 10 of the Criminal Code (Legge 9 ottobre 1967, n°962).
- **Luxembourg:** Art. 10 of the Law of 9 January 1985 on the Repression of Serious Violations of the International Geneva Conventions of 12 August 1949. (*Mém. A* N° 2 of 25 January 1985, p.24); Art. 1 of the Law of 2 August 1947 on the Repression of War Crimes (*Mém.* 1947. 755-Pas. 1947. 500); Art. 7-3 of the Code of Criminal Procedure, in combination with Art. 260-1 to 260-4 of the Criminal Code and Art. 7-4 of the Code of Criminal Procedure. See also Articles (4) and 5-1 of the Code of Criminal Procedure and Art. 163, 169, 170, 177, 178, 187-1, 192-1, 192-2, 198, 199, 199bis, and 368 to 382 of the Criminal Code. See also Art. 6 of the Law of 8 August 1985 on the Repression of Genocide.
- **The Netherlands:** Sections 2(1)(a) and (c) and 2(3) of the Law on International Crimes, adopted on 19 June 2003 and entered into force on 1 October 2003.
- **Portugal:** Art. 5 § 2 of the Criminal Code. See also Art. 5 para. 1 (b) and Art. 239 para. 1 of the Criminal Code.
- **Sweden:** Chapter 2, section 3 (6) and chapter 22, section 6 of the Criminal Code. See also chapter 2, section 3(7) of the Criminal Code in combination with Law (1964/169) on the Repression of Genocide.

CHAPTER III

The Extraterritorial Criminal Liability of Multinational Corporations for Human Rights Violations before American and Canadian Courts

A. In the USA

B. In Canada

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A. In the USA

1. Recognising the principle of corporate criminal liability and applicable penalties

To establish a corporation's liability for criminal acts committed by individuals, US courts draw upon three theories:⁵⁸⁴

- **The theory of agency:** This theory allows a company to be held liable for violations committed by its employees (*vicarious liability*). It must be proved that the employee acted within the scope of his or her duties for the benefit of the company (at least in part), and that the intent (*mens rea*) and the physical act (*actus reus*) of the offense committed by the employee are attributable to the company.
- **The theory of identification:** This theory allows a company to be held liable for violations committed by its officers or executives. There is a connection between the corporation and those persons not subordinate within the hierarchy of the company. Knowledge of and willingness to commit an offense, conditions required to invoke the company's criminal liability, must be attributed to an individual regarded as "the directing mind and will" of the company. The conduct of the company's leader is likened to that of the corporation. Unlike the theory of agency, the theory of identification invokes the company's strict liability for the actions of its staff and executives who are personally liable.
- **The theory of accomplice liability:** Under this theory, a company may be held liable when it has been complicit in illegal acts committed by outside individuals. Complicity must feature a **shared criminal intent**.⁵⁸⁵ In the US, the **accomplice**

⁵⁸⁴ E. Engel, "Extraterritorial criminal liability: a remedy for human rights violations?" *Saint John's Journal of Legal Commentary*, spring 2006, p. 2.

⁵⁸⁵ In the United States, this intentional element is called "state of mind": the intention to commit or participate in a crime.

must desire that the crime be committed **and must assist** the primary perpetrator in committing the offense. These provisions have at times been interpreted in such a manner that the primary perpetrator of the offense and his or her accomplice should share the same motivations for the crime.⁵⁸⁶ The theory of “shared intent” makes it difficult, however, to determine the complicity of transnational corporations because companies generally do not encourage human rights violations for the same reasons as the perpetrators of such crimes. Indeed, transnational corporations are often motivated solely by profit, thus one can argue that transnational corporations and perpetrators of crimes simply act in common interest. The International Commission of Jurists, however, considers that this interpretation confuses the *motivation* and *intent* of perpetrators and accomplices.⁵⁸⁷

Given that the United States is a confederated nation, the US criminal justice system is legally grounded not only in the Constitution, its amendments and federal criminal statutes but also in the criminal law of each state. The role of the Attorney General, and that of the applicable penalties, thus varies depending on whether one is charged under federal or state law.⁵⁸⁸

The United States, however, has adopted guidelines that broadly determine which penalties may be imposed on legal persons. The Federal Sentencing Guidelines, issued in 1991, have helped to harmonise the penalties legal persons face in different US states. These guidelines contain a number of penalties that have been issued according to the severity of the crime, the company’s culpability and the financial gain the company obtained following the offense.

In addition to these guidelines, each law is accompanied by its own sanctions and penalties:

- **Fines** are administrative penalties the court calculates in two stages. The court first calculates the base fine by referring to the amount indicated in the table of offenses and adding to it any financial gains and losses generated by the offense. The fine is then increased or decreased according to the threshold of the company’s culpability.⁵⁸⁹
- **Probation** is a criminal sanction which permits the company to be monitored for a maximum period of five years. Monitoring is conducted by the government and may include board supervision. The company may also be required to provide

⁵⁸⁶ A. Ramasastry, R. C. Thompson, “Commerce, Crime and Conflict, legal remedies for private sector breaches of international law, a survey of sixteen countries”, *FAFO*, 2006, p.18-19.

⁵⁸⁷ International Commission of Jurists, *Corporate complicity & legal accountability – Report of the International Commission of Jurists expert legal panel on corporate complicity in international crimes*, vol. 2, 2008.

⁵⁸⁸ J. Jacobs, “L’évolution du droit pénal américain”, *Revue électronique du département d’Etat*, volume 6, No. 1, 1 July 2001, p.6.

⁵⁸⁹ M. Wagner, “Corporate Criminal Liability: National and International responses.” *Commonwealth Law Bulletin*, 1999, p. 8-9.

periodical activity reports to its probation officer or to the court. In addition to probation, certain laws such as RICO (see below) provide for prison sentences of up to 20 years for individuals convicted of organised crime.⁵⁹⁰

- **Forfeiture and disgorgement** are civil penalties proposed under RICO and other laws. These penalties require the company to turn over to the US government all property and financial gain obtained through illegal acts.
- **Damages** can be awarded to victims of the offense and may be considered a civil penalty charged to the companies. Punitive damages also exist. Unlike civil law countries, common law countries provide for sums of money to be paid as **punishment**. This remedy seeks to punish reprehensible conduct and prevent its reoccurrence. This sanction is not to be confused with a fine.⁵⁹¹

2. The jurisdiction of US criminal courts for acts committed abroad

a) Territorial Jurisdiction

For the purposes of territorial jurisdiction, the US follows the “effects” doctrine. Most US extraterritorial legislation applies only if the alleged conduct abroad can have a “**direct, substantial and predictable effect on its national soil**”⁵⁹² (effects test), **or if the alleged conduct directly causing damage abroad took place on US soil** (conduct test). The extraterritorial application of these laws is in this case limited by a requirement of minimal ties to US soil.

b) Personal jurisdiction

The United States applies the principles of **active personality** and **passive personality**.⁵⁹³ Most US criminal laws use **active personality** as a link, which means the laws apply only if the perpetrator is a US citizen. The criterion of **passive personality** applies only under certain specific laws, such as the *US war crimes statute*, in which the offense is committed by a foreigner and the victim is a US citizen.⁵⁹⁴

Extraterritorial corporate criminal liability is a question not fully resolved overseas. Various researchers and US courts do not always agree on the legitimacy of the theory and the criteria for its application. Because the common law system depends

⁵⁹⁰ Title 18 USC, A§ 1964 (a).

⁵⁹¹ M. Wagner, *op. cit.*, p.9.

⁵⁹² O. De Schutter, “Les affaires *TOTAL* et *UNOCAL*: complicité et extraterritorialité dans l’imposition aux entreprises d’obligations en matière de droits de l’homme”, *AFDI*, LII, 2006, p. 35. This doctrine was used for the first time in 1945 by the Second Circuit Court of Appeals in *United States v. Aluminum Co. of America (Alcoa)*. We analyze its particular use under RICO later.

⁵⁹³ *Idem*, p. 36.

⁵⁹⁴ A. Ramasastry, R. C. Thompson, *op. cit.*, p. 16.

primarily on legal doctrine and precedent to create law rather than on written law,⁵⁹⁵ it is difficult to agree on clear and precise criteria for the application of extraterritorial criminal liability. Some defend the proposition that corporations should be held accountable for criminal acts they commit abroad, based on a common law principle known as *ultra vires* (beyond the powers conferred by a company's rules and regulations).

In effect, this means that companies today which receive their powers and privileges (legal personhood, limited liability) from the state, must not only uphold the laws of the state but also the international legal obligations to which the state has committed to respect.

Several US laws such as RICO and the FCPA render multinational corporations criminally liable, but the laws apply only to certain offenses.

c) Universal jurisdiction

The Constitution limits the degree to which states exercise federal jurisdiction.⁵⁹⁶ US states cannot extend their jurisdiction beyond those crimes committed on their soil.⁵⁹⁷

The federal government itself can enact extraterritorial criminal laws,⁵⁹⁸ although they contain only minor extensions of US law and do not truly create universal jurisdiction.

Conventions protecting human rights

These include:

- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force on 20 November 1994,
- The Convention against Genocide of 9 December 1948, and
- The Geneva Conventions of 1949 and related protocols.

The United States is party to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and has incorporated it into national law. Thus the *Torture Statute*⁵⁹⁹ enjoys quasi-universal jurisdiction provided the alleged perpetrator is a US citizen, or the alleged perpetrator is present on US soil, regardless of the nationality of either the victim or the alleged perpetrator.

⁵⁹⁵ While only a few criminal statutes specifically address the extraterritorial criminal liability of transnational corporations, there is no written rule. These laws will be discussed below.

⁵⁹⁶ A. Cassese and M. Delmas-Marty, *Juridictions nationales et crimes internationaux*, PUF, Paris, 2002, p. 458.

⁵⁹⁷ See 14th Amendment (1868 clause on preserving individual liberties).

⁵⁹⁸ A. Cassese et M. Delmas-Marty, *op. cit.*, p.458.

⁵⁹⁹ See 18 USC 2340A.

The United States is also party to the Convention against Genocide. Federal law has since affirmed that US courts have universal jurisdiction over the crime of genocide. However, federal law does establish jurisdictional requirements,⁶⁰⁰ including the **US citizenship** of the accused or his or her **presence on US soil**.

In fact, no international legal instrument requires states to exercise jurisdiction over cases of genocide and crimes against humanity if the facts present no ties to a country's territory. Because these crimes are considered part of *jus cogens*, however, states have a customary obligation to end it.⁶⁰¹

The United States has also incorporated an element of the Geneva Conventions through the War Crimes Statute.⁶⁰² US courts have jurisdiction to hear war crimes if the perpetrator or victim is a US citizen or a member of the US armed forces. War crimes aside, other provisions of the Geneva Conventions, including laws to tackle crimes against humanity, have not been incorporated into the American legal code.⁶⁰³

It is worth noting that the United States has not ratified the Rome Statute and thus the International Criminal Court has no jurisdiction over international crimes committed by US nationals.

In situations where these international conventions have been incorporated into US domestic law, it should be noted that they generally apply when crimes are committed abroad by US perpetrators or with US victims. **A tie with the US is always required.**⁶⁰⁴

The applicability of these federal statutes against torture, war crimes and genocide to legal persons (e.g. companies) remains an unresolved issue. Despite the lack of clarity, one could legitimately consider a case, particularly under the *Torture Statute*, in which the use of the generic term “person” permits both legal persons and individuals to be held liable. Even if no provision expressly excludes the applicability of these laws to companies, prior to undertaking any legal proceedings it would be prudent to examine the preparatory work that led to a particular law's drafting.

⁶⁰⁰ See 18 USC 1091.

⁶⁰¹ O. De Schutter, “Les affaires *TOTAL* et *UNOCAL*: complicité et extraterritorialité dans l'imposition aux entreprises d'obligations en matière de droits de l'homme”, *op. cit.*

⁶⁰² See 18 USC 2441.

⁶⁰³ There is currently a debate in the US as to whether a federal law targeting crimes against humanity will be adopted.

⁶⁰⁴ E. Engel, *op. cit.*, p. 30–31. Indeed, in a recent publication, Dr. Jennifer Zerk confirms that “States appear to regard the nationality principle as the strongest basis for direct extraterritorial criminal jurisdiction [...]” See J. Zerk, *Extraterritorial Jurisdiction: Lessons from the Business and Human Rights Sphere from Six Regulatory Areas: A report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human Rights*, Working Paper No.59, June 2010.

The special case of the Foreign Corrupt Practices Act (FCPA) and Racketeering Influenced and Corrupt Organisations (RICO)

Several US criminal laws render companies criminally liable for human rights violations in which they participate abroad. The US has extraterritorial laws against money laundering, in situations where laundering would bring into the US money obtained illegally in a foreign country. There is also a law against the importation of stolen objects and a law against importing illicit drugs.⁶⁰⁵

The most important laws are the anti-bribery law (FCPA) and the law against organised crime (RICO):

Anti-bribery Laws

At the international level, the United States is bound by two conventions: the *Inter-American Convention Against Corruption* of 29 March 1996 and the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* of 18 December 1998. The first falls under the framework of the Organisation of American States (OAS) and the second under the Organisation for Economic Co-operation and Development (OECD).

At the national level, the matter is addressed by two texts: the FCPA and recommendations from the *Securities and Exchange Commission* (SEC). **The FCPA applies to illegal activities carried out abroad by US companies.** Above all, the law criminalises the **bribery** of foreign government officials in order to obtain advantages of any kind. **US companies cannot be prosecuted, however, for practices that are not criminalised in the laws of the host country.** Nor can they be prosecuted when payments are made for the purposes of demonstrating or explaining a product, or when they facilitate the execution of a contract already signed with a foreign government.

Companies guilty of bribing foreign officials are liable for fines up to \$2,000,000. Officers, directors, shareholders, employees and agents face fines of up to \$100,000 and/or five years imprisonment.

⁶⁰⁵ *Ibid*, p. 26.

➔ **Securities and Exchange Commission v. ABB Ltd, 2004**

In 2004, the SEC investigated ABB Ltd, a Swiss engineering group in Sweden.

In its complaint, the SEC determined that between 1998 and 2003, ABB subsidiaries in the US and overseas seeking to enter into business relationships with Nigeria, Angola and Kazakhstan offered illicit payments of more than U.S.D. 1.1 million to officials in those countries.

According to the complaint, all of the payments were made to influence the actions and decisions of foreign officials in order to assist ABB's subsidiaries in establishing and maintaining business relationships in the countries.

The complaint further alleged that the payments were made with the knowledge and approval of certain members of staff responsible for managing ABB subsidiaries, and that payments worth at least \$865,726 were made after ABB registered with the SEC in April 2001 and was from that point on subject to the SEC's reporting obligations.

Finally, the complaint accused ABB of having poorly accounted for the payments in its books and records, and of failing to have implemented significant internal controls to prevent and detect such illicit payments.

The SEC held that in making the payments through its subsidiaries, ABB violated the anti-bribery provisions of the FCPA (Section 30A of the *Securities Exchange Act* of 1934).

The SEC also held that ABB's improper recording of the payments violated the FCPA's relevant books and records provisions (Article 13 (b) (2) (A) of the *Securities Exchange Act* of 1934).

Finally, the **SEC held that in failing to develop or maintain an effective system of internal controls to prevent** and detect the FCPA violations, ABB violated the FCPA's internal accounting controls (Section 13(b)(2) (B) of the *Securities Exchange Act* of 1934).

Determined to accept ABB's settlement offer, the SEC took into account the full co-operation that ABB provided SEC staff during its investigation. The Commission also considered the fact that ABB itself brought the matter to the attention of SEC staff and the US Department of Justice.

In 2004, the SEC ordered ABB Ltd. to pay a fine of \$10.5 million and an additional sum of \$5.9 million.

In addition, ABB paid approximately \$17 million in legal fees.

The FCPA's extraterritoriality has given rise to discussion, in part because some consider it to be an affront to the host nation's sovereignty. However, most doctrines and jurisprudence recognise an extraterritorial character within the FCPA.⁶⁰⁶

► NOTE

Only the SEC and Department of Justice can seek justice. Individuals can address the SEC and DOJ and inform them of offenses of which they are aware.

Racketeering Influenced and Corrupt Organisations (RICO)

This law has been incorporated into Title 18 of the US Code and targets organised crime. Title 18 USC A§ 1962 states: “It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.”⁶⁰⁷

RICO employs a very broad definition of what an enterprise might be: according to RICO, an enterprise is a “group of persons associated together for a common purpose of engaging in a course of conduct.”⁶⁰⁸ A parent company and a subsidiary can be treated as a single enterprise if an offense is committed as part of their relationship.⁶⁰⁹

The company must have committed “a pattern of racketeering activity”, which is to say a series of criminal acts related to one another. These crimes must feature a certain **continuity**. The criminal acts prosecutable under RICO are those cited in the Hobbs Act and in Title 18 USC A§ 1962 (c). In addition to the list of crimes contained therein, **a company can be charged under RICO for acts considered criminal in the country in which it operates**. A criminal complaint under RICO may thus be introduced on the basis of a violation of foreign law if the violation corresponds with a violation of US law.⁶¹⁰ RICO applies, however, only if the alleged situation involves a **direct link with the United States** and may have a **direct effect on US commerce**⁶¹¹ (conduct/effects test).

The possibility of applying RICO extraterritorially in the absence of US ties is a subject of current debate in US courts and may evolve in the coming years.

⁶⁰⁶ See *S.E.C. v. Montedison, S.P.A.*, Lit. Release No. 15164, 1996 WL 673757 (D.D.C., 1996). In this case, the SEC prosecuted the Montedison company for FCPA violations committed in the course of its activities in Europe. The court held that the company was liable.

⁶⁰⁷ Title 18 USC. A§ 1962 (c).

⁶⁰⁸ Title 18 USC. A§ 1961 (3).

⁶⁰⁹ E. Engel, *op. cit.*, p. 7.

⁶¹⁰ See *Orion Tire Corp. v. Goodyear Tire & Rubber Co.* 268 F. 3d 1133, 1137 (9th Cir. 2001): This decision made it possible to cite foreign laws under RICO.

⁶¹¹ E. Engel, *op. cit.*, p. 7-8.

3. The roles of victims and the prosecution in initiating proceedings

The victim's role in initiating proceedings

In the US criminal justice system, victims cannot initiate criminal proceedings. **The Attorney General alone may initiate proceedings at any time.** Victims of a crime are never party to the proceedings, but may serve as witnesses. Outside the criminal process, however, victims may undertake civil action provided that criminal law does not provide for the action. The Attorney General thus enjoys a type of monopoly in initiating criminal proceedings.

Prosecutorial discretion and the role of the Attorney General

The US criminal justice system is grounded in an accusatory process and it is the prosecution's responsibility to prove the guilt of the accused. To do this, the prosecutor has broad discretion to determine whether it is useful and timely to pursue a particular suspect.⁶¹² This suggests that in many cases, prosecutors may, for political and economic, rather than strictly legal reasons, refuse to bring criminal charges against multinational corporations for human rights violations committed abroad.

An insight into...

Procedural and political hurdles

Strictly procedural hurdles

The Department of Justice faces a number of procedural hurdles, mostly in civil actions brought by victims, such as the *statute of limitations*, the *act of state doctrine* and *international comity doctrine*⁶¹³ (for a detailed description, see Part I, Section III which addresses challenges to corporate liability).

The cost of litigation

Because victims are not party to the proceedings, the Department of Justice must incur the costs of investigation and prosecution. Although defendants may choose between using their own attorneys and seeking legal assistance, it appears certain that a multinational corporation will select the first option. It is very likely that the financial resources at the company's disposal will exceed those of the Department of Justice, creating an imbalance between the parties in criminal proceedings.

⁶¹² J. Jacobs, *op. cit.*, p.2.

⁶¹³ *United States v. Giffen*, 326 F. Supp. 2d 497; 2004 US Dist. LEXIS 12273.

► NOTE

Regarding the recognition of US judgments abroad or of foreign judgments in the US, **state courts do not generally recognise or enforce foreign criminal judgments**. Exceptions to this principle include bilateral agreements on extradition or those facilitating the recognition of certain convictions. However, such exceptions do not exist with regards to corporate convictions.

B. In Canada

1. Recognising the principle of corporate criminal liability and applicable penalties

In Canada, legal persons – included in the category of “organisations” – can be held liable for most criminal offenses under the Criminal Code.

Article 2 of the Criminal Code specifies that the terms “whomever”, “individual”, “person” and “owner” used in the code include “Her Majesty and organisations.” Similarly, the word “person” in the Crimes Against Humanity and War Crimes Act includes legal persons, *inter alia*, given that Article 2 states: “Unless otherwise indicated, the terms of this Act shall be construed under the Criminal Code.” Canada therefore allows legal persons to be prosecuted for genocide, crimes against humanity, war crimes and breach of responsibility by a military commander or other superior.

The Canadian Criminal Code makes a distinction between crimes of negligence (art. 22.1) and offenses for which some knowledge or intent must be established (art. 22.2). Thus, Article 22.1 of the Criminal Code notes that *“In respect of an offence that requires the prosecution to prove negligence, an organisation is a party to the offence if (a) acting within the scope of their authority: (i) one of its representatives is a party to the offence, or (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and (b) the senior officer who is responsible for the aspect of the organisation’s activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organisation from being a party to the offence.”*

In other words, with regard to the material element, an organisation is liable for the negligent act or negligent omission of one of its agents. However, the offense may also be the result of the collective behaviour of several of the organisation’s agents. Regarding the moral element, the executive officer or senior management, must collectively make a marked departure from the standard of care expected in the circumstances to prevent neglect.

In addition, Article 22.2 of the Criminal Code notes that “*In respect of an offence that **requires the prosecution to prove fault — other than negligence** — an organisation is a party to the offence if, with the intent at least in part to benefit the organisation, one of its senior officers*

- (a) acting within the scope of their authority, is a party to the offence;*
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organisation so that they carry out the act or make the omission specified in the offence; or*
- (c) knowing that a representative of the organisation is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.”*

Article 22.2 of the Criminal Code thus provides three ways in which a corporation may commit an offense requiring knowledge of a fact or a specific intent. In all cases, the emphasis is placed on executives who must have intended to use the organisation in order to commit an offence.

The Canadian Criminal Code provides for fines where organisations are deemed guilty of a breach of business law. The Code sets no ceiling for fines imposed on organisations. This amount is left to the discretion of the court and varies depending on a number of factors.⁶¹⁴

The Criminal Code also provides for probation orders for companies.⁶¹⁵ The conditions the court may impose on an organisation include:

- Providing compensation for victims of the offense to emphasise that their losses are among the sentencing judge’s primary concerns;
- Requiring the organisation to inform the public of the offense, the penalty imposed and the corrective measures it has taken;
- Implementing policies and procedures to reduce the possibility of committing other offenses;
- Communicating those policies and procedures to its employees;
- Designating a senior manager responsible for overseeing the implementation of those policies and procedures;
- Reporting on the implementation of various penalties

⁶¹⁴ These factors are provided in section 718.21 of the Canadian Criminal Code and are essentially the profits the organisation derived due to the commission of the offense, the complexity of the planning related to the offence, the degree to which the organisation co-operated during the investigation, the costs incurred by the administration, and the effect of the penalty on the company’s viability.

⁶¹⁵ Art. 718.21 of the Canadian Criminal Code.

2. The jurisdiction of Canadian criminal courts for acts committed abroad

a) Territorial jurisdiction

The principle of territoriality is privileged under Canadian law. Article 6(2) of the Canadian Criminal Code⁶¹⁶ provides that “Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 730 of an offence committed outside Canada.”

When there is a link between Canada and the alleged offense, provided the activity takes place largely outside of Canada but that much of the offense is committed in Canada, it is possible to establish a “real and substantial connection”⁶¹⁷ with Canada, such that Canada has jurisdiction to prosecute. In establishing such a link, the court must examine the facts which occur in Canada – at corporate headquarters, for example, in the case of a Canadian business operating outside of Canada. In addition, the court must determine whether Canada’s exercise of extraterritorial jurisdiction may be poorly received by the international community.

b) Personal jurisdiction

The principles of **active personality** (under which Canadian courts have jurisdiction over all Canadian nationals who commit an offense, regardless of where the offense occurs) and **passive personality** (under which Canadian courts have jurisdiction in cases where Canadian nationals have been victims of an offence, regardless of where the offense occurs) **are rarely used**. They are used, however, for the most serious international crimes including:

- Terrorist crimes prohibited by international conventions;⁶¹⁸
- War crimes and crimes against humanity⁶¹⁹ and treason.⁶²⁰

c) Universal jurisdiction

Canada uses the principle of universal jurisdiction in a measured manner. According to Article 7(3.71) of the Canadian Criminal Code,⁶²¹ any person who commits an act or omission constituting an international war crime or crime against humanity

⁶¹⁶ Criminal Code Art. 6(2) (L.R.C. 1985, ch. C-46, modified).

⁶¹⁷ See e.g., *R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.).

⁶¹⁸ Criminal Code Art. 7(3) (L.R.C. 1985, ch. C-46, modified) and the International Convention for the Suppression of Terrorist Bombings, opened for signature in New York 12 January 1998.

⁶¹⁹ Criminal Code Art. 7(3.73) and (3.75) (L.R.C. 1985, ch. C-46, modified); Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts, *S.C. 2000, c. 24*; the Geneva Convention of 1949 the additional protocols of 8 June 1977, ratified by Canada on 5 May 1965 and 20 November 1990.

⁶²⁰ Criminal Code Art. 46(3) (L.R.C. 1985, ch. C-46, modified).

⁶²¹ Criminal Code Art. 7(3.71) (L.R.C. 1985, ch. C-46, modified).

and a violation of Canadian law at the time of the act or omission will be regarded as having committed the act or omission in Canada if:

- 1) At the time,
 - He or she was a Canadian citizen or Canadian public or military employee;
 - He or she was a citizen or public or military employee of a country participating in armed conflict against Canada; or
 - The victim was a Canadian citizen or a national of a state allied in armed conflict with Canada or
- 2) If at the time of the act or omission, and in accordance with international law, Canada could exercise jurisdiction over the person on the basis of his or her presence on Canadian soil, and if after the time of the act or omission, the person is present on Canadian soil.

In order to meet the conditions for universal jurisdiction the allegations must focus on one of the two abovementioned crimes, there must be a violation of Canadian law and in addition, the party involved must fall under one of the two categories above.

Based on the Rome Statute of the International Criminal Court, Canada has fully incorporated the three crimes of conventional and customary international law – genocide, crimes against humanity and war crimes – in its national legislation by adopting the Law on Crimes Against Humanity and War Crimes.⁶²²

The applicability of that law to corporations is a subject of discussion, particularly due to inadequate definitions of the crimes legal persons can commit under international law.

Under Canadian law, complicity in the commission of genocide, a war crime or crime against humanity is itself a crime. Thus, Articles 4(1.1.) and 6(1.1.) of the Law on Crimes Against Humanity and War Crimes stipulate that “Every person is guilty of an indictable offence who commits (a) genocide; (b) a crime against humanity; or (c) a war crime” and “is an accessory after the fact in relation to, or counsels in relation to, an offence.”

Some believe that the Special Economic Measures Act (SEMA) could potentially be used to penalise companies that commit human rights violations abroad. The SEMA authorises the Cabinet to implement the decisions, resolutions or recommendations of international organisations of which Canada is a member, in order to adopt economic measures against another state if an international organisation requests it.

⁶²² Law on Crimes Against Humanity and War Crimes, S.C., 2000, c. 24, articles 4 and 6.

The Canadian government, however, has interpreted SEMA as authorising the adoption of such measures only on the request of an international body.

Lastly, under Article 11 of the Canadian Charter of Rights and Freedoms:

“Any person charged with an offence has the right [...] not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations.”

The scope of this right’s application has not been delineated in practice, but could allow for the prosecutions of corporations in Canada for violations of international law.

3. The roles of victims and the prosecution in initiating proceedings

Victims may only initiate criminal legal proceedings with the court’s approval. Article 9(3) of the Code of Criminal Procedure states “The following may be prosecutors: (1) the Attorney General; (1.1) the Director of Criminal and Penal Prosecutions; (2) a prosecutor designated under any Act other than this Code, to the extent determined in that Act; (3) a person authorised by a judge to institute proceedings.” Victims may thus initiate criminal proceedings when they receive the court’s permission to bring charges. Victims must request authorisation from an ad hoc court. When the court has reasonable grounds to believe a violation has occurred, it authorises prosecution.

Prosecutions are generally taken over in first instance by the Attorney General or the Director of Criminal and Penal Prosecutions.⁶²³ With regard to international crimes, however, the personal written consent of the Attorney General or his Deputy Attorney General is required to prosecute.⁶²⁴ The Interdepartmental Operations Group (IOG, or Ops Committee) has developed a policy to establish criteria ensuring that cases under investigation are appropriately prioritised for possible prosecution under the Law on Crimes Against Humanity and War Crimes. These criteria are grouped into three categories:

- **The nature of the allegation** (credibility, severity of the crime (genocide, war crimes, crimes against humanity), military or civilian position, strength of evidence).
- **The nature of the investigation** (progress in the investigation, ability to obtain the co-operation of other countries or an international tribunal, the likelihood of

⁶²³ Canadian Code of Penal Procedure, Art. 11.

⁶²⁴ Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court, and to make consequential amendments to other Acts, *S.C. 2000, Art. 9.*

effective co-operation with other countries, the presence of victims or witnesses in Canada or in other countries where access is easy, the likelihood of a parallel investigation in another country or by an international tribunal, the likelihood of being part of a collective investigation in Canada, the ability to conduct a document search in order to assess the credibility of the allegation, the likelihood of prosecuting for the offence or of danger to the public with regards to allegations of crimes against humanity and war crimes).

- **Other factors** (probability of no return, no reasonable prospect of fair and effective prosecution in another country or indictment by an international court, unlikely extradition, factors affecting the national interest).

➔ **ACCI v. Anvil Mining Limited in DRC**

On 8 November 2010, a class action against Anvil Mining was filed by the Congolese NGOs ASADHO and ACIDH and their partners RAID, Global Witness and the Canadian Center for International Justice, which are all members of the Canadian Association against Impunity (ACCI), an NGO coalition representing relatives of victims of the 2004 Kilwa massacre in the DRC. Anvil Mining is accused of providing logistical support to the Congolese army who raped, murdered and brutalised the people of Kilwa.

On 28 April 2011, the Superior Court of Quebec ruled that the case can proceed to the next stage. In his decision, Judge Benoît Emery rejected Anvil Mining's position that there were insufficient links to enable the court to have jurisdiction over the case and considered that at this stage in the proceedings, on the basis of article 3135 of the Civil Code of Quebec, if the court were to refuse to accept the class action, there would be no other possibility for the victims' civil claim to be heard.

Anvil lawyers sought leave to appeal this judgement and a hearing was held on 3 June 2011. The main legal issue hinges on the interpretation of the meaning of activities [3148 (2) CcQ]. ACCI argued that traditionally activities had been widely interpreted in Quebec jurisprudence. It therefore argued that it was sufficient to show that the company had an establishment and undertook activities in Quebec to be able to proceed.

On 25 January 2012, the Quebec Court of Appeal reversed the decision of the Superior Court Judge Honorable Benoît Emery and thus refused jurisdiction to hear the class action. The Court of Appeal states that there was insufficient connections to Quebec due to the fact that Anvil Mining's office was not involved in managerial decisions leading to its alleged role in the massacre (which contradicts earlier findings by Judge Emery). The Court also found that it had not been proven that victims could not access justice in another jurisdiction (the DRC or Australia).

The applicants will try for leave to appeal to the Supreme Court of Canada.

An insight into...

Procedural and political hurdles

Foreigners' access to justice

Canadian law does not distinguish between Canadian and foreign citizens in providing access to justice.

Political Question and Act of State Doctrine

The Supreme Court of Canada has stated that any matter is justiciable.⁶²⁵ Parliament has nonetheless granted blanket immunity to foreign states and their governments before Canadian courts. That immunity, however, does not extend to procedures related to the commercial activities of foreign states.

Forum non conveniens

The Supreme Court has emphasised the exceptional nature of exercising *forum non conveniens*, arguing that the existence of a more appropriate jurisdiction should not lead a sufficiently appropriate court to decline jurisdiction.

Legal aid

In criminal matters, legal aid may be granted to Canadian citizens and to refugees and migrants. In Québec, it is provided almost exclusively to Canadian citizens.

Cost of litigation

In general, the unsuccessful party bears the costs incurred by the other party. In Québec for instance, the costs are determined by the *Tariff and Court Costs* whereas in Ontario, costs are generally divided between parties.

⁶²⁵ *Operation Dismantle v. The Queen*; 1985.



SECTION III

* * *

MEDIATION MECHANISMS



Andean people protest against Newmont Mining's Conga gold project during a march near the Cortada lagoon in Peru's region of Cajamarca November 24, 2011. Peru, 2011 ©REUTERS/Enrique Castro-Mendivi

SECTION III

MEDIATION MECHANISMS

PART I

OECD Guidelines for Multinational Enterprises

The Organisation for Economic Co-operation and Development (OECD) is an international economic organisation with a mission to “promote policies that will improve the economic and social well-being of people around the world”, and a “commitment to market economies backed by democratic institutions”.¹ The organisation collects and analyses data in many fields of economic cooperation and development,² and provides a forum for the member countries to discuss common problems and develop policies.

The OECD was founded in 1960 by 18 European states along with the United States and Canada, and grew out of the Organisation for European Economic Co-operation (OEEC), originally charged with administering the Marshall plan in post-war Europe. Its 34 members,³ which are among the world’s most advanced economies today, are mainly Western states.

In 1976 the OECD adopted the OECD Guidelines for Multinational Enterprises (the Guidelines), which constitute **recommendations addressed by governments to companies operating in or from the adhering countries**.⁴ In addition to the 34 member countries of the OECD the following twelve countries adhere to the Guidelines: Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia.

The Guidelines aspire to be “a leading international instrument for the promotion of responsible business conduct”, and are composed of **a non-binding set of**

¹ About the OECD, www.oecd.org/about/

² The OECD deals with numerous topics, some of which are: Agriculture, Education, Competition, Corporate Governance, Insurance, Bribery and corruption, Regulatory Reform and Social and Welfare systems. For a complete overview see “Topics” www.oecd.org/

³ Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

⁴ OECD Guidelines for Multinational Enterprises, <http://mneguidelines.oecd.org/text/>

⁵ OECD, *Corporate Responsibility: Reinforcing a Unique Instrument - 2010 Annual Report on the OECD Guidelines for Multinational Enterprises*, available at www.oecd.org

principles and standards for responsible business conduct in the following areas: employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interest, science and technology, competition, and taxation. Despite their non-binding nature, the Guidelines are backed up by a complaint mechanism, called **National Contact Points (NCPs), which are tasked with their implementation and handling cases of alleged breaches of the Guidelines by companies operating from or in these countries (see chapter II of this section).**

In 2011, the Guidelines were updated for the fifth time. A key achievement of the 2011 update was the inclusion of a new chapter on human rights based on **the corporate responsibility to respect human rights** as set out in the UN Guiding Principles on Business and Human Rights⁶.

The Guidelines are composed of two parts: the Recommendations themselves, hereunder presented in Chapter 1, and their implementation procedures, dealt with in Chapter 2.



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⁶ Section 1, Part 1, Chapter 1 of this Guide.

CHAPTER I

Content and Scope of the OECD Guidelines

* * *

Part I of the Guidelines consists of eleven chapters covering the following topics:

- I. Concepts and Principles
- II. General Policies
- III. Disclosure
- IV. Human Rights
- V. Employment and Industrial Relations
- VI. Environment
- VII. Combating Bribery, Bribe Solicitation and Extortion
- VIII. Consumer Interests
- IX. Science and Technology
- X. Competition
- XI. Taxation

Below follows a general description of the rights and obligations referred to in the Guidelines. For a detailed overview, see the original document and the commentaries, which are placed after each chapter.⁷

This chapter will firstly look at 6 specific areas covered by the Guidelines (A) (Human Rights, Fundamental Labour Rights, Disclosure, Environmental Protection, Bribery and Consumer Protection), before discussing the scope of the Guidelines (B).

A. Main areas covered by the Guidelines relevant to the respect and protection of human rights

1. Human rights

Chapter II, “General Policies”, contains one specific recommendation on human rights and other general provisions relevant to the respect and protection of human rights by multinational enterprises in their operations. The Guidelines also include a Chapter IV on Human Rights that reaffirms and details the content of these norms.

The content of Chapter IV is based on Pillar II of the UN Guiding Principles on Business and Human Rights.⁸

⁷ OECD Guidelines for Multinational Enterprises, <http://mneguidelines.oecd.org/text/>

⁸ See Section 1, Part 1, Chapter 1 of this Guide.

Chapter II provides for broad General Policies, demanding business to take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders.⁹ More specifically, they demand enterprises to [...]:

- “ 2. **Respect the internationally recognised human rights** of those affected by their activities.
10. Carry out risk-based **due diligence**, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts [...].
11. **Avoid causing or contributing to adverse impacts on matters covered by the *Guidelines***, through their own activities, and **address such impacts when they occur**.
12. **Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship**. [...]
13. **Encourage**, where practicable, business partners, including **suppliers and sub-contractors**, to apply principles of responsible business conduct compatible with the *Guidelines*.
14. **Engage with relevant stakeholders** in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.” ”

Chapter IV, dealing specifically with human rights, affirms that enterprises should:

- “ 1. **Respect human rights**, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. **Within the context of their own activities, avoid causing or contributing to adverse human rights impacts** and address such impacts when they occur.
3. **Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship**, even if they do not contribute to those impacts.

⁹ For a full overview, see OECD Guidelines for Multinational Enterprises, *op. cited*

4. **Have a policy commitment** to respect human rights.
5. **Carry out human rights due diligence** as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. **Provide for or co-operate through legitimate processes in the remediation** of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

”

Commentary on General Policies

The Guidelines makes clear that the respect for human rights by businesses is understood “**within the framework of internationally recognised human rights**, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations (...)”.¹⁰ The Guidelines’ “specific instance” grievance mechanism can thus be used to address violations of **civil and political rights as well as economic, social and cultural rights**.

The OECD Guidelines’ grievance mechanism has previously been used to address violations of the following rights:

- Right to form or join a trade union
- Right to collective bargaining
- Right to enjoy just and favourable conditions at work
- Right to non-discrimination in employment and occupation
- Right to an adequate standard of living
- Right to safe and healthy conditions at work
- Right to health
- Right to life and prohibition of torture and arbitrary arrests¹¹
- Right to health, food, housing, education and standard of living¹²
- Right to receive and share information and freedom of expression¹³
- Right to non-discrimination, rights of indigenous peoples and prohibition of forced evictions¹⁴
- Prohibition of child labour, elimination of forced labour, right to education and non-discrimination¹⁵

¹⁰ *Ibid.*, Chapter IV, Chapeau.

¹¹ NCP Norway, *Aker Kvaerner ASA*, 2005.

¹² NCP Belgium, *George Forrest International Belgium and OM Group*, USA, 2004. See also NCP Belgium, *ACIDH et al vs Compagnie Minière de Sud Katanga*, 2012.

¹³ NCP Canada, *Ascendant Copper*, 2005.

¹⁴ NCP Norway, *Framtiden i våre hender vs Intex Resources*, 2009.

¹⁵ NCP France, *Germany and Switerland, ECCHR, Sherpa & UGF vs ICT Cotton*, 2010.

- Children’s rights, prohibition of arbitrary detention and rights of asylum seekers¹⁶
- Access to effective remedies¹⁷
- Crimes against humanity and war crimes committed by a private security company¹⁸

With regard to **human rights due diligence**, the Commentary on Chapter IV, explains that “the process entails **assessing** actual and potential human rights impacts, **integrating** and **acting** upon the findings, **tracking** responses as well as **communicating** how impacts are addressed”¹⁹. It is also established that “human rights due diligence can be included within broader enterprise risk management systems provided that it goes beyond simply identifying and managing material risks to the enterprise itself to include the risks to rights-holders. It is an on-going exercise, recognising that human rights risks may change over time as the enterprise’s operations and operating context evolve”²⁰.

The introduction of Chapter IV on Human Rights is a major improvement to the Guidelines, however some NGOs, including FIDH, have expressed their concerns on several aspects.²¹ The text remains weak with regard to consultation of affected communities in particular of indigenous peoples and no explicit reference is made to indigenous peoples’ right to free, prior and informed consent. However, the commentary to Chapter II does refer to other “UN instruments” when dealing with indigenous peoples’ rights. UN instruments could be interpreted as including the UN Declaration on the rights of indigenous peoples and ILO Convention no.169.

2. Fundamental labour rights

Labour rights are covered by Chapter IV on Human Rights. Respect for the human rights of workers is also addressed in Chapter V on Employment and Industrial Relations.

In accordance with the obligations specified by the relevant ILO conventions, Chapter V establishes four basic obligations toward workers:

- the right to form or join a trade union, **the right to collective bargaining and the right to the participation and consultation of workers** (including those practices which facilitate the exercise of those rights, such as: encouraging the negotiation of collective agreements, the provision of information as to the

¹⁶ NCP Australia, *Human Rights Law Centre and Raid vs. G4S*, 2014.

¹⁷ NCP Netherlands, *CEDHA et al. vs Nidera*, 2011.

¹⁸ NCP United Kingdom, *Avient Ltd.*, 2004.

¹⁹ OECD Guidelines, *op. cit.*, Chapter IV, Commentary on Human Rights, para 5.

²⁰ *Ibid.*, Chapter IV, Commentary on Human Rights.

²¹ For more information, see: FIDH, *Open Letter to OECD Investment Committee on the review process of the OECD guidelines for Multinational Enterprises*, 28 April 2011, www.fidh.org; Amnesty International, Public Statement, *The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has come to an end: the OECD must now turn into effective implementation*, 23 May 2011, www.amnesty.org

- conditions of employment, and a guarantee against the use of employee transfer as a threat, etc.)²²
- **Abolition of child labour**²³
- **Elimination of all forms of forced or compulsory labour**²⁴
- **Non-discrimination** in employment and occupations (notably in hiring, dismissal, remuneration, promotion, training and retirement)²⁵

In addition, companies are called upon to take the necessary measures to ensure that the **health and safety standards** of the workplace are “not less favourable than those observed by comparable employers in the host country.”²⁶ Under another set of provisions businesses are expected to employ local personnel and provide, without discrimination, training with a view to improving skill levels.²⁷ They should also work with trade unions and government representatives to mitigate the adverse impacts of closures and other changes in operations which have major employment effects and refrain from threatening to transfer production or workers in order to hinder the right to organise.

3. Disclosure

The Guidelines request that multinational enterprises publish “timely and accurate information”, which shall be made available to **employees, local communities, special interest groups, and the public at large**. However, this disclosure “should be tailored to the nature, size and location of the enterprise, with due regard of costs, business confidentiality and other competitive concerns.”

- *Financial disclosure*: accurate and relevant information should be disclosed in a timely manner on all material matters regarding the corporation, including the “financial situation, performance, ownership, and governance” of the company.²⁸

²² OECD Guidelines, *op. cit.*, Chapter V, §§ 1 a) and b); 2 a), b) and c); 6; 7 and 8.

²³ *Ibid.*, Chapter V, § 1 c. See also ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998; ILO, Convention No. 182 on the Worst Forms of Child Labour, adopted on 17 June 1999, entered into force in 2000.

²⁴ OECD Guidelines, *op. cit.*, Chapter V, § 1 d). See also ILO, Convention No. 29 on Forced Labour, adopted in 1930, entered into force in 1932; ILO, Convention No. 105 Abolition of Forced Labour, adopted in 1957, entered into force in 1959.

²⁵ OECD Guidelines, *op. cit.*, Chapter V, § 1 e). See ILO, Convention No. 111 concerning Discrimination (Employment and Occupation), adopted in 1958, entered into force in 1960 (The text provides a non-exhaustive list of grounds including “race, color, sex, religion, political opinion, national extraction or social origin”); OECD, Guidelines, *op. cit.*, Chapter V, Commentary on Employment and Industrial Relations. (The text includes the full list of grounds of discrimination such as “marriage, pregnancy, maternity or paternity”); ILO, Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted in 1977, amended in 2000.

²⁶ OECD Guidelines, *op. cit.*, Chapter V, § 4 a) and Commentary.

²⁷ *Ibid.*, Chapter V, § 5.

²⁸ *Ibid.*, Chapter III, § 1 and Commentary 28.

– *Non-financial disclosure*: companies are also expected under the Guidelines to report issues of a non-financial nature, especially in areas where “reporting standards are still emerging”.²⁹ This includes disclosures regarding:

- the company’s aims;
- social, environmental and risk reporting;
- risk management systems;
- other critical issues concerning employees and other stakeholders connected to the company.

This may include, for example, “information on the activities of **subcontractors** and **suppliers** or of **joint venture partners**.”³⁰ Companies are also encouraged to publicly state principles or rules of conduct, including information on their social, ethical and environmental policies and other codes of conduct to which the company subscribes (with respect to the countries or entities to which they apply).³¹

Companies are also encouraged to report on their **performance** measured against these standards. Enterprises are encouraged to provide easy and economical access to published information and to consider making use of information technologies to meet this goal. Enterprises may take special steps to make information available to communities that do not have access to printed media, especially “**poorer communities that are directly affected by the enterprise’s activities**.”³²

With regard to corporate transparency, the Guidelines unfortunately do not include recommendations on country-by-country reporting and social and environmental disclosure requirements in line with international best practice.³³

Companies are encouraged to inform workers (Chapter V, §6) when they envisage making changes to their operations that may have a significant impact on the livelihoods of their employees (for example, in the case of closure of an entity involving collective redundancies). In particular, they should provide reasonable notice to representatives of employees and, where appropriate, to the relevant government authorities; co-operating with them “so as to mitigate to the maximum extent practicable adverse effects”³⁴ and, ideally, giving stakeholders prior notice before a final decision is taken.

²⁹ *Ibid.*, Chapter III, § 3 and Commentary.

³⁰ *Ibid.*, Chapter III and Commentary, p.30.

³¹ *Ibid.*, Chapter V, § 4.

³² *Ibid.*, Chapter III and Commentaries, p. 31.

³³ OECD Watch, *Statement on the update of the OECD Guidelines for MNEs*, 25 May 2011, <http://oecdwatch.org>

³⁴ OECD Guidelines, *op. cit.*, Chapter V, § 6

4. Environmental protection

Three distinct axes structure the principles in the field of environmental protection (Chapter VI):³⁵

Environmental management system

The Guidelines adopt a three-pronged approach that encourages multinational enterprises to establish an environmental management system, which should feature:³⁶

- Collection and evaluation of adequate and timely *information* regarding the environmental, health, and safety impacts of their activities;
- Establishment of measurable *objectives* and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives;
- Regular *monitoring and verification of progress* toward environmental, health and safety objectives.

Additionally, companies are requested to **provide adequate education and training to employees in environmental health and safety matters**. Enterprises are also encouraged to work to raise the level of environmental performance in all parts of their operations, even where “this may not be formally required by existing practice in the countries in which they operate.”³⁷

Communications on environmental matters

Companies are also required to be transparent in their communication of information including:³⁸

- Providing the public at large and employees with adequate **information concerning the environmental, health and safety impacts of their activities**;
- **Consulting**, in a timely manner, the relevant **stakeholders** (employees, clients, suppliers, contractors, local communities and the public at large) as regards the company’s policies on the environment, health and safety.³⁹

³⁵ *Ibid.*, Chapter VI.

³⁶ *Ibid.*, Chapter VI, § 1.

³⁷ *Ibid.*, Chapter VI, Commentary.

³⁸ *Ibid.*, Chapter VI, § 2.

³⁹ *Ibid.*, Chapter VI, Commentary.

The precautionary principle

Invoking the precautionary principle that emerged from the Rio Declaration⁴⁰ in 1992, the Guidelines call on companies to:

- assess and address in decision-making, the environmental, security and health impacts of the proposed activities, where appropriate via the preparation of a suitable **environmental impact assessment**;⁴¹
- Adopt effective measures to prevent or reduce the threat of serious harm to the environment and to health and safety (noting that the lack of full scientific certainty should not be a reason for postponing cost-effective measures to prevent or minimise such damage);⁴²
- Maintain contingency plans to prevent, mitigate and control serious environmental and health damage from their operations, and adopt mechanisms facilitating prompt reporting to the competent authorities.⁴³

5. Combating bribery

The chapeau of chapter VII states that “enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion”⁴⁴. The Guidelines refer to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and its commentary as well as the UN Convention against Corruption.⁴⁵ The Guidelines’ commentary draws recommendations regarding anti-bribery policies and good governance practices.⁴⁶

6. Consumer protection

Companies are encouraged in this area to comply with fair and honest practices⁴⁷ in their commercial business, marketing and advertising activities, and to take all

⁴⁰ UN, *United Nations Conference on Environment and Development*, Rio de Janeiro, Brazil 3-14 June 1992. Principle 15 of Rio Declaration states: “To protect the environment, precautionary measures should be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be an excuse for postponing the adoption of effective measures to prevent environmental degradation.”

⁴¹ OECD Guidelines, *op. cit.*, Chapter VI, § 3.

⁴² *Ibid.*, Chapter VI, § 3.

⁴³ *Ibid.*, Chapter VI, § 5.

⁴⁴ *Ibid.*, Chapter VII, Chapeau.

⁴⁵ *Ibid.*, Chapter VII, Commentary; OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, entered into force 15 February 1999, www.oecd.org; UN Convention against Corruption entered into force on 14 December 2009, www.unodc.org

⁴⁶ OECD Guidelines, *op. cit.* Chapter VII and Commentary on Combating Bribery, Bribe Solicitation and Extortion.

⁴⁷ OECD Guidelines, *op. cit.*, Chapter VIII, § 4.

reasonable steps to ensure the safety and quality of goods or services they provide.⁴⁸ Enterprises are urged to develop honest business practices⁴⁹ and respect the right of consumers to privacy and the protection of their personal data.⁵⁰

More specifically, the Guidelines develop the obligation to inform consumers, and to make available transparent and effective means⁵¹ to ensure the health and safety of consumers so as to allow them to make informed decisions.

For more information regarding legislation protecting consumers, see section V of this guide on the use of voluntary commitments for greater corporate accountability.

B. The implementation of the Guidelines

One of the main challenges when discussing the implementation of the Guidelines is that they can be interpreted in different manners according to the institution (NCP, see following chapter) tasked with their implementation. That is to say, a similar factual case brought to two different NCPs may give very different results. The following section should therefore be seen as a reference to concepts and issues that may arise when submitting a complaint, which may differ depending on where the complaint is brought. For example, an interpretation made by the Swedish NCP does not oblige the UK NCP to come to the same conclusion, and vice versa. It is however expected that an NCP will respect its own interpretation. Civil society organisations are calling on the harmonisation of the Guidelines' interpretation.

For a helpful updated analysis and overview of recent NGO cases submitted under the OECD Guidelines, please visit the website of the international network of civil society organisations called OECD Watch.⁵² The Trade Union Advisory Committee to the OECD (TUAC) also maintains a list of trade union cases submitted to NCPs together with profiles of the National Contact Point.⁵³

Whilst they are addressed to multinational enterprises, the Guidelines **do not provide a precise definition of the term**.⁵⁴ Chapter I, section 4 merely states that in general these usually comprise: “Companies or other entities established in more than one

⁴⁸ *Ibid.*, Chapter VIII, Preamble.

⁴⁹ *Ibid.*, Chapter VIII, § 4.

⁵⁰ *Ibid.*, Chapter VIII, § 6.

⁵¹ See also, United Nations, Guidelines for Consumer Protection, New York, adopted in 1999, revised in 2003; OECD, Guidelines for Consumer Protection in the Context of Electronic Commerce, adopted in 1999.

⁵² OECD Watch: www.oecdwatch.org. OECD Watch maintains a database of cases filed by NGOs, as well as information regarding reviews of NCPs, briefing papers, and steps required to file an OECD Guidelines complaint. See next chapter on implementation.

⁵³ See TUAC's list of trade union cases submitted under the OECD Guidelines: www.tuacoeedmneguidelines.org/cases.asp. TUAC also maintains profiles of NCPs and key information sources on the Guidelines.

⁵⁴ OECD Guidelines, *op. cit.*, Chapter I, § 4.

country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, state or mixed. The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities).⁵⁵ The OECD secretariat has also clarified that the Guidelines also apply to government entities such as central banks, sovereign wealth funds, and export credit agencies if and when these entities operate in the commercial arena.

1. The Guidelines and supply chains

The Guidelines include a far-reaching approach to due diligence and responsible value chain management. The Guidelines require multinational enterprises to “seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.”⁵⁶ As per the Commentary of the Guidelines, the term ‘business relationship’ includes “relationships with business partners, **entities in the supply chain** and any other non-State or State entities directly linked to its business operations, products or services.” Multinational enterprises are therefore responsible for avoiding and addressing adverse impacts in their activities, including in their value chains. The requirement to undertake due diligence to identify, prevent and (in some cases⁵⁷) remedy actual and potential adverse impacts also applies to a company’s value chain.

Paragraph 13 of Chapter II of the Guidelines addresses the issue of supply chains, and demands enterprises to “**encourage, where practicable, business partners, including suppliers and sub-contractors**, to apply principles of corporate conduct compatible with the Guidelines.”⁵⁸

The Commentary pertaining to this recommendation does however recognise practical limitations in the capacity of enterprises to influence the conduct of their business partners: these limitations are “related to product characteristics, the number of suppliers, the structure and complexity of the supply chain, the market position of the enterprise vis-à-vis its suppliers or other entities in the supply chain.”⁵⁹

⁵⁵ *Ibid.*, Chapter I, § 4.

⁵⁶ OECD Guidelines, *op. cit.* Chapter I, § 3.

⁵⁷ Remedy will be required only if the company is causing or contributing to the impact (not if it is “directly linked” to their operations, products or services.)

⁵⁸ OECD Guidelines, *op. cit.*, Chapter II, § 13.

⁵⁹ *Ibid.*, Commentary on General Principles, § 21.

However, the Commentary specifies that “enterprises can also **influence suppliers** through contractual arrangements such as management contracts, pre-qualification requirements for potential suppliers, voting trusts, and licence or franchise agreements”⁶⁰.

Thus, the responsibility of an enterprise will be determined by its relationship to an adverse impact: to meet its responsibility to prevent or mitigate adverse human rights impacts, the enterprise is expected to **use its leverage** – alone or in co-operation with other entities- to **influence the entity causing the adverse human rights impact**⁶¹.

This influence can assume several forms:

- Through direct influence, expressed via command: this concept affirms that an enterprise bears a responsibility to ensure that every entity which it either *de jure* or *de facto* controls respects the Guidelines to the same extent as the enterprise itself;
- Stemming from other business practices, namely those pertaining to structural characteristics: such as leveraging market power⁶² or other market arrangements (for example, accreditation programmes and product tracing systems that ensure supplier accountability for particular aspects of their performance).⁶³

Assessments may vary between NCPs and are established on a case-by-case basis. Consult the website of OECD Watch, who publishes case updates and analysis of different NCPs, in order to get an updated overview over recent cases.⁶⁴

2. Guidance on application of the guidelines to specific industrial sectors

The Guidelines state explicitly that they apply to all sectors of the economy, including the financial sector.⁶⁵ The OECD has recently started sector-specific projects to clarify and elaborate on how exactly the Guidelines apply to specific industrial sectors. One of the first projects concerns due diligence in the financial sector. As part of this project, the OECD Working Party on Responsible Business Conduct confirmed that the Guidelines apply to minority shareholders in companies and/or projects that may be causing adverse impacts.⁶⁶

⁶⁰ *Ibid.*

⁶¹ Commentary on Human Rights, §43.

⁶² Companies having market power vis-à-vis their suppliers may be able to influence business partners’ behaviour even in the absence of investment giving rise to formal corporate control.

⁶³ OECD, Report by the Chair of the Annual Meeting of National Contact Points, 2003, p. 26, www.oecd.org

⁶⁴ See OECD Watch, www.oecdwatch.org

⁶⁵ Part I on Concepts and Principles states that “A precise definition of multinational enterprises is not required for the purposes of the Guidelines. These enterprises operate in all sectors of the economy.” The Commentary on the General principles (§ 12) also refers to the financial sector.

⁶⁶ See OECD, *Scope and application of ‘business relationships’ in the financial sector under the OECD Guidelines for Multinational Enterprises*, June 2014.

Sector-specific guidance

Sector-specific initiatives based on the Guidelines are being developed and used to promote, in specific sectors, what the OECD refers to as “responsible business conduct” (RBC). The OECD has developed or is in the process of developing sector specific due diligence guidance for agricultural supply chains, garment and footwear supply chains, meaningful stakeholder engagement in the extractive sector, and the financial sector. The OECD also completed Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas providing recommendations to help companies respect human rights and avoid contributing to conflict through their mineral purchasing decisions and practices.



➤ Demonstration on the occasion of the World Social Forum in Nairobi, 2008.

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CHAPTER II

The mechanism for implementing the Guidelines

* * *

A. What bodies are involved in the implementation of the Guidelines?

The institutional mechanisms set up to promote respect for the Guidelines is based on two main organs: the National Contact Points (1) and the Investment Committee and the Working Party on Responsible Business Conduct (2).

In addition to these organs, the Business and Industry Advisory Committee (BIAC) (3), the Trade Union Advisory Committee to the OECD (TUAC) (4), as well as the international NGO network OECD Watch (5) play important advisory roles and are explicitly mentioned in the Guidelines.

1. The National Contact Points

Under the Guidelines, each adhering government has the formal obligation to establish a **National Contact Point (NCP)**.

NCPs have various duties. Specifically, they must **ensure the promotion of the Guidelines, resolve issues prompted by their implementation via the “specific instances” procedure**, and assist civil society in contributing to the interpretation of the texts. The NCPs are also encouraged to collaborate with each other when needed.

The process of examining distinct issues, the so-called “specific instance” procedure, constitutes the **most important competency** of the NCPs with respect to multinational enterprises’ responsibilities as regards human rights. It allows for trade unions, affected communities and other interested parties to refer a case to the NCP in the country where a company has failed to comply with the Guidelines or – if that country does not have an NCP – to the NCP in the country where the company is headquartered (see below).

Structure of the NCPs

According to the Guidelines, States enjoy a certain degree of flexibility to determine the structure and organisation of their NCP. Their composition and organisation should enable them to operate in an impartial manner while maintaining an adequate level of accountability vis-à-vis the adhering government.

NCPs are **governmental agencies organised in various forms**. They may, for example, be structured around a senior official; an administrative office headed by a senior officer, or be formed through the co-operation of representatives of various public agencies.⁶⁷ The Canadian NCP is an example of an inter-ministerial structure presided over by the Ministry of Foreign Affairs and International Trade, while the Italian NCP is established solely within the Ministry of Economic Development. Furthermore, NCPs can be comprised of one or several public agencies; or they may be of a tripartite nature (formed by government, employees and companies), and might also formally include NGOs as stakeholders in their structure in what is known as a quadripartite structure.

In the **United Kingdom**, the NCP is composed of officials from the Department for Business, Innovation and Skills (BIS) and is overseen by a steering board composed of various government officials and four external members appointed by the Trades Union Congress, the Confederation of British Industry, and NGOs.⁶⁸

In the **Netherlands**, the NCP⁶⁹ consists of four individuals of different (non-governmental) backgrounds that operate and handle complaints independently from the government. In addition, four government representatives of various ministries have an advisory function to the independent NCP members. The Secretariat of the Dutch NCP is based at the Ministry of Foreign Affairs.

Despite the innovative nature of this mechanism, the fact that each adhering state establishes its own NCP means that the **functioning, efficiency and independence of the NCPs vary considerably**, and indeed remain the subject of much criticism. Certain NCPs have adopted effective practices and have demonstrated their concern to promote the principles of “responsible business conduct”.

NGOs have often stressed the importance of strengthening the NCP mechanism to ensure the credibility and effectiveness of the Guidelines. By encouraging NCPs to adopt common rules and standards across the different countries, it would enable them to establish minimal criteria and guidance with regard to the specific instance procedure.

To guarantee their impartiality, NCPs’ composition should include different stakeholders, including independent experts, steering committees or consultative committees which could assist the NCPs in their work. The Guidelines’ Procedural Guidance for NCPs contains core criteria for NCP functional equivalence⁷⁰ such as

⁶⁷ OECD Guidelines, *op. cit.*, Procedural Guidelines. For an overview of the institutional arrangements of the various NCPs, see: OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2007 - Corporate responsibility in the financial sector*, *op. cit.*

⁶⁸ UK Department for Business, Innovation & Skills, The UK National Contact Point for the OECD Guidelines for Multinational Enterprises, www.gov.uk

⁶⁹ NCP Netherlands, www.oecdguidelines.nl/ncp

⁷⁰ OECD Guidelines *op. cit.*, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Core Criteria for Functional Equivalence in the Activities of NCPs.

visibility, accessibility, transparency and accountability, but civil society organisations believe it remains insufficient since it does not require NCPs to be independent, multi-stakeholder or at a minimum to be overseen by a steering committee.

Lack of financial resources and permanent staff is a recurrent problem for most NCPs that seriously hampers their effectiveness.⁷¹

NCPs are required to prepare an annual report to the Investment Committee that communicates both the nature and results of the NCP's activities (including those relating to the procedures for 'specific instances').⁷² These reports are submitted to the Investment Committee in the run-up to the annual meeting of the NCPs in Paris each June.⁷³

Concerns related to the functioning and effectiveness of the NCPs are discussed at the end of this chapter.

2. The Investment committee and the Working Party on Responsible Business Conduct

The Investment Committee

The Investment Committee was created in 2004 and is the OECD body that oversees the functioning of the Declaration on International Investment and Multinational Enterprises.⁷⁴

The Investment Committee is composed of government representatives of OECD member countries, adhering countries and observers. It has been assigned five specific tasks in relation to the Guidelines:⁷⁵

- To respond to the questions concerning the interpretation of the Guidelines;
- Organising consultations with civil society representatives and states not adhering to the Guidelines;
- To publish clarifications regarding the interpretation of the Guidelines to ensure uniform understanding between the different countries (noting that such clarifications may only be requested by member countries, TUAC, BIAC, and OECD Watch);

⁷¹ ILO-OECD *Conference on Employment and Industrial Relations: Promoting Responsible Business Conduct in a Globalizing Economy*, 23-24 June 2008, Paris, France, p. 11. www.oecd.org

⁷² OECD Guidelines, *op. cit.*, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprise.

⁷³ OECD Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, available at: www.oecd.org

⁷⁴ In 2004 the CIME (Committee on International Investment and Multinational Enterprises) and CMIT (Committee on Capital Movements and Invisible Transactions) merged to form the Investment Committee.

⁷⁵ OECD, OECD Guidelines for Multinational Enterprises: Frequently asked questions, www.oecd.org

- To review the Guidelines and procedures of implementation in order to ensure their relevance and effectiveness;
- To provide reports to the OECD Council on the Guidelines.

The Investment Committee may opt to invite experts (from the OECD, other international organisations, NGOs or from academia) to examine and report on either general topics or specific issues in particular areas of concern, such as child labour or human rights.⁷⁶

OECD Watch believes that the Investment Committee has thus far taken an insufficiently proactive role in facilitating the effective functioning of NCPs and ensuring genuine functional equivalence among NCPs. In its 2015 report *Remedy Remains Rare*, OECD Watch called on the Investment committee to do so by institutionalizing and managing a system of mandatory NCP peer reviews and initiating a process to revise the Guidelines' Procedural Guidance to strengthen NCP structure and functioning.⁷⁷

The Working Party on Responsible Business Conduct

The Working Party on Responsible Business Conduct is a subsidiary body of the OECD Investment Committee. It is an inter-governmental body inaugurated in 2013 and tasked with assisting in “furthering the effectiveness of the Guidelines, fostering NCP functional equivalence, pursuing the proactive agenda, promoting engagement with non-adhering countries, partner organisations, and stakeholders, and serving as central point of information on the Guidelines”⁷⁸.

3. The Business and Industry Advisory Committee (BIAC)

The Business and Industry Advisory Committee is an independent body officially recognised by the OECD as the **representative body of business and industry**.⁷⁹ Composed of the main employers' organisations of member countries of the OECD, BIAC's mandate is to advise and counsel the business community and to make recommendations on policy matters pertaining to the OECD's work.

4. The Trade Union Advisory Committee (TUAC)

The TUAC (Trade Union Advisory Committee) is an international trade union organisation with consultative status to the OECD and its committees. It brings together 59 trade union affiliates in 34 countries and represents approximately

⁷⁶ OECD Guidelines, *op. cit.*, Commentary on the Implementation Procedures

⁷⁷ OECD Watch, *Remedy Remains Rare*, June 2015, pp. 14-19, <http://oecdwatch.org>

⁷⁸ OECD, “About the OECD Guidelines for Multinational Enterprises”, <http://mneguidelines.oecd.org/about/>

⁷⁹ BIAC, www.biac.org

70 million workers.⁸⁰ As an international trade union, TUAC is the interface between trade unions and the OECD. Its main role is to hold regular consultations with the various OECD committees and member countries, **representing the position of the various trade unions** affiliated to the organisation.

TUAC is the lead trade union organisation on the OECD Guidelines. It provides policy input to the work of the OECD and supports trade unions around the world to use the Guidelines. TUAC maintains a web site of trade union cases submitted under the OECD Guidelines together with key information sources.

At the annual meeting of NCPs, TUAC presents an annual report based on consultations with trade unions as to their experience of the implementation of the Guidelines. Finally, TUAC plays an important role in relation to the different trade unions of the member countries of the OECD, both advising and intervening when the causes it promotes are challenged.

5. OECD Watch

OECD Watch is an international network of over 100 civil society organisations promoting corporate accountability.⁸¹ FIDH is a member of OECD Watch. OECD Watch aims to ensure that business activity contributes to sustainable development and poverty eradication and that corporations are held accountable for their impacts around the globe. Members of OECD Watch share a common goal to improve corporate accountability mechanisms in order to achieve sustainable development and enhance the social and environmental performance of corporations worldwide.

OECD Watch is committed to the following aims:

1. Ensure effective access to remedy for communities, workers and individuals negatively affected by business conduct.
2. Increase the effectiveness and reach of the OECD Guidelines for Multinational Enterprises as a tool to ensure corporate accountability and access to remedy.
3. Build capacity of civil society organisations to use the OECD Guidelines complaint mechanism to address cases of corporate misconduct.

If you are considering submitting a case before an NCP, it is recommended to familiarise yourself with the OECD Watch website, which provides detailed and updated information about procedures for submitting cases, NCP's decisions on admissibility and merits, and recent analysis on scope and interpretation of the Guidelines. OECD Watch is also a focal point to put forward civil society's views in the OECD Investment Committee and Working Party on Responsible Business Conduct. It is recommended that anyone interested in filing an OECD Guidelines

⁸⁰ TUAC, "Affiliates", www.tuac.org/en/public/tuac/affiliates.phtml

⁸¹ OECD Watch, <http://oecdwatch.org>

complaint with an NCP get in contact with OECD Watch (info@oecdwatch.org) before doing so.

C. The “Specific Instances” Procedures

The “specific instances” procedure establishes the means by which various concerned parties can engage with the relevant NCP where a particular company has failed to respect the Guidelines (see chapter 1 of this section on the content and scope of the Guidelines).

② Who can file a complaint?

Any “interested party” – representatives of employers’ organisations, trade unions, NGOs and individuals – can file a complaint with an NCP if it can demonstrate it has an interest in the issues. Any individual or group of people from, for example, a village or community, or an employee, could therefore file a complaint with the NCP, either directly or through an NGO or trade union.

② To which NCP should a “specific instance” be filed: home or host country?

The case should be submitted to the NCP in the country where the alleged violation occurred (if an NCP exists in that country). This practice has the benefit of encouraging a local resolution among local actors directly responsible for and/or affected by a violation. However, it also often allows parent companies and home country governments to shirk their responsibility by transferring the case to the local NCP.

NGOs have sought to highlight the issue of parent company responsibility by simultaneously filing cases before both the host and home country NCPs and calling on both NCPs to collaborate and contribute equally to resolving the case. If a case is filed simultaneously in several countries, NCPs are expected to collaborate with each other to handle the issues raised.

In 2011, in an attempt to highlight the responsibility of the Dutch agricultural company Nidera for violations of the Guidelines in Argentina, a group of Argentine and Dutch NGOs filed a case with the Dutch NCP (rather than the Argentine NCP) and emphasised the necessity of handling the complaint in the Netherlands, arguing that local violations of the OECD Guidelines were the direct result of strategic policy decisions made by the parent company⁸².

⁸² See *CEDHA et al. vs Nidera*, http://oecdwatch.org/cases/Case_220. See also Joseph Wilde-Ramsing, *Toward parent company and home country responsibility in OECD Guidelines cases*, 25 September 2009, <http://oecdwatch.org>

► NOTE TO TRADE UNIONS

A trade union wishing to file a complaint should contact either its national union and/or the relevant Global Union Federation. TUAC can also provide assistance as it has published a Trade Union Guide to the OECD Guidelines⁸³ which includes a check-list for filing a complaint. TUAC also publishes a list of trade union cases submitted under the Guidelines.

② What might cause an NCP to reject a case?

Some of the reasons frequently given by NCPs for the **inadmissibility of complaints** are of particular note:

- The inadmissibility of a complaint based on the **definition of what constitutes a multinational enterprise**.⁸⁴
- Inadmissibility due to **ongoing judicial proceedings** in relation to the issue at hand. Despite the fact that the Guidelines state that “NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned”, NCPs do frequently reject cases on these grounds⁸⁵. If the NCP evaluates that it can bring a positive contribution to the issues raised (and not generate “any serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation”), it should offer its good offices.
- One of the most common frustrations that complainants face when bringing NCP cases is the application of an **unreasonably high burden of proof** to reject cases. NCPs have rejected 43 of the 250 (17%) cases filed by communities, individuals and NGOs because the NCP did not consider that the complainants had provided sufficient evidence of a breach of the Guidelines. The Procedural Guidance directs NCPs to determine whether a complaint raises a *bona fide* issue and to consider whether the issue is “material and substantiated.” The Procedural Guidance does not define “substantiated,” which has led to widely varying interpretations by different NCPs. While many NCPs apply an interpretation that leads them to accept complaints that raise credible claims, others have used this language to require a level of certainty that is inappropriate and often impossible for complainants to meet.⁸⁶

⁸³ TUAC, *The OECD Guidelines for Multinational Enterprises, Recommendations for Responsible Business Conduct in a Global Context, Trade Union Guide*, www.tuaoecdmguidelines.org

⁸⁴ For an example, see *Bahrain Watch et al. vs. Dae Kwang*, http://oecdwatch.org/cases/Case_315

⁸⁵ OECD Guidelines, *op. cited*, Commentary on the Implementation Procedures, Initiative assessment, §26, p 83.

⁸⁶ For an example, see http://oecdwatch.org/cases/Case_251 and *Privacy International et al. vs. Trovicor*, http://oecdwatch.org/cases/Case_287.

➤ Process and outcome

Initial Assessment

The NCP will first conduct an initial examination as to whether issues raised are relevant to the implementation of the Guidelines; it then determines whether they warrant further examination and responds to the parties responsible for raising them. The NCP will take into account, amongst other details, the identity of the party and their particular interest in the case; the relevance of the concern; the evidence provided to support the claims; and the manner in which similar issues have been handled at either a national or international level.

After examining the original submission, the NCP can take two courses of action:

Declare that the complaint is unfounded – a dismissal

Where the complaint is dismissed the NCP will inform the complainant/applicant as to the basis of the decision.

If the NCP's decision to dismiss the case is based on a flawed interpretation of the Guidelines, or if the NCP has failed to follow the Procedural Guidance in its dismissal, a request for clarification may be referred to the Investment Committee by government authorities or by TUAC, BIAC, or OECD Watch.

Declare the complaint admissible

In this situation the NCP should offer its good offices to the parties to facilitate a resolution to the **issues raised**.

The NCP shall then consult the parties and, where appropriate, it will:

- With the agreement of the concerned parties, offer to facilitate entry into non-adversarial and consensus-based dialogue, such as mediation or conciliation talks, to help resolve the issues of contention;
- Solicit advice from the relevant authorities and/or representatives from the business community, trade unions, NGOs and other experts (which may include either the appropriate authorities in non-adhering countries, or the management of the company in the home country);⁸⁷
- Consult, as appropriate, the NCP in the other country (or countries) concerned;
- Seek the opinion of the Investment Committee when doubts exist as to the interpretation of the Guidelines with respect to the case.

When concluding the procedure, the NCP will issue a public statement. If the parties can reach an agreement the matter will be considered resolved.

⁸⁷ OECD Guidelines, *op. cit.*, Procedural guidance, I.C. § 2a.

If, however, no solution is found, the NCP is obliged to issue a public statement. The NCP may also make **recommendations** to the parties concerned. The Procedural Guidance allows for – but does not require – NCPs to make a determination on whether the Guidelines had been violated in cases where mediation fails.⁸⁸

The Duration of the Procedure

The Guidelines set out an indicative time frame on how long the different stages in the examination of a case should last⁸⁹. According to the Guidelines, the process should last for approximately 12 months. In many instances it has taken twice as long (even simply to decide on the admissibility of the case).

The Confidentiality of Proceedings

According to the Procedural Guidance, transparency is a core operating principle of NCPs. However, in facilitating resolution of the issues raised, the NCP will take the necessary steps to ensure that both the business' and other parties' sensitive material remains confidential.⁹⁰ While the procedures are under way, the confidentiality of the proceedings will be maintained. Following receipt of a complaint, any information or documentation received or exchanged between parties cannot normally be disclosed.

At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party involved will remain confidential, unless both parties agree to their disclosure.

After consultation with the parties involved, the NCP will make publicly available the results of these procedures “unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines.”⁹¹ The publication of the results of inquiries varies according to the NCP. Some NCPs publish this information on their websites. Whilst some NCPs prefer not to divulge the name of companies involved in their reviews, others consider that such information need not remain confidential once the procedure has been completed. NCPs are required to publish their final statements.

The confidentiality of the procedure remains an issue that is still debated. BIAC and certain NCPs⁹² insist that the confidentiality rules be extended to all phases of the procedure (thus also including the initial filing of the complaint). They contend that statements made during the proceedings violate the Guidelines. The companies

⁸⁸ See OECD Watch, *Statement on the update of the OECD Guidelines*, 25 May 2011, *op. cit.*

⁸⁹ OECD Guidelines, *op. cit.*, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Indicative Timeframe.

⁹⁰ OECD Guidelines, *op. cit.*, Procedural guidance, § I. C) 4.

⁹¹ OECD Guidelines, *op. cit.*, Procedural guidance, § I. C) 3.

⁹² Some NCPs advocate extending confidentiality to all phases of the procedure; see the Australian NCP's statements at: www.ausNCP.gov.au/ and the British NCP's at: www.berr.gov.uk

are of the view that the confidentiality of proceedings facilitates the mediation process.⁹³ On the other hand, publicity can be a useful means of applying pressure, helping ensure that the Guidelines are more effectively applied.⁹⁴

The Guidelines' commentaries require that a balance be struck between confidentiality and transparency.⁹⁵ Whilst they stipulate that the procedure will normally remain confidential, the commentaries do not state that information of a secondary nature, such as the status of proceedings, cannot be disclosed.⁹⁶ OECD Watch has produced guidance for (potential) complainants as to how to navigate the transparency *versus* confidentiality issue during specific instance procedures.⁹⁷

Follow-up of the case

Though not all NCPs do so, the best performing NCPs develop concrete monitoring and follow-up procedures to ensure the implementation of the recommendations of final statements issued or commitments agreed to in joint statements resulting from NCP processes. NCPs such as the Dutch, UK, Norwegian and French generally require complainants to report back on implementation of the recommendations/agreements three months and one year after the closing of the case.⁹⁸

HOW TO FILE A COMPLAINT?

Legal representation is not required before the NCPs, and therefore the claimants can potentially avoid financial expenses. It is nonetheless important to note that companies are likely to engage legal counsel, and not doing so may therefore result in an inequality of legal resources available to the parties. Certain NCPs, such as the Dutch NCP, provide a prior advisory service to potential complainants: they can advise as to the likelihood of the filing being accepted, or may suggest how the submission might be improved.⁹⁹ This is what the Dutch NCP refers to as the optional preliminary consultation. Going a step further, the Norwegian NCP has actually provided complainants with a technical assistant (consultant) to equal out the power imbalance between the parties in some cases.¹⁰⁰

⁹³ OECD Watch, *The Confidentiality Principle, Transparency and the specific instance procedure*, 2006, p.3. <http://oecdwatch.org>

⁹⁴ For advices on transparency and confidentiality rules once a complaint is filed, see OECD Watch, *Transparency & Confidentiality*, <http://oecdwatch.org>

⁹⁵ OECD Guidelines, *op. cit.*, Procedural Guidance, C.4, Commentary on the Implementation Procedure § 38.

⁹⁶ *Ibid.*, Commentary on the Implementation Procedure.

⁹⁷ See OECD Watch, *Transparency and Confidentiality*, *op. cited*

⁹⁸ See, for example, the Nidera case handled by the Dutch NCP, http://oecdwatch.org/cases/Case_220

⁹⁹ ILO-OECD Conference on Employment and Industrial Relations: Promoting Responsible Business Conduct in a Globalizing Economy, *op. cit.*, p. 11.

¹⁰⁰ OECD Watch, Norwegian Support Committee for Western Sahara vs Sjovik, http://oecdwatch.org/cases/Case_247

There is no one model for writing a complaint. It is important to note that some NCPs list the information required or provide an on-line for filing complaints. The list of the different NCPs can be found here: <https://mneguidelines.oecd.org/ncps>

✧ **OECD Watch complaint template¹⁰¹**

COMPLAINT ELEMENT	DESCRIPTION
Date	Date the complaint will be submitted to the NCP and any other recipients.
Contact information of NCP receiving the complaint	This includes the full address of the NCP and, if known, the name of the chair or representative, email address and telephone number(s). If you are sending the complaint to other NCPs, the OECD, government officials, OECD Watch, TUAC, etc., you should also mention in this part of the letter here using 'cc'.
Subject line	OECD Watch recommends stating the name of the company, the issues raised, and the country where the problem is occurring.
Introduction	List at a minimum: name of the complainant, company name, the problem and the location of the violations. You can also briefly state the main request to the NCP and the chapters that are breached.
Explain your interest in the complaint/ who you represent	For example, an NGO's interest could stem from its mission or work with the affected union members or community.
Enterprise contact details	Contact details for the enterprises, include full company names, addresses, and any other relevant details that are known, such as contact names, telephone numbers, email addresses and website addresses.
Structure of the company	If the case involves more than one company, describe their structure and relationships. For example, parent-subsidiary relationship, supply chain relationship, enterprise-bank relationship, etc.
Context of the complaint	Include general information about the broader background, context or location of violations mentioned in the complaint before going into detail about the specific breaches.
List the chapter and paragraphs you believe the company has breached	This information should include the who, how, what, when, where and why for each allegation. In addition, you should provide detailed evidence and information that supports the allegations. You can make this section as short or long as you see fit, but make sure your argumentation is clear. The documents can be annexed to the complaint, but they should be mentioned and referenced in the text.
Other relevant international standards the NCP should take into account when considering the complaint	If applicable, other instruments can be highlighted to show the severity of the problem. Complainants will have to decide the most effective way of presenting this information.
Previous attempts at resolution	Explain whether you have sought to resolve the issues directly with the enterprise and if so, what was the enterprise's response?
Recipient NCP and justification (if necessary)	In some instances, the host and home countries both have NCPs. The complaint can be submitted to both NCPs. However, an explanation on why the case is being submitted to both NCPs is recommended.
Complaint goals	If it makes strategic sense, explain your demands and/or what you think the company should do to resolve the problem.
Request to the NCP	State what you expect from the NCP, e.g. mediation, a fact-finding mission, make a determination, etc.
Confidentiality request and justification (if necessary)	Indicate if the names of individuals, sources of evidence or any documentation have been anonymised, and why this is justified.

¹⁰¹ OECD Watch, *Calling for Corporate Accountability*, p 45-47, June 2013, available at: <http://oecdwatch.org>

Statement of 'good faith' to engage in the complaint procedure	Acknowledge your good intentions to engage in the process and what you will do to facilitate this. You can also reference how you will respect confidentiality in case you are, for example, pursuing other strategies such as media outreach, advocacy and campaigning.
Closing	The closing should state that a written confirmation of receipt is expected.
Signature	Add names and signatures of all of organisations who co-sign the complaint.
Attachments and/or appendices	Provide a list of attachments and/or appendices to the complaint.

Outcome

The NCPs perform mainly a role of conciliation and mediation, the quality of which tends to vary considerably between them. The NCP's findings are not legally enforceable and their endeavours reflect an approach that is non-contentious in respect of alleged violations. As non-judicial organs, they cannot grant financial compensation to complainants, nor impose pecuniary sanctions on companies. Although they lack the capacity to enforce their decisions, the mere fact that the NCP's conclusions are out in the public domain can have an influence on the conduct of the parties. Civil society organisations regret that the 2011 update failed to sufficiently establish states duties to protect human rights in cases of violations of the Guidelines. The main role of the NCP remains to reach a mediated outcome. One way in which the recommendations of the NCP could be given greater weight would be to **link certain recommendations to some sort of sanction** (see examples below), most notably in relation to export credit programmes, overseas investment guarantees and inward investment promotion programmes.

NCPs and financial consequences

In April 2015, the final statement of the **Canadian NCP** regarding a specific instance filed by the Canada Tibet Committee resulted in the withdrawal of the Canadian government's Trade Commissioner Services and/or Export Development Canada (EDC) financial services for the company China Gold International Resources for its operations in the Gyama Valley. The decision was taken following the company's refusal to cooperate with the NCP.¹⁰² The **Dutch government** has also pledged to ensure that consequences (such as barring companies from receiving export credits, participating in trade missions, and other forms of state support) are attached to a company's non-compliance with the Guidelines.

¹⁰² See *Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region*, www.international.gc.ca. See also: Canada Tibet Committee, *Government of Canada NCP releases final statement on China Gold International Resources in Tibet's Gyama Valley*, http://tibet.ca/en/library/media_releases/370

The NCPs in action in corporate-related human rights abuses

➔ **Lawyers for Palestinian Human Rights vs. G4S**¹⁰³

G4S and its Israeli subsidiaries provide, install, and maintain equipment that is used in military checkpoints in the Annexion Wall. The complaint alleges that G4S contributed to serious human rights abuses, including the detention and imprisonment of children in Israeli prison facilities, during which many allege being subject to torture and/or cruel and degrading treatment.

LPHR requests that G4S provide information about where and how its equipment is used and what due diligence checks have been conducted in providing it. The complaint also asks G4S to stop servicing the equipment, remove it, agree to an independent audit of these actions, and agree to identify ways to compensate the people who have suffered adverse impacts.

LPHR is represented by the London-based law firm Leigh Day.

On 22 May 2014, the NCP accepted the case; however, it rejected allegations relating to G4S's obligations to avoid causing or contributing to adverse human rights impacts and to conduct human rights due diligence.

The NCP offered the parties mediation, but G4S declined the offer, claiming it was legally bound to keep information relevant to the case confidentiality, and because it felt that LPHR did not have a mandate to negotiate and resolve the issues. Given this situation, the NCP informed the parties on 8 July 2014 that it would proceed to the next phase of the complaint process and conduct a further examination of the allegations in the complaint.

In March 2015, the NCP issued its final statement, finding that G4S's actions "are not consistent with its obligation under Chapter IV, Paragraph 3 of the OECD Guidelines to address impacts it is linked to by a business relationship." As a result of this breach, the UK NCP found that G4S is also technically in breach of other Guidelines provisions related to respect for human rights, but that the company had not failed to respect human rights in regard to its own operations.

For other examples of cases, please refer to the table at the end of this chapter.

¹⁰³ Extract from OECD Watch, *Lawyers for Palestinian Human Rights vs. G4S*, 27 November 2013, http://oecdwatch.org/cases/Case_327

COMPLAINTS LODGED BY NGOS – OVERVIEW

As of June 2015 there had been 250 complaints¹⁰⁴ lodged with NCPs by civil society organisations, communities, and individuals.¹⁰⁵ Noting that a complaint may in fact concern breaches of multiple sections of the Guidelines, the violations the most invoked are, in decreasing order: the general principles; employment and industrial relations; human rights; disclosure; the protection of the environment; concepts and principles; bribery; competition; consumer interest; and taxation.

To date, 108 complaints have been rejected by the NCPs and 65 have been concluded. The others are either still pending or have been closed or blocked by the NCP without an explanation or withdrawn by the complainants.¹⁰⁶

The table at the end of this section features selected specific instances examined by the different NCPs.

For a preliminary indication whether the Guidelines apply to your complaint, you may find OECD Watch online “Case Check” tool helpful. Based on the information you fill in, this tool generates tailored advice to your potential complaint or situation. The answers you provide remain confidential. See www.oecdwatch.org/oecd-watch-case-check.

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¹⁰⁴ In addition to 170 trade union cases.

¹⁰⁵ OECD Watch, Quarterly Case Update, June 2015, accessible on: <http://oecdwatch.org/publications-en>

¹⁰⁶ OECD Watch, Quarterly Case Update, December 2014, *op. cited*

Questionable effectiveness...

Whilst the 2011 update brought significant improvements to the Guidelines, some concerns remain, in particular regarding the effectiveness of the NCPs.

Advantages

- The **inclusion of a new chapter (IV) on human rights**;
- The integration of the **concept of due diligence** in particular with regard to human rights;
- An **extended scope of application** to all sectors, and including business relationships (in particular the supply chain as well as institutional shareholders¹⁰⁷);
- The broad nature of the principles and the **extraterritorial scope** of the Guidelines (where the parent company is based in an adhering state) make them a potentially powerful instrument, particularly regarding companies' activities, including in weak governance zones.¹⁰⁸ The Guidelines are increasingly becoming **more visible and widespread**, and recognised by States,¹⁰⁹ NCPs and companies.¹¹⁰ The Guidelines are increasingly utilised as a benchmark and constitute one of the principal measures by which companies' responsibilities are assessed;
- A recognised **mediation role**: due to their visibility and flexibility, the Guidelines are shaping consensus, to the extent that they can be considered a tool of social dialogue.

Other possible advantages:

- Possibility that NCPs will conduct fact-finding;
- Possibility that NCPs will issue strong final statements and determination of a breach of the Guidelines;
- Possibility of NCP monitoring;
- Opportunity to generate public and political attention;
- Less costly than court cases.

¹⁰⁷ See *Scope and application of 'business relationships' in the financial sector under the OECD Guidelines for Multinational Enterprises*, approved by the OECD Responsible Business Conduct Working Party at its meeting on 20 March 2014.

¹⁰⁸ OECD, *Promoting Corporate Responsibility*, *op. cit.*, p.9.

¹⁰⁹ States have made particular mention of the Guidelines at a meeting of G8 Summit in Eiligendamm in 2007.

¹¹⁰ The Guidelines are directly cited by 22% of executives at multinational enterprises. OECD, *Promoting Corporate Responsibility*, *op. cit.*, p. 7.

Concerns

In the past 15 years, **only 3 of the 250 cases filed (1%) have resulted in directly improved conditions for victims of corporate abuse and no cases have led to compensation for the harms endured.**¹¹¹

The most frequent criticisms of the Guidelines refer to the NCPs:

- The **assessment of admissibility is too restrictive** in determining whether a complaint should be accepted;
- At times NCPs make **contradictory interpretations** of the concepts embodied in the Guidelines;
- There is **lack of interaction** amongst the different NCPs and between the NCPs and the other parties, especially the NGOs, as to the progress of the procedures;
- The specific instances procedures are being conducted in a **confidential** manner;
- The delay in examining complaints is still too important.

In addition, major concerns remain:

- The **proximity of the NCPs to the business community** and the unequal treatment given to NGOs regarding the structure of NCPs;
- The lack of willingness from the NCPs to **assume a monitoring role** once a case is concluded;
- The NCPs' **lack of an investigative will and/or capacity**. As a result, complainants often carry the burden of providing evidence to support the claims made against the business (running the risk that the complaint be dismissed where the information provided proves insufficient). It should be noted that some NCPs do undertake their own fact-finding missions as part of their examination of the case. Both the Dutch and the Norwegian NCPs have done this.¹¹² However, most NCPs refuse to do any investigation beyond the documentation provided directly to them by the parties and – should this documentation be inconclusive – simply say, “There’s no more we can do” and close the case without resolution.

¹¹¹ OECD Watch, *Remedy Remains Rare*, June 2015, pp. 14-19, *op. cited*

¹¹² See, for example, *CEDHA et al. vs Nidera* (Dutch NCP), http://oecdwatch.org/cases/Case_220, and *Future in Our Hands vs Intex Resources* (Norwegian NCP), http://oecdwatch.org/cases/Case_164

Finally, the main limitation for the NCPs resides in the fact that, even where the company is found to have violated the guidelines, there exists **no enforcement mechanism established by the States** to ensure that the NCPs' recommendations are implemented. The lack of sanctions or "consequences" remains the main weakness of this mechanism and brings into question its effectiveness. However as is illustrated above, **some governments** and NCPs are starting to **link the violations of the Guidelines to sanctions**. NCPs are encouraged to inform other government agencies of their statements and reports when they are known by the NCP to be relevant to a specific agency's policies and programmes which may lead to consequences for the company found to have violated the Guidelines¹¹³.

ADDITIONAL RESOURCES

- OECD, "Text of the OECD Guidelines for Multinational Enterprises"
www.oecd.org/daf/investment/guidelines
 - OECD, National Contact Points,
<https://mneguidelines.oecd.org/ncps/>
 - OECD WATCH
www.oecdwatch.org
 - OECD Watch Case Check:
<http://oecdwatch.org/oecd-watch-case-check>
 - OECD Watch Guide (in English, Spanish and French),
"Calling for Corporate Accountability: A Guide to the Guidelines",
<http://oecdwatch.org/news-en/new-oecd-watch-guide-to-the-oecd-guidelines>
 - OECD Watch brochure on the Guidelines (in eight different languages)
http://oecdwatch.org/publications-en/Publication_3816
 - TUAC, "Trade Union Advisory Committee to the OECD"
www.tuaoecdmneguidelines.org/Home.asp
 - TUAC, Trade Union Cases
www.tuaoecdmneguidelines.org/cases.asp
-

¹¹³ OECD Guidelines, *op. cit.*, Commentary on the Implementation Procedure. § 37.

➤ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
Australia (agreement established with the UK's NCP in June 2005)	NGOs: <ul style="list-style-type: none"> - Brotherhood of St Laurence, - ChilOut, - Human Rights Council of Australia, - International Commission of Jurists - Rights and Accountability in Development Company: GSL Australia Pty Ltd, a 100% subsidiary of the parent company Global Solutions Ltd (UK-registered company)	<ul style="list-style-type: none"> - Having concluded a contract with the Australian Department of Immigration and Citizenship under which it was charged with managing immigration detention centres, the allegations were: - practice of arbitrary and indefinite detention of asylum seekers; - detention of children (also for indefinite periods). <p>The company was accused of not having respected its commitments to respect human rights.</p>	II. General Policies VIII. Consumer Interests	
Australia (with similar cases being filed with the UK and Swiss NCPs regarding British and Swiss firms also implicated).	Complainant: Mr Ralph Bleechmore, Adelaide barrister. Companies: <ul style="list-style-type: none"> - BHP Billiton - Cerrejon Coal Company 	<ul style="list-style-type: none"> - Attempted depopulation and forced eviction of residents of the slums in Tabaco (five additional communities in the region were affected by the same policy). 	II. General Policies III. Disclosure VI. Environment	
Canada	NGOs: Canada Tibet Committee Company: China Gold International Resources Corp. Ltd.	<ul style="list-style-type: none"> - Failure to protect the environment, public health and safety - Discriminatory hiring practices, forced evictions and expropriation of land, violations of the freedom of expression and to information, and inability to obtain remedy. - Failure to disclose accurate information about the environmental risks associated with the project, the full impact of the project to local communities; and failure to allow independent inspectors to ascertain the causes of the March 29, 2013 landslide disaster that took 83 lives. 	II. General Policies III. Disclosure IV. Human Rights V. Employment and Industrial Relations VI. Environment	
Denmark	NGO: Mellempfolkeligt Samvirke (Action Aid Denmark) Company: Arla Foods	<ul style="list-style-type: none"> - Failure to conduct due diligence and to mitigate the impacts on the livelihood of local stakeholders of subsidized export of cheap milk powder (among other products) to international markets at low prices. 	IX. Science and Technology	

FILING DATE	HOST COUNTRY	RESULT
2005	Australia	<ul style="list-style-type: none"> - Mediation: the parties approved 34 recommendations made to GSL concerning its conduct in relation to detainees. - Statement issued April 6th, 2006 and confirmed on October 13th, 2006. - Further information available at: http://oecdwatch.org/cases/Case_73
2007	Colombia	<ul style="list-style-type: none"> - Mediation - Statement adopted on June 12th, 2009, procedure closed: www.ausncp.gov.au
2014	China	<ul style="list-style-type: none"> - In a final statement, the NCP concluded to non-compliance with the OECD Guidelines, and took the unprecedented step of imposing sanctions on the company for failing to engage in the complaint process, including by withdrawing Trade Commissioner Services and other Canadian advocacy support abroad. - NCP recommendations with respect to human rights due diligence including undertaking human rights impact assessments and of disclosing any past or future reports). - Statement released on 1 April 2015: http://oecdwatch.org
2014	Global	<ul style="list-style-type: none"> - The parties were already engaged in constructive dialogue when the complaint was filed. The filing served to speed up the process, as 4 months after, the parties reached an agreement on 26 September 2014 by which Arla committed to implement a proactive human rights policy in its global operations, as well as to introduce due diligence procedures and engage in a more systematic identification, prevention and mitigation of actual and potential unintended consequences on local farmers' business prospects and rights that may be impacted by Arlas sales and operations. See http://oecdwatch.org

➤ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
France (case also filed with Belgium and Luxembourg NCPs)	NGOs: <ul style="list-style-type: none"> - Sherpa - CED - FOCARFE - MISEREOR Company: <ul style="list-style-type: none"> - Bolloré S.A - Financière du Champ de Mars - SOCFINAL - Intercultures 	<ul style="list-style-type: none"> - failure to take action to prevent SOCAPALM's negative impact on the environment, local communities, and workers. 	I. General Policies IV. Human Rights V. Employment and Industrial Relations	
Germany (case filed with UK NCP following German NCP's termination)	NGOs: <ul style="list-style-type: none"> - Bahrain Center for Human Rights - Bahrain Watch - European Center for Constitutional and Human Rights - Privacy International - Reporters Without Borders Company: <ul style="list-style-type: none"> - Trovicor GmbH - Gamma International UK Ltd 	<ul style="list-style-type: none"> - Aiding and abetting the Bahraini government in its perpetration of human rights abuses (including violations of the right to privacy, freedom of expression and freedom of association, as well as arbitrary arrest and torture) through the selling and maintaining of surveillance technology. 	II. General Policies IV. Human Rights	
Korea (simultaneously filed with Norway and Netherlands NCPs)	NGOs: <ul style="list-style-type: none"> - Fair Green Global Alliance - Korean Trans National Corporations Watch - Lok Shakti Abhiyan - Norwegian Forum for Environment and Development Company: <ul style="list-style-type: none"> - POSCO - Algemeen Burgerlijk Pensioenfonds - Norway Government Pension Fund Global 	<ul style="list-style-type: none"> - Failure to seek to prevent human rights abuses (including physical and economic displacement of more than 20,000 people, including individuals with special legal protections under the Recognition of Forest Rights Act) and carry out comprehensive human rights and environmental impact assessment studies for iron mine, steel plant and associated infrastructure in the State of Odisha, India. - Failure to engage in meaningful stakeholder consultation with all affected communities and failure to conduct due diligence 	II. General Policies IV. Human Rights V. Employment and Industrial Relations VI. Environment	
Norway	NGO: Framtiden i vare hender (The future in our hands) Company: Intex ressources (nickel mines)	<ul style="list-style-type: none"> - Infringement of the rights of affected indigenous people: right to property and right to water 	II. General Policies V. Environment VII. Combating Bribery	

FILING DATE	HOST COUNTRY	RESULT
2010	Cameroon	<ul style="list-style-type: none"> - Mediation between Sherpa and Bolloré started in 2013 (after nearly 2 years of Bolloré refusing to cooperate) leading to the creation of an action plan. - Final statement of June 2013 concluded that through their business relations with SOCAPALM, all four holding companies violated the Guidelines. <p>See http://oecdwatch.org</p> <ul style="list-style-type: none"> - Follow-up statement in March 2014 indicating appointment of an independent organisation to monitor the implementation of the action plan. - Follow-up communiqué in March 2015 to ask all parties to take responsibility for concrete implementation of the action plan. <p>See http://www.tresor.economie.gouv.fr</p> <ul style="list-style-type: none"> - The action plan is yet to be adequately implemented
2013	Bahrain	<ul style="list-style-type: none"> - The German NCP offered a mediation on Trovicor's management system, but declared the allegations were not substantiated as there was no sufficient evidence of Trovicor's business relationship with the Bahraini government. The German NCP issued its final statement "terminating" the case on 21 May 2014. - The UK NCP accepted the case against Gamma on 24 June 2013, and appointed an external mediator. The mediation process was flawed in several ways. The final NCP statement is pending. <p>See http://oecdwatch.org</p>
2012	India	<ul style="list-style-type: none"> - In June 2013 the Korean NCP rejected the complaint as it determined it could not play a role in resolving the dispute, which they consider to be the responsibility of the Indian authorities. See http://oecdwatch.org - NBIM refused to engage with the Norwegian NCP, which found it was in violation of the Guidelines. On 27 May 2013, the Norwegian NCP published its final statement reaffirming the Dutch NCPs assertion that the Guidelines apply to minority shareholders - The Dutch NCP facilitated mediation in relation to the Dutch pension fund ABP and the Norwegian Government Pension Fund Global's investments in POSCO. ABP and APG committed to exercise their leverage to bring POSCO's business practices in line with international standards. Following the joint agreement, the Dutch NCP published a statement confirming that the OECD Guidelines apply to minority shareholdings. See http://oecdwatch.org
2009	The Philippines	<ul style="list-style-type: none"> - In March 2010, the NCP accepted the complaint and appointed an independent expert in charge to carry out research in situ. - The expert concluded in January 2011 that the activities of the company respected the domestic law but not the Guidelines due to a lack of consultation, environmental impact assessment and transparency. - Resolution, 30th November 2011: non-compliance with the Guidelines in terms of stakeholder consultation and environmental protection. The NCP called the company to act on the principle of due diligence particularly with regard to the indigenous population: www.regjeringen.no

➤ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
Norway (in consultation with the South Korean and Dutch NCPs)	NGO: Forum for Environment and Development (ForUM) Company: Norwegian Bank Investment Management (NBIM)	Failure to take the appropriate steps to prevent or mitigate negative human rights on forest dwellers and environmental impacts in connection with NBIM's investment in POSCO India Private Limited.	II. General Policies III. Disclosure IV. Human Rights VI. Environment	
Norway	NGO: Fivas Company: Norconsult	<ul style="list-style-type: none"> - Violation of indigenous peoples rights and internationally recognised guidelines - Lack of information regarding the potential risks resulting from the project, and a lack of consultation with local communities in the decision-making process. - Lack of due diligence 	II General Policies III Disclosure IV Human Rights	
Netherlands	NGOs: <ul style="list-style-type: none"> - Center for Human Rights and Environment - Fundación Promoción Humana a través de su Instituto Internacional de Formación - Oxfam Novib - SOMO Company: Nidera	Inadequate living and working conditions and inadequate information for temporary workers at the corn seed plants.	II. General Policies V. Employment and Industrial Relations	
Switzerland	NGOs: Building and Wood Workers International (BWI) Company: FIFA	Failure to engage in due diligence concerning human rights violations of migrant workers related to the construction of facilities for the FIFA 2022 World Cup in Qatar	II. General Policies IV. Human Rights	
United Kingdom	NGO: Lawyers for Palestinian Human Rights (LPHR) Company: G4S PLC	<ul style="list-style-type: none"> - Human rights violations of Palestinians through its contracts to install, service, and maintain security systems at Israeli prisons and equipment at checkpoints 	II. General Policies. IV. Human Rights.	

FILING DATE	HOST COUNTRY	RESULT
2012	India	<ul style="list-style-type: none"> - Violation of Guidelines due to NBIM's refusal to participate in the NCP process - Confirmed violation for lack of due diligence - Final statement released 27 May 2013: http://www.responsiblebusiness.no
2014	Malaysia	<ul style="list-style-type: none"> - Mediation - A joint agreement and commitment by Norconsult to respect the right to free, prior and informed consent (FPIC) of indigenous communities affected by projects to which it is linked (in accordance with ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)). Norconsult also committed to implementing human rights due diligence procedures in order to avoid and minimise the adverse impacts of major hydropower projects on human rights and the environment.
2011	Argentina	<ul style="list-style-type: none"> - Mediation which resulted in a joint agreement on 25 November 2011, through which Nidera strengthened its human rights policy, formalised human rights due diligence procedures for temporary rural workers, and allowed the NGOs to monitor its Argentine corn seed operations through field visits. - Final statement issued 5 March 2012. See http://oecdwatch.org - Complainants were satisfied with the implementation of the agreement and Nidera complied with its commitment to implement an operational-level grievance mechanism. In February 2013, the parties submitted a joint "One Year On", report to the NCP.
2015	Qatar	<ul style="list-style-type: none"> - Initial assessment issued on 13 October 2015: The swiss NCP concluded that FIFA as a multinational organisation is bound by the OECD guidelines. http://business-humanrights.org
2013	Israel and the Occupied Palestinian Territory	<ul style="list-style-type: none"> - In March 2015, the NCP issued its final statement, finding that G4S's actions "are not consistent with its obligation under Chapter IV, Paragraph 3 of the OECD Guidelines to address impacts it is linked to by a business relationship." As a result of this breach, the UK NCP found that G4S is also technically in breach of other Guidelines provisions related to respect for human rights, but that the company had not failed to respect human rights in regard to its own operations. See http://oecdwatch.org

➤ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
United Kingdom	NGO: WWF International Company: SOCO	- Infringement of the DRC's legal commitment to preserve Virunga National Park as a World Heritage Site by conducting oil exploration and exploitation activities; and break on sustainable development. - Failure to conduct human rights due diligence and meaningfully consultations	II. General Policies. IV. Human Rights. VI. Environment	
United Kingdom	NGO: ADHRB Company: Formula One World Championship Ltd.	- Contribution, inadvertently or otherwise, to further human rights violations in Bahrain and the continuation of impunity for past violations (including arbitrary detention and torture), as a result of failure to conduct human rights to due diligence and lack of meaningful stakeholder engagement	II. General Policies. IV. Human Rights.	

FILING DATE	HOST COUNTRY	RESULT
2013	Democratic Republic of Congo (DRC)	- Mediation by the UK NCP, which led to a joint statement and agreement on 11 June 2014, in which SOCO agreed to cease its operations and committed never again to jeopardize the value of any other World Heritage Sites anywhere in the world, as well as to undertake environmental impact assessments and human rights due diligence in accordance to international norms and standards. Despite the agreement, however, SOCO has yet to relinquish its operating permits. See http://oecdwatch.org
2014	Bahrain	- Mediation, at the issue of which Formula One publicly committed to respecting internationally recognized human rights in all of its operations, including by committing to develop and implement a due diligence policy which analyzes and takes steps to mitigate any human rights impact in a host country, including on the human rights situation in Bahrain.

PART II

National Human Rights Institutions (NHRIs)

National Human Rights Institutions (NHRIs)¹¹⁴ are national independent public bodies established by states in accordance with the 1993 UN Paris Principles, which set out the criteria for a legitimate and credible NHRI.¹¹⁵ A NHRI's main role is to promote and protect human rights, and their functions include monitoring and advising home governments, raising awareness through human rights education activities and coordinating local initiatives with international bodies.

The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), an international association of NHRIs tasked with the coordination and promotion of the work of NHRIs, was established in 1993. The ICC also accredits NHRIs according to their degree of conformity with the Paris Principles. As of May 2014, 106 countries have established ICC accredited NHRIs, with 71 maintaining an “A-level” accreditation, which denotes full compliance with the Paris Principles.¹¹⁶

There are different models of NHRIs: human rights commissions, human rights ombudsman institutions, hybrid institutions, consultative and advisory bodies, institutes and centres, and multiple institutions. Core functions of NHRIs include complaint handling, human rights education and making recommendations on law reform.¹¹⁷ They are part of the State apparatus and are funded by the State. However, according to the Paris Principles, they should operate and function independently from governments. NHRIs can have formal and coercive powers of investigation, or powers to make binding recommendations without an adjudication function. For instance, some NHRIs have a mandate to deal with complaints from individuals or groups of individuals, who are victims of violations of human rights. Others

¹¹⁴ Information about NHRIs can be found on the website of the UN Office of the High Commissioner for Human Rights <http://www.ohchr.org>, quick link to “National Human Rights Institutions”, or directly at: <http://www.ohchr.org/EN/Countries/NHRI/>. A full list of NHRIs and their accreditation can be found on the website of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC): <http://nhri.ohchr.org>.

¹¹⁵ OHCHR, Paris Principles, <http://www.ohchr.org>

¹¹⁶ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), *Rules of Procedure for the ICC Sub-Committee on Accreditation*, <http://nhri.ohchr.org>

¹¹⁷ ICC, *Role and types of NHRIs*, <http://nhri.ohchr.org/>

do not have direct adjudicatory functions concerning complaints of human rights violations and will rather focus on the detection and prevention of systemic human rights violations (this can include reviewing governmental policies and state compliance with human rights obligations) with powers including the conduct of inquiries and the possibility to provide legal advice and representation to persons to take legal action.

With a few exceptions, NHRIs generally do not have the power to make binding decisions¹¹⁸.

However, decisions can for instance serve as “authoritative interpretation” and can sometimes be enforceable by national judicial bodies.¹¹⁹

NHRIs and corporate accountability

In 2009, the ICC established the ICC Working Group on Business and Human Rights in order to support NHRIs with capacity building and strategy development in the field of Business and Human Rights.¹²⁰ The Working Group reports to the ICC Bureau twice a year. At the 10th international conference of NHRIs in Edinburg, Scotland in 2010, the ICC issued the Edinburg Declaration on Business and Human Rights, in which NHRIs agreed to promote and protect human rights related to business activities.

Regional networks of NHRIs have also adopted regional action plans on business and human rights, including in Africa,¹²¹ Asia-Pacific,¹²² Americas¹²³ and Europe.¹²⁴

Work on business and human rights greatly varies from one NHRI to another, and in accordance with recent developments on the international level, their expertise in this field has developed quickly over the last years. Some NHRIs, such as those in Australia, Denmark, Germany, Indonesia,¹²⁵ Kenya, Malaysia, Mexico, Morocco, South Africa and Thailand, have been particularly active on these issues. Regarding the handling of complaints, some of them are directly or indirectly looking at corporate responsibility by examining complaints related to the discrimination in the

118 Katrien Meuwissen, Working paper no. 154, *NHRIs and the State: new and independent actors in the multi-layered human rights system?* Leuven Centre for Global Governance Studies, Ku Leuven, Institute for International Law, March 2015, available at: https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp151-160/wp154-meuwissen.pdf

119 For example, decisions of the Hearing Panel of the Kenyan Human Rights Commission are enforceable by the High Court. See OHCHR, *Business and Human Rights: A Survey of NHRI Practices*, 2007 available at: www.ohchr.org

120 ICC, Themes, Business and Human Rights, <http://nhri.ohchr.org/>

121 Africa: Yaoundé plan of action, <http://nhri.ohchr.org>

122 Asia-Pacific: <http://nhri.ohchr.org>

123 Americas: <http://nhri.ohchr.org>

124 Europe: Berlin Action Plan: <http://nhri.ohchr.org>

125 See for instance, Indonesian National Commission on Human Rights, <http://www.asiapacificforum.net>

workplace. Others, such as the South African Human Rights Commission (SAHRC), have dealt with complaints related to business and human rights on different issues, ranging from discrimination, the impacts of the mining industry and price fixing in the food sector. Comprehensive mapping has been undertaken, dealing in detail with the question of NHRI activities on human rights and business and what their complaints handling mandate is.¹²⁶ Such mapping also make references to public enquiries conducted by some NHRIs, such as in Kenya and Malawi.

HOW TO FILE A COMPLAINT?

NHRIs have different rules of procedure, and you should contact the NHRI in the country where the abuse has occurred in order to obtain up to date information about the specific procedure and the potential outcome of such a procedure. Although NHRIs are generally limited in their ability to deal with situations of human rights abuse in the territory of the state in which the NHRI is based, it may be worth contacting the NHRI of the home country of the company involved in human rights abuses. As some of the cases below illustrate, some NHRIs have investigated and confirmed human rights violations committed abroad by corporations based in their country. For an updated list of NHRIs see the website of ICC: <http://nhri.ohchr.org> under “About us” and “ICC Accreditation”.

🕒 Process and Outcome

As there is significant variety in the competences and resources allocated to the NHRIs, as well as their independence from the state, outcomes may vary to a great extent from country to country. The outcomes will vary depending on whether or not the NHRI has the ability to deal with complaints. You should consult with the NHRI relevant to the human rights situation (the state where the violation occurred, or potentially the state where the company is based) in order to learn of the potential outcome of a complaint and/or of engaging with an NHRIs. For an updated list of existing NHRIs see the website of ICC: <http://nhri.ohchr.org>.

NHRIs in action on corporate-related human rights abuses

Some, though not all NHRIs, have dealt with complaints related to violations involving companies (Australia, Canada, Indonesia, New-Zealand, Uganda, etc.), mainly related to employment issues. Ombudsman institutions also deal with a range of issues such as public sector employment, which could concern state-owned enterprises. The fact that NHRIs are increasingly paying attention to the issue of business and human rights represents an opportunity for civil society to

¹²⁶ Network of African National Human Rights Institutions, Report of the NANHRI mapping survey on business and human rights, 2013, www.nanhri.org. See also OHCHR, *Business and Human Rights: A Survey of NHRI Practices*, 2007, www.ohchr.org

demand that they be proactive in this field and that they benefit from the financial resources to do so. NHRIs have the potential to play an important role in complaint handling and could use the outcomes of complaints to monitor the conduct of TNCs. It would be interesting to further explore the opportunity for NHRIs to consider complaints on the failure of states to ensure that companies based in their territory respect human rights in their overseas operations. Indeed, depending on how restrictive the mandate of each NHRI is, it is not excluded that NHRIs explore states' extraterritorial obligations.

② NHRIs in action in corporate related Human Rights abuses

➔ Investigating alleged Human Rights abuses of Thai sugar company in Cambodia¹²⁷

The National Human Rights Commission of Thailand (NHRCT)¹²⁸ was established by the 1997 Constitution, and, following the enactment of the National Human Rights Commission Act in 1999, started functioning in July 2001. The 1999 Act requires the NHRCT to be independent and impartial, and bestows it with numerous mandates. These include to:

- Promote respect for human rights, domestically and internationally;
- Examine acts of human rights violations and propose remedies to actors concerned;
- Submit to Parliament and the Government an annual report on the country's human rights situation;
- Propose legal and regulatory reform and policy recommendations for the promotion and protection of human rights;
- Disseminate information and promote education and research on human rights; and
- Cooperate and coordinate with the Government, NGOs and other human rights organisations.

The 2007 Constitution added the following functions to the NHRCT's mandate:

- It may submit cases and opinions to the Constitutional Court and the Administrative Court where legislative, regulative or administrative acts are deemed detrimental to human rights;
- It may file lawsuits on behalf of a complainant in order to redress a general problem of human rights violations.

In May 2013, the local NGOs Licadho (Cambodian League for the Promotion and Defence of Human Rights) and Equitable Cambodia filed a complaint with the Thai NHRC on behalf of 602 families from Oddar Meanchey province of Cambodia. The complaint accused the Thai sugar firm Mitr Phol of illegally taking their lands and violating their human rights. In 2007, the Government had granted Mitr Phol three plantations totaling more than 20,000 hectares in Samroang City and Chongkal district. The lands of more than 2,000 families

¹²⁷ Peter Zsomer, *Thai Human Rights Body Says Plantations Stole Land*, The Cambodia Daily, 14 August 2014; Peter Zsomer and Pheap Aun, *Second Sugar Firm Taken to Thai Human Rights Commission*, The Cambodia Daily, 3 June 2013

¹²⁸ Website of the Office of the National Human Rights Commission of Thailand: <http://www.nhrc.or.th/en>

are affected, but many have moved away since they lost their lands. Following mounting pressure for greater transparency of global supply chains, it was revealed in 2013 that Mittr Pohl was one of Coca Cola's three main global suppliers of sugar.

On 13 August 2014, the Thai NHRC backed claims that the Thai Coca Cola supplier illegally acquired the lands of the villagers in Cambodia and violated their human rights. In May 2015, Mittr Pohl announced that it had withdrawn from its three Cambodian plantations, though victims have seen no compensation or improvement to their conditions to date.¹²⁹

This is not the first case by the Thai NHRC confirming human rights violations committed by Thai corporations abroad. In a preliminary report of 2012, the Commission confirmed the allegations of a 2010 complaint submitted by a local aid group, the Community Legal Education Center, against the Thai company Khon Kaen Sugar for forcing hundreds of families off their lands in the Koh Kong province of Cambodia. However, apart from investigating and confirming the human rights violations and playing a mediating role between the parties, the Thai NHRC has no other powers to address violations taking place outside Thailand. FIDH and numerous NGOs continue to take action regarding human rights abuses occurring on sugar plantations in an effort to secure reparations for affected communities.

As of February 2015, there are plans to merge the NHRCT with the Thai Office of the Ombudsman, who has competence to look at administrative errors or abuses by state agencies.¹³⁰ The proposed merger has been met with strong opposition from NGOs and academia, who are concerned about the independence of the National Human Rights Commission, which enjoys a much broader mandate (see above). By time of publishing, this merger has not yet been implemented.

➔ **The Human Rights Commission of Malaysia (SUHAKAM): Cambodian and Thai villagers file complaint against Malaysian company for involvement in Don Sahong dam project in Laos**¹³¹

The Human Rights Commission of Malaysia (SUHAKAM) was established by the Parliamentary Act 597 "Human Rights Commission of Malaysia Act" of 1999, and was inaugurated on 24 April 2000. Under the 1999 Act, SUHAKAM's functions are:

- To promote awareness of and education relating to human rights;

¹²⁹ Daniel Pye, "Sugar Company Pulls Out", Phnom Penh Post, 11 May 2015, www.cambodiadaily.com

¹³⁰ See website of the Office of the National Human Rights Commission of Thailand: [http://www.hrw.org](http://www.nhrc.or.th/en; Human Rights Watch, Thailand: Keep Independent Rights Commission. Plan to Merge With Ombudsman Would 'Gut' Rights Agency, 3 February 2015, <a href=)

¹³¹ Bobbie Sta. Maria, "Human rights institutions in Southeast Asia: Are the "paper tigers" coming to life?", Asian Correspondent, 21 October 2014. The author is a representative for the Business and Human Rights Resources Centre.

- To advise and assist the Government in drafting legislation and procedures, and make recommendations for necessary measures;
- To make recommendations to the Government regarding adherence to treaties and other instruments in the field of human rights; and
- To inquire into complaints regarding human rights infringements.

Furthermore, in order to exercise its functions effectively, the 1999 Act empowers SUHAKAM to:

- Undertake research by conducting programs, seminars and workshops;
- Advise the Government or relevant authorities of complaints against them, and recommend adequate steps to be taken;
- Study and verify human rights infringements;
- Visit places of detention, in accordance with legal procedures, and make necessary recommendations;
- Issue public statements on human rights as and when necessary; and
- Undertake appropriate activities, as deemed necessary.

In October 2014, rural Cambodian and Thai villagers filed a complaint with their NGO representatives to SUHAKAM against the Malaysian company Mega First for the company's work on the Don Sahong dam project in Laos. The dam project is likely to have serious and irreversible effects on the environment, as well as the communities living in the river areas. The project is located less than two kilometres upstream from the Cambodia-Laos border, and scientists have warned that the project will seriously disturb fish migration between Cambodia, Laos and Thailand. Villagers also warn that the project will largely undermine food and livelihood security for communities in Laos, Thailand, Cambodia and Vietnam. At time of publishing, SUHAKAM had not yet delivered an opinion on the issue.

➔ Singapore's Transboundary Haze Pollution Act¹³²

On 2014 Singapore adopted the Transboundary Haze Pollution Act, which allows the Government to act against companies contributing to haze and fine them. On this basis companies contributing to the haze could be held accountable. Until now, 6 companies have been compelled to take action to stop burning and to seek information with regard to haze causing activities by their **subsidiaries and suppliers**.

¹³² Bussiness and Human Rights Ressource Centre, *In courtroom and beyond : New strategies to overcome inequality and improve access to justice.* - *Corporate Legal Accountability Annual Briefing*, Fevrier 2016, p. 5.

② ICC Working Group on Business and Human Rights¹³³

Following a roundtable on Human Rights and Business held in July 2008 and convened by the Danish Institute for Human Rights, a thematic Working Group on the issue of Business and Human Rights was established by the International Coordination Committee of National Institutions (ICC) in August 2009.¹³⁴

The Working Group's mission is to: "facilitate collaboration among National Human Rights Institutions in relation to **strategic planning**, joint **capacity building** and **agenda-setting** in the field of business and human rights, in order to assist National Human Rights Institutions in promoting corporate respect and support for international human rights principles; and in strengthening human rights protection and remediation of abuses in the corporate sector in collaboration with all relevant stakeholders at the domestic, regional and international levels."¹³⁵

ADDITIONAL RESOURCES

- **International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC):**
www.nhri.ohchr.org
- **UN Office of the High Commissioner for Human Rights (OHCHR) on OHCHR and NHRIs:**
<http://www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx>
(or accessible through "Quick links" on OHCHR's home page: www.ohchr.org, where you can find relevant UN resolutions, the latest Secretary General's report to the Human Rights Council and information about the regional networks for NHRIs.
- **Report of the NANHRI mapping survey on Business and Human Rights 2013**, Network of African NHRIs (NANHRI) in cooperation with the Danish Institute for Human Rights, accessible on NANHRI's website under Resources, Reports: www.nanhri.org.
- **Updated list of NHRIs and their accreditation under ICC on:**
www.nhri.ohchr.org "About us", "ICC Accreditation".
- **Business and human rights guidebook and e-learning for NHRIs**, available at:
<http://www.ohchr.org/Documents/Issues/Business/ForumSession2/DanishInstituteHR.pdf>.

¹³³ International Coordinating Committee on NHRIs for the Protection and Promotion of Human Rights (ICC), Business and Human Rights, the ICC Working Group on Business and Human Rights, see: <http://nhri.ohchr.org/EN/Themes/BusinessHR>

¹³⁴ *Ibid.*

¹³⁵ ICC Working Group on Business and Human Rights, <http://nhri.ohchr.org>

- FRA (European Union Agency for Fundamental Rights), *Strengthening the fundamental rights architecture in the EU I, National Human Rights Institutions in the EU Member States*, available at: http://fra.europa.eu/sites/default/files/fra_uploads/816-NHRI_en.pdf.
 - Gauthier de Beco, “National Human Rights Institutions in Europe”, *Human Rights Law Review* (2007) 7 (2): 331-370, available at: <http://hrlr.oxfordjournals.org/search?author1=Gauthier+de+Beco&sortspec=date&submit=Submit>.
 - Christopher Schuller and Deniz Utlü, *Transnational Cooperation in Business and Human Rights A model for analysing and managing NHRI networks*, German Institute for Human Rights, 2014, available at: http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Transnational_Cooperation_in_Business_and_Human_Rights_A_model_for_analysing_and_managing_NHRI_networks.pdf.
-

PART III

Ombudsmen

Ombudsmen represent another type of mediation mechanism that victims can turn to. Although there is no clear and universally accepted definition of an Ombudsman, it is generally associated with an independent and objective investigator of complaints filed by individuals against government agencies and other organisations from both public and private sectors. In some countries, they take the form of the National Human Rights Institutions (NHRIs – see previous part of this section). After reviewing the complaint, the Ombudsman determines whether the complaint is justified and makes recommendations to the organisation to resolve the problem. Sometimes they may also provide support to human rights defenders.

An ombudsman may be appointed by a legislature, a professional regulatory organisation or a local or municipal government, but s/he may also be appointed directly by a company to handle complaints internally, or by an NGO. Depending on the type of ombudsman and the appointment procedure, their independence is subject to various criticisms. Individuals can sometimes be sceptical vis-à-vis the Ombudsmen and their ability to handle their complaints impartially.

There are dozens numerous ombudsmen in several countries, mandated to hear complaints from individuals against public or private actors (industry, electricity and gas, banking, insurance, telecommunications, consumer, etc.). Examples of countries would include the United Kingdom¹³⁶, New Zealand¹³⁷, Ghana¹³⁸ and India¹³⁹. In many countries the Ombudsman only has competence to hear complaints against the public administration, but this may still be relevant to corporate-related human rights abuse if it includes the way in which the administration has dealt with the abuse. Some Ombudsmen are established for specific industry sectors, such as the Canadian Office of the Extractive Sector Corporate Social Responsibility (CSR)

¹³⁶ British and Irish Ombudsman Association: www.ombudsmanassociation.org/

¹³⁷ Office of the Ombudsman: www.ombudsman.parliament.nz/

¹³⁸ The Ombudsman of Ghana is a part of the Commission on Human Rights and Administrative Justice (CHRAJ) of Ghana, see: www.chrajghana.com, 'Mandates'.

¹³⁹ The Central Vigilance Commission, <http://cvc.nic.in>

Counsellor for the Extractive Sector,¹⁴⁰ and the Pakistani Federal Ombudsman Secretariat for Protection Against Harassment of Women at Work Place.¹⁴¹

A number of mediation mechanisms including ombudsmen are reviewed under other sections of the present guide. In particular, section IV on financial institutions describes various mechanisms set up by multilateral banks (for example, Compliance Advisor Ombudsman of the International Financial Corporation) or that can be appealed in case the requester is not satisfied with the outcome of a grievance mechanism set up by a public bank (a request may for instance be filed with the European Ombudsman in relation to the EIB), or another institution (for instance a complaint concerning the UK Export Credit Agency may be forwarded by the UK Parliamentary Ombudsman).

② Process and outcome

Ombudsmen do not exist in all countries or for all sectors, and are often only mandated to deal with complaints against the state administration. You may verify if there exists an ombudsman in the particular country or for the particular industry relevant to your situation, either in the country where the human rights abuse has occurred or in the home country of the corporation involved. Contact the relevant Ombudsman directly or see their website for procedural requirements.

The expected outcome will vary greatly according to their degree of independence, their mandate, etc.

Ombudsmen in action in corporate-related human rights abuses

➔ Costa Rica Ombudsman's Office files legal action against genetically modified corn

In June 2013, the Ombudsman's Office of Costa Rica filed a legal action challenging the constitutionality of a decision permitting a subsidiary of the multinational biotechnology company Monsanto to grow genetically modified corn in the country. The complaint also requested the reform of the country's Phytosanitary Law in order to better protect against entry of genetically modified organisms (GMOs) in the country. In September 2014, the Constitutional Chamber of the Supreme Court annulled the decision for unconstitutionality.¹⁴²

¹⁴⁰ The Office's mandate is to review CSR practices of Canadian companies operating outside of Canada. Affected individuals, groups, communities or their representatives can request the Ombudsman to facilitate dispute resolutions. See www.international.gc.ca/csr_counsellor-conseiller_rse/

¹⁴¹ Pakistan Federal Ombudsman Secretariat for Protection against Harassment of Women at Workplace: www.fos-pah.gov.pk/

¹⁴² Judicial Bulletin n°155 11/08/2015, p. 1-25.

➔ Canada's Corporate Social Responsibility (CSR) Counsellor for the Extractive Sector

Since its inception in 2009, this mechanism has proved to be deeply flawed. As the mandate of the first Counsellor only included a voluntary participation-based mediation mechanism, companies repeatedly walked away from the mediation with no consequences.¹⁴³ The first Counsellor quietly resigned in October 2013 before the end of her mandate after none of the six cases brought before her was mediated, and none of the complainants had received remedy.¹⁴⁴

After more than a year of inaction, November 2014 saw the launching of “Canada's Enhanced CSR Strategy: Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad.”¹⁴⁵ On 1 March 2015 the second CSR Counsellor for the Extractive Sector was appointed, with reportedly “enhanced” mandate. Canadian civil society organisations remain highly critical of the Counsellor and its mandate: they are calling for an independent and effective ombudsman that can investigate allegations and offer recommendations and remedy for workers or communities affected by Canadian-owned mines.¹⁴⁶

¹⁴³ Mining Watch Canada, *Third Mining Company Walks Out in Canada's Extractives Counsellor*, 16 October 2013, accessible on www.miningwatch.ca

¹⁴⁴ Mining Watch Canada, *The Federal CSR Counsellor has Left the Building: Can we now have an effective ombudsman mechanisms for the extractive sector?*, 1 November 2013, accessible on www.miningwatch.ca

¹⁴⁵ Foreign Affairs, Trade and Development Canada, *Appointment of Canada's Extractive Sector Corporate Social Responsibility Counsellor*, News Release by the Media Relations Office, 1 March 2015, accessible on www.international.gc.ca

¹⁴⁶ Canadian Network on Corporate Accountability (CNCA), *New Mining Counsellor Set Up to Fail*, 3 March 2015, <http://cnca-rcrce.ca/new-mining-counsellor-set-up-to-fail/>



SECTION IV

* * *

WHO IS FUNDING THE PROJECT OR OWNS THE COMPANY?

Using Financial Institutions'
Mechanisms and Engaging
with Shareholders



A soldier stands by a bulk liquid carrier at a checkpoint in the outskirts of Puerto Gaitan, Meta department, eastern Colombia, on October 8, 2011. Colombia, 2011 © AFP PHOTO/Eitan Abramovich

SECTION IV

WHO IS FUNDING THE PROJECT OR OWNS THE COMPANY?

Using Financial Institutions' Mechanisms and Engaging with Shareholders

* * *

As members of Multilateral Development Banks, which are public banks, states are bound by their human rights obligations and should therefore make sure that the operations of these banks comply with human rights standards. It can also be argued that International Financial Institutions (IFIs), which bring together public and private banks, have – as “organs of society” – human rights responsibilities as per the Universal Declaration of Human Rights. Victims of corporate abuses can, under certain conditions, turn to the organisations which financially support TNCs involved in corporate-related abuses. Accountability mechanisms are “offices in these international financial institution that have been given the authority to try to resolve a dispute or determine compliance with the institution’s policy. Accountability mechanisms may resolve the dispute formally or informally, and may use a variety of tools to resolve the dispute, including investigations or formal dispute resolution proceedings”.¹ These accountability mechanisms are increasingly used by affected communities. The following section will specifically look at:

- the Multilateral Development Banks, often criticised for funding projects which have negative impacts on human rights (World Bank, European Investment Bank and the European Bank for Reconstruction and Development, Inter-American Development Bank, African Development Bank and Asian Development Bank)². These institutions have set up internal accountability mechanisms to address disputes and compliance with their own policies.
- Most Multilateral Development Banks also have an office or department which investigates allegations of fraud and corruption in activities financed by the Bank concerned (such as the Inter-American Development Bank’s Office of Institutional Integrity). Although this guide will not be looking into this issue, it could represent an interesting avenue for victims, as corruption and human rights violations

¹ *Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development*, Accountability Counsel, 8th edition, August 2015, available at www.accountabilitycounsel.org

² There are various others regional banks that are not covered by this guide.

are too often linked, including in cases of human rights violations committed by multinational corporations.

- the Export Credit Agencies (ECAs) which are private or quasi-governmental institutions that act as intermediaries between national governments and exporters to issue export financing. Many ECAs also feature accountability mechanisms where people affected by ECA-funded projects can file complaints.
- the private banks, of which some are bound by the Equator Principles.
- the shareholders of companies that can act as powerful actors to raise human rights or environmental concerns.



➤ Children working on shipbreaking yards in Bangladesh.

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PART I

International Financial Institutions

For many years, international financial institutions did not consider human rights norms as part of their work. It is only recently that they have started to take human rights standards into account. Yet, none of the financial institutions have adopted a comprehensive human rights policy with adequate standards of implementation. Most multilateral development banks have adopted social and environmental policies, which most often do not use human rights language. **The different policies and standards applied by these institutions remain uneven, vague and widely criticised. Nevertheless, where an institution's social and environmental policies correspond with human rights law, human rights concerns can be raised before complaints mechanisms that banks have put in place to attempt to resolve disputes and/or to assess whether a project is compliant with the institution's policies.** Most accountability mechanisms have two functions, a 'dispute resolution' or 'problem solving' function and a 'compliance' function. These mechanisms may entail on-site visits by inspectors and generate reports, including recommendations for corrective action plans.

Although most of these mechanisms remain criticised for various reasons (lack of staff with required expertise, length of processes, lack of enforcement of recommendations), they can be used by civil society as powerful lobbying tools. Moreover, these mechanisms' problem-solving function may enable communities to participate in negotiating a settlement agreement to address their concerns.

The review, by these mechanisms, of a project supported by a financial institution may lead to adjustments in the project to better benefit communities, or to better compensation packages than those initially offered by corporations. However, these mechanisms **do not directly provide reparation to victims**, and are often incapable of providing adequate remedy for victims of serious human rights violations. They can also lead to institutions' withdrawals from projects which can in turn paralyse a company's activities.

The **list of the projects financially-supported** by these institutions is normally **publicly made available** on their respective websites. As it can prove difficult to find which institution may be financing a project due to a lack of accessible information and increased channelling through financial intermediaries, it is recommended to contact specialised NGOs to seek assistance in researching which institutions may be financially supporting the project.³

³ See list of additional resources at the end of this section.

CHAPTER I

The World Bank Group

A. World Bank Inspection Panel

B. Compliance Advisor Ombudsman (CAO)

* * *

The World Bank Group consists of five closely associated institutions. All five are governed by member countries, and each institution plays a distinct role in the group's stated mission, i.e. to combat poverty and elevate living standards for people in the developing world. The term 'World Bank Group' encompasses all five of the following institutions:

- the International Bank for Reconstruction and Development (IBRD), which focuses on middle income and credit-worthy poor countries;
- the International Development Association (IDA), which focuses on the poorest countries in the world;
- the International Finance Corporation (IFC), which supports private sector investments in developing countries;
- the Multilateral Investment Guarantee Agency (MIGA), which provides insurance to private corporations for investments in developing countries, and
- the International Centre for Settlement of Investment Disputes (ICSID), which provides for a neutral forum to resolve international investment disputes between its member states and the nationals of other member states

The World Bank Inspection Panel hears complaints regarding projects financed by the IBRD and IDA, which are often collectively referred to as the "World Bank." The Compliance Advisor Ombudsman (CAO) hears complaints regarding projects supported by the IFC or MIGA. **The Inspection panel and the CAO complaints processes are discussed below.**

A. World Bank Inspection Panel

The World Bank (WB) is an international development bank that provides low-interest loans, interest-free credits and grants to developing countries for education, health, infrastructure, communications, and many other purposes. The World Bank specifically refers to two of the five World Bank Group development institutions: the IBRD (International Bank for Reconstruction and Development) with 188 member states, and the IDA (International Development Association), with 173 member states.

The World Bank Inspection Panel, created in 1993, is composed of three members appointed by the Board of Executive Directors of the World Bank for a non-renewable period of five years. The Panel is a non-judicial “impartial fact-finding body, independent from the World Bank management and staff”⁴. Panel members cannot have worked for the Bank in any capacity for the two years prior to being appointed to the Panel, and cannot go back to working for the Bank again after their term at the Panel.⁵

② What are the issues that can be dealt with?

The World Bank Inspection Panel was created to address the concerns of people who believe they have been harmed, or are likely to be harmed, by the projects supported by the WB. The Panel assesses allegations of harm to people or the environment and reviews whether the Bank followed its operational policies and procedures during the design, preparation and implementation phases of the various projects.⁶ The Panel handles on average 3-4 complaints a year, and in 2014 it received 8 complaints. **The Panel does not prescribe remedies.**

From its establishment through to June 2015, the Panel has been asked to consider claims that have been framed explicitly in human rights terms in 14 out of 96 total Panel cases filed.⁷ Nevertheless, in its consideration of claims that directly or indirectly raise human rights concerns, it has identified **four circumstances in which Bank policies and procedures may require the Bank to take human rights issues into account:**⁸

- The Bank must ensure that its projects do **not contravene the borrower’s international human rights commitments**;
- The Bank must determine whether human rights issues may impede compliance with Bank Policies as part of its **project due-diligence**;
- The Bank must interpret the requirements of the **Indigenous Peoples policy** in accordance with the policy’s human rights objective; and
- The Bank must consider **human rights protections enshrined in national constitutions or other sources of domestic law.**

4 The Inspection Panel, *About Us*, The World Bank, www.worldbank.org. For more information see See The Panel Resolution and Mandate, The Inspection Panel, *About Us*, The World Bank, www.worldbank.org.

5 In early 2014, Panel members proposed to change these rules, which was seen as a risk for the Panel’s independence by NGOs and former Panel members. For more information, see Accountability Counsel, 2014 Inspection Panel Secretariat Crisis, www.accountabilitycounsel.org.

6 The Inspection Panel, *About Us*, The World Bank, *op. cited*

7 The Inspection Panel, *Panel Cases*, worldbank.org http://ewebapps.worldbank.org/apps/ip/Pages/Panel_Cases.aspx

8 See Steve Herz and Anne Perreault, *Bringing Human Rights Claims to the World Bank Inspection Panel*, CIEL, BIC and International Accountability Project, October 2009, www.bankinformationcenter.org.

In practice however, the Panel has not typically considered claims that were framed in terms of domestic or international law violations unless they were also framed as violations of Bank policy. When claimants seek to raise human rights issues, they should be careful to show how alleged violations of their human rights were caused by the Bank's failure to adhere to its own policies.

The WB has about 50 operational policies, including the following⁹:

- *Environmental assessment*: this policy evaluates the potential environmental risks and impacts of a project and examines alternatives as well as ways of improving the project selection, siting, planning, design, and implementation. It also includes the process of mitigation and management of adverse environmental impacts throughout the project's implementation.
- *Gender development*: this policy covers the gender dimensions of development within and across sectors in the countries in which the WB has an active assistance program. Here, the borrower's record with respect to gender and minority rights should be assessed.
- *Indigenous peoples*: this covers special considerations with regards to land and natural resources, commercial development of natural and cultural resources, as well as the physical relocation of indigenous peoples. The policy includes a process of free, prior, and informed consultation with the affected indigenous peoples' communities at each stage of the project and the preparation of an "Indigenous Peoples' Plan" or "Indigenous Peoples' Planning Framework". This policy requires the borrower to undertake a social assessment to evaluate the project's potential positive and adverse effects on indigenous peoples, and to examine project alternatives where adverse effects may be significant.
- *Involuntary resettlement*: this policy covers direct economic and social impacts that result from the Bank-assisted investment projects in order to avoid involuntary resettlements whenever it is possible. The policy provides for a resettlement plan or resettlement policy framework that includes information, consultation and compensation. This policy requires that particular attention be paid to the needs of vulnerable groups among those displaced, including women and ethnic minorities. Complaints can therefore address situations where free, prior and informed consultation has not been conducted prior to resettlement, or when information, consultation or compensation has been insufficient.

In sum, various rights may be affected in projects financed by the World Bank. These may range from the right to food (activities that pollute land or destroy it, preventing its use for production of food), the right to health (transportation of chemicals), the right to life (the use of security personnel, environmental damages) to the right

⁹ The World Bank, Operational Manual, *Operational Policies (Ops)* <http://web.worldbank.org/>.

to property (indigenous peoples' land rights, free, prior and informed consent), etc.¹⁰

World Bank's safeguards under review: dangerous risk of roll-back on environmental and social protections

In July 2012, the World Bank started a review process of its operational policies, also known as the "WB's safeguard policy requirements" or "WB safeguards", with the aim of updating and strengthening its environmental and social policies¹¹. The review focuses on the WB's eight environmental and social safeguard policies¹², as well as the Policy on Piloting the Use of Borrower Systems for Environmental and Social Safeguards ("Use of Country Systems").

The review process will be undertaken in three Phases, which each include consultations with a range of stakeholders and feature meetings, focus groups and submissions¹³. During Phase one, consultations were held on an "Approach Paper" focusing on the approach the new safeguards should take, and which led to the drafting of a first draft Environmental and Social Framework (ESF)¹⁴. This document was open to consultations during Phase two, which took place between July 2014 and March 2015, and which saw wide criticism emerging from World Bank Vice Presidents, civil society organisations (CSOs), UN experts and local communities, both on the content of the first draft safeguards, as well as on the consultation process¹⁵. The **second draft** ESF¹⁶ was published on 4 August 2015, thereby opening the third round of consultations, which will close on March 15, 2016. The second draft has received immediate criticism from civil society, once again with regard to content¹⁷ and to the consultation process¹⁸.

While acknowledging that the new WB Safeguards contain some improvements on language, civil society groups worldwide strongly criticize the new policy for representing a significant step backwards in terms of protection for communities and the environment, and a serious weakening of human rights standards in the safeguards, in particular in relation to Indigenous Peoples, resettlement, discrimination, and labour rights. The new draft overly relies on borrower's national

¹⁰ Steve Herz and Anne Perreault, *Op. cit.* www.bicusa.org/wp-content/uploads/2013/01/InspectionPanel_HumanRights.pdf

¹¹ For information on the review process, consultations and to access drafts, see *Review and Update of the World Bank Safeguard Policies*, <http://consultations.worldbank.org>. Bank Information Center, *World Bank Safeguards Review*, www.bankinformationcenter.org/safeguards/.

¹² The WB's eight environmental and social safeguard policies under review are: OP 4.01-Environmental Assessment; OP 4.04 -Natural Habitats; OP 4.09 - Pest Management; OP 4.10 - Indigenous Peoples; OP 4.11- Physical Cultural Resources; OP 4.12- Involuntary Resettlement; OP 4.36 -Forests; OP 4.37 - Safety of Dams.

¹³ See *Review and Update of the World Bank Safeguard Policies*, *po.cit.*

¹⁴ Environmental and Social Framework, World Bank, SFirst Draft for consultation, <http://consultations.worldbank.org>.

¹⁵ See *Submissions Hub: World Bank Safeguards Review*, Bank Information Centre, www.bankinformation-center.org.

¹⁶ Environmental and Social Framework, World Bank, Second Draft for consultation, <http://consultations.worldbank.org>.

¹⁷ A repository of Reactions to the Second Draft is available at www.bankinformationcenter.org/safeguards/.

¹⁸ *World Bank Safeguards Review –Phase 3 Consultations*, Joint CSO letter, 22 May 2015, www.bankinformationcenter.org.

systems and would de facto eliminate the bank's mandatory due diligence requirements to ensure that borrower environmental and social protections are at least as strong or equivalent to those of the bank: in other words, it removes mandatory timing and procedural requirements for borrower compliance.¹⁹ Moreover, many CSOs are concerned about the precedent that the World Bank's new safeguard policies could set, given that these highly influence standards for many of the world's financial institutions.²⁰ They have been described as a "shocking attempt to eviscerate protection from the poor". Interestingly, in January 2015, the US Congress passed the 2015 Omnibus Appropriations Act which includes a provision requiring the U.S. Treasury Department to veto any WB policy that is less protective of human rights and the environment than the current operational policies. With this Act, the United States, the World Bank's largest contributor, is required to vote against any new loans or grants if the World Bank weakens its safeguard policies.²¹

🕒 Who can file a complaint?²²

Complaints to the World Bank Inspection Panel are formally known as a "Request for Inspection", which can be submitted by "any group of two or more people in the country where the Bank financed project is located who believe that, as a result of the Bank's violation of its policies and procedures, their rights or interests have been, or are likely to be adversely affected in a direct and material way"²³. Organisations, associations, societies or other groups of individuals can file requests, as long as they meet this directly affected standards. However, one individual alone can not. Alternatively, the following entities may file a request on behalf of affected people:

- A duly appointed local representative acting on explicit instructions as the agent of adversely affected people;
- A foreign representative acting as the agent of adversely affected people, in exceptional cases;²⁴
- An Executive Director of the Bank in special cases of serious alleged violations of the Bank's policies and procedures; and
- the Executive Directors acting as a Board.²⁵

Requesters may ask for confidentiality in the handling of the Request.

¹⁹ BIC, *Dangerous Rollback on Environmental and Social Protection*, www.bankinformationcenter.org.

See also: "Coalition for Human Rights in Development, <http://rightsindevelopment.org>

²⁰ Bank on Human Rights, *Get Informed*, <http://bankonhumanrights.org/get-informed/>.

²¹ Inclusive Development International, *US Congress opposes World Bank plan to weaken environmental and social protections*, www.inclusivedevelopment.net. For more information on the US position see: *Review and Update of the World Bank's Safeguards Policies Committee on Development Effectiveness Discussion of the Proposed Second Draft of the Environmental and Social Framework World Bank Safeguards Policies*, <https://consultations.worldbank.org>

²² The Inspection Panel at the World Bank, *Operating Procedures*, April 2014, www.worldbank.org.

²³ How To File A Request For Inspection To The World Bank Inspection Panel, General Guidelines, <http://ewebapps.worldbank.org>.

²⁴ See *The Inspection Panel at the World Bank, Operating Procedures*, April 2014, *op. cited*

²⁵ How To File A Request For Inspection To The World Bank Inspection Panel, General Guidelines, *op cited*

② Under what conditions?

- The complainant must live in the territory of the borrowing state and in the area affected by the project.²⁶
- An affected party must believe that:
 - they are suffering or may suffer harm from a WB-funded project;
 - the WB **may have violated its operational policies or procedures** with respect to the design, appraisal, and/or implementation of the project;
 - the violation is causing the harm.²⁷
- The complaint can be submitted during the design, appraisal or implementation of a project, and must be submitted **before** the project's funding is closed and **before 95 percent** of the funding has been disbursed. A complaint may be submitted before the WB has approved financing for the project or program.²⁸
- The project must be funded at least in part by the International Development Association (IDA) or the International Bank for Reconstruction and Development (IBRD).²⁹
- **Before speaking to the Inspection panel**, the complainant needs to raise his/her concerns with WB staff;
- If Management fails to demonstrate that it is taking adequate steps to follow policies and procedures, the complainant may submit a request for inspection to the Inspection Panel directly;
- The complaint can be submitted in any language. For working purposes, the Panel will translate the request into English.
- The request should be dated and signed by the Requesters or their representative, and be sent with any supporting documentation, via post or email.

HOW TO FILE A COMPLAINT?

Content of the complaint must include:

- name, contact address, and telephone number of the complainants or representative(s);
- name of the area the complainants live in;
- name and/or brief description of the project or program;
- location/country of the project or program;
- description of the damage or harm the complainants are suffering or likely to suffer from the project or program;
- list (if known) of the WB's operational policies believed not to be observed; and
- explanation as to the unsatisfactory response given by the World Bank management as a result of the attempts made to bring the matter to its attention³⁰.

²⁶ The World Bank, *Accountability at the World Bank: The Inspection Panel 10 Years On*, 2003, Report No. 26758, p.19.

²⁷ *Ibid*, p. 25.

²⁸ *Ibid*, p. 24.

²⁹ *Ibid.*, p. 7.

³⁰ Accountability at the World Bank. The Inspection Panel, 15 years, www.worldbank.org, p. 23

The request must be sent to³¹:

The Inspection Panel
1818 H Street, NW
Mail Stop: MC10-1007
Washington, DC 20433 USA
Phone No. 202 458 5200
Fax No. 202 522 0916
E-mail address: ipanel@worldbank.org

The suggested format for a request for inspection can be found at www.worldbank.org

Process and Outcome

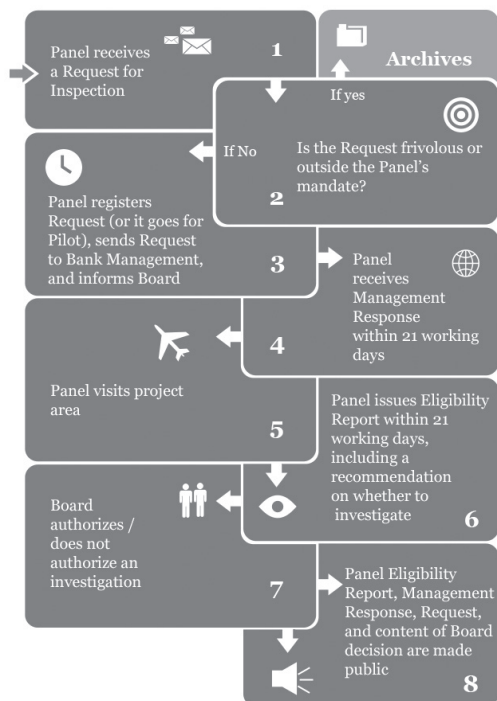
- When the Panel receives a request, it first checks whether it is frivolous or outside its mandate. If it is the case, a notice of non-registration will be sent, but if the request is admissible, it is registered by the Panel and sent to the World Bank's management. The latter has 21 days to respond. Under the Inspection Panel's new Pilot Program, the Panel can delay a decision on registration and allow bank management an opportunity to resolve the dispute before the Panel takes any further action.³² This new policy has generated a lot of criticism from civil society.³³
- The Panel may visit the project area, or make an eligibility determination based on a desk review. It then decides whether to recommend an investigation to the World Bank Executive Board. The Panel may also postpone the decision on whether to recommend an investigation in order to give management and complainants another chance to resolve the issues first.
- If the Executive Board approves an investigation, the Panel reviews relevant documents, interviews WB staff, and visits the project site.
- An investigation may take a few months, or more in complex cases.
- The Panel sends a written report of its findings to the Executive Board and the President.
- Within six weeks, the WB Management must respond and indicate how it plans to address the Panel's findings, usually in the form of an action plan, which it must develop in consultation with affected people.
- These decisions are then made available to complainants and the public in the form of an investigation report published on the World Bank's website.

³¹ A sample form for a request for inspection is available at: www.worldbank.org.

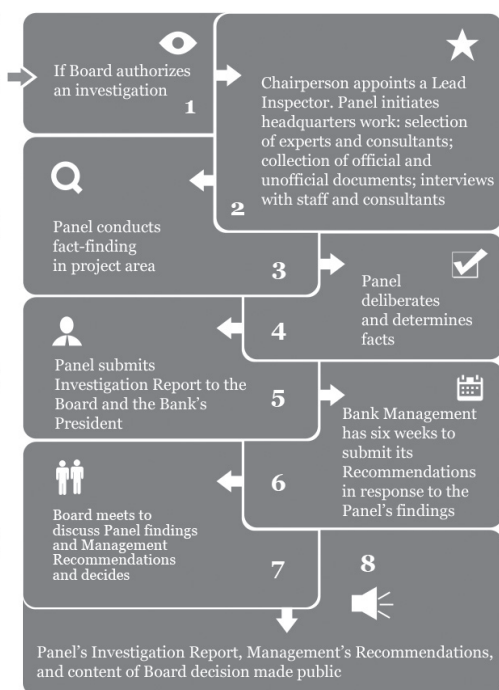
³² *The Inspection Panel at the World Bank, Operating Procedures*, April 2014, p. 24, *op. cited*

³³ *Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development*, Accountability Counsel, 8th edition, August 2015, p.9, *op. cited*

1- Inspection Panel Eligibility Phase



2- Inspection Panel Investigation Phase³⁴



The Inspection Panel in action

➔ Cambodia: Boeung Kak Lake evictions³⁵

Until recently, the Boeung Kak settlement consisted of nine villages surrounding the iconic lake in central Phnom Penh, where some 4000 families resided. In February 2007, the Municipality of Phnom Penh granted a 99-year lease to the private developer Shukaku Inc. over a 133-hectare area covering the lake and the nine surrounding villages, illegally stripping residents of their land rights. In September 2009, IDI associates assisted community representatives to prepare a complaint to the World Bank Inspection Panel, alleging that the World Bank breached its operational policies by failing to adequately supervise the Land Management and Administration Project (LMAP). This World Bank financed land titling project was established with the stated aim of improving security of tenure for the poor

³⁴ How to File a Request, The Inspection Panel, The World Bank, <http://ewebapps.worldbank.org/apps/ip/Pages/Processing-a-Request.aspx> (FIDH was granted permission to use the graphic).

³⁵ Case extract from Inclusive Development International, Cambodia: Boeung Kak Lake evictions, www.inclusivedevelopment.net/bkl/.

and reducing land conflicts in Cambodia by systematically registering land and issuing titles across the country. However, land-grabbing and forced evictions have escalated significantly over the last ten years, while many vulnerable households have been arbitrarily excluded from the titling system. This exclusion has denied these households protection against land-grabbing and adequate compensation for their expropriated land, often thrusting them into conditions of extreme poverty.

Despite many households having strong evidence to prove their legal rights to the land, Boeung Kak residents were excluded from the titling system when land registration was carried out in their neighborhood in 2006. Shortly thereafter, the Cambodian Government granted the Boeung Kak lease to Shukaku, and the 4000 families residing in the area were suddenly classified as illegal squatters on State-owned land. In addition to being unfairly denied title en masse, residents were also denied the protection of the LMAP Resettlement Policy Framework (RPF), which established a fair process for resettlement and compensation of people found to be residing on State land, in accordance with World Bank social safeguards.

The Inspection Panel found in favor of the Boeung Kak community's claim that non-compliance with Bank safeguard policies in the design, implementation and supervision of LMAP contributed to the harms that they had suffered. Accordingly, Bank Management made a number of commitments to attempt to address harms suffered. Specifically, it committed to "working with the Government and Development Partners towards ensuring that the communities who filed the Request will be supported in a way consistent with the Resettlement Policy Framework." Further, Management pledged to "continue to pursue actions so that people can benefit from a set of protection measures in line with what they would have received under the RPF,"³⁶ including the possibility of using other World Bank credits or trust fund mechanisms.

The Cambodian government, however, showed no willingness to cooperate with the Bank on these remedial actions. In turn, Bank Management informed the Government that it would stop providing loans to Cambodia and would not resume lending until there was a satisfactory resolution of the Boeung Kak case.

Within a week after this lending freeze became public knowledge, on August 17th, the Cambodian government issued a sub-decree granting title to the remaining 800 families over 12.44 hectares of residential land in the Boeung Kak area. By the end of December 2011, more than 500 families had received titles.

Despite this considerable positive development, the case is by no means closed. At least 90 families were excluded from the land concession, and on September 16th, eight of the excluded families were violently evicted. The other excluded families live under a daily threat of being forcibly evicted.

³⁶ *Id.* 35

FIDH – through the Observatory for the Protection of Human Rights Defenders – is also mobilised to protect members of the Boeung Kak community targeted for their activities in defense of human rights.³⁷

B. Compliance Advisor Ombudsman (CAO)

The Office of the Compliance Advisor Ombudsman (CAO) is the independent recourse mechanism for environmental and social concerns **regarding the private sectors activities of the World Bank Group**.³⁸

It relates to the:

- International Finance Corporation (IFC);³⁹ and
- The Multilateral Investment Guarantee Agency (MIGA).⁴⁰

The CAO has three functions:⁴¹

- **Dispute resolution** with project-affected communities and companies to address environmental and social concerns.
- **Compliance** investigations of the environmental and social performance of IFC/ MIGA.
- Independent **advice** to the World Bank Group president and IFC/MIGA senior management on systemic environmental and social issues.

② What are the issues that can be dealt with?

Regarding the social and environmental impact of the projects they support, IFC and MIGA apply their Performance Standards (PS) which cover the following areas:

- Assessment and management of social and environmental risks and impacts
- Labour and working conditions
- Resource efficiency and pollution prevention
- Community, health, safety and security
- Land acquisition and involuntary resettlement
- Biodiversity conservation and sustainable management of living natural resources
- Indigenous peoples
- Cultural heritage

³⁷ See notably Interview of Yorm Bopha at: FIDH, *We Are not Afraid*, <https://wearenotafraid.org/en/>.

³⁸ Compliance Advisor Ombudsman, www.cao-ombudsman.org/ All Compliance Advisor Ombudsman cases can be found at www.cao-ombudsman.org.

³⁹ The IFC provides investments and advisory services to support private sector investment in developing countries. See International Finance Corporation, *About IFC*, World Bank Group, www.ifc.org/about.

⁴⁰ The MIGA provides advisory services and political risk insurance (guarantees) to protect private investors against non-commercial risks, such as war, expropriation, and currency inconvertibility. See Multilateral Investment Guarantee Agency, The World Bank Group, www.miga.org/Pages/Home.aspx

⁴¹ Compliance Advisor Ombudsman, *CAO Operational Guidelines*, 2013, p.4-5, www.cao-ombudsman.org.

Revision of IFC Sustainability framework

The IFC Board of Directors approved the updated sustainability framework in May 2011, culminating a two-and-a-half year review and a 18-month consultation process. The new policies and standards came into effect on January 1st 2012. The main objectives of the new framework are to strengthen IFC commitment to critical issues such as climate change, business and human rights, supply-chain management and transparency.

The 2012 PS include measures to enhance energy, water efficiency and target greenhouse-gas reduction. The framework advocates for more transparency and also recognizes the responsibility of the private sector to identify adverse risks and impacts through **environmental and social due diligence** and to provide effective **grievances mechanisms**. Updates also address human trafficking, forced evictions (even if the PS does not specify that evictions are forbidden or that private sector must be carried out also in accordance with international human rights standards) and communities access to cultural heritage. The IFC has adopted the principle of **“Free, prior and Informed consent” introduced by the 2007 UN Declaration on the rights of indigenous peoples**, but only in certain cases: where activities have impacts on lands and natural resources subject to traditional ownership or under customary use, in cases of relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use and where a project may significantly impact on critical cultural heritage.

In 2011, the IFC recognised the responsibility of business actors to respect human rights, and stated that it would be guided by the principles of the International Bill of Human Rights and of the 8 core ILO Conventions. More specifically, it considered that in “limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business”.⁴²

Civil society had called for stronger human rights language in the policies, including engagement by the IFC not to support activities that could lead to or contribute to human rights abuses and a requirement that IFC clients should carry out human rights due diligence.

Some improvements include requirements regarding the disclosure of principal contracts for extractive projects, greater transparency and communication at the project-level concerning the environment and social impacts and development

⁴² See notably Environmental Finance, *NGOs Welcome Reforms to IFC Sustainability Policies*, 11 August 2011, www.environmental-finance.com.

outcomes of projects funded by the bank⁴³ and the requirement to obtain “free, prior and informed consent” of indigenous peoples.

Although the new PS disclose significant improvements with regard to rights of indigenous peoples, the UN Special Rapporteur on this question⁴⁴ highlighted some of the limitations that can still be found in the final version and recommended:

- The establishment of a consultation model for all projects affecting local communities;
- The prohibition of a project if the free, prior and informed consent is not obtained;
- The establishment by states of mechanisms to financially and technically support affected communities with a view to balance negotiation powers between the latter and IFC clients.

② Who can file a complaint?

Any individual or group of individuals directly impacted or likely to be impacted by social or environmental impacts of an IFC or MIGA project can file a complaint.

A complaint may be lodged by an organisation or individual representing those affected, if they provide explicit evidence of authority to present the complaint on their behalf.⁴⁵

③ Under what conditions?

- The complaint may not be anonymous but the complainant can ask for confidentiality.⁴⁶
- The complaints may relate to any aspect of the planning, implementation, or social or environmental impacts of IFC/MIGA projects.
- The complaint may be submitted in any language.
- The complaint must be submitted to the office of the CAO in writing.

HOW TO FILE A COMPLAINT?

Content of the complaint must include:⁴⁷

- the complainant’s name, address and contact information or the identity of those on whose behalf the complaint is being made;
- information on whether or not the complainant wishes its identity or any information communicated as part of the complaint be kept confidential (stating reasons);

⁴³ James Anaya, UN Special Rapporteur on the rights of indigenous peoples, Memorandum, *Draft IFC performance standards*, March 2, 2011.

⁴⁴ *Ibid.*

⁴⁵ Compliance Advisor Ombudsman, *CAO Operational Guidelines*, 2013, p.10, *op. cited*

⁴⁶ *Ibid.*

⁴⁷ Compliance Advisor Ombudsman, *CAO Operational Guidelines*, 2013, p.12, *op. cited*

- the identity and nature of the project;
- a statement of the way in which the complainant believes it has been, or is likely to be, affected
- by social or environmental impacts of the project;
- a statement of which performance standards are alleged to have been violated.

Complaints should be submitted by email, fax, and mail/post or delivered to:

Office of the Compliance Advisor/Ombudsman (CAO)

2121 Pennsylvania Avenue, NW

Washington, DC 20433, USA

Tel: + 1 202 458 1973

Fax: + 1 202 522 7400

E-mail: CAO@worldbankgroup.org

➡ Process and Outcome⁴⁸

Within five days after submission of the complaint, the CAO will acknowledge its receipt. The CAO will then determine whether the complaint is receivable and will inform the complainant of either its acceptance or rejection within 15 days. The CAO will then conduct an assessment of the complaint for up to 120 days, which may include:

- a visit to the project site
- a review of IFC/MIGA files
- meetings with the complainants and other project stakeholders.

At the end of the assessment, the CAO issues an Assessment Report. Such assessments should not entail judgements on the merits of the case, but rather are an opportunity for the CAO to learn more about the issues, engage with the parties, and determine which process the parties seek to initiate.

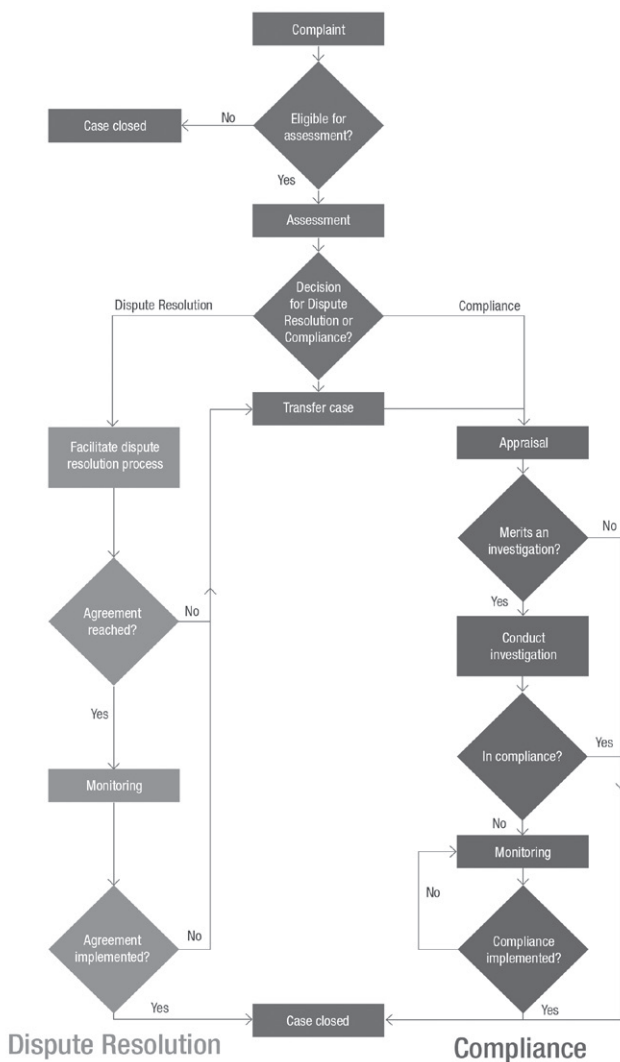
The complaint may first go through the **Dispute Resolution** process, if the CAO sees an opportunity to reach a solution through mediation, which may involve hiring a professional mediator, hire experts to assist with fact-finding or use other techniques to address the conflict.

If Dispute Resolution is not possible, or if at any point either party no longer wishes to be a part of the process, the complaint is transferred to the **Compliance Function**. The CAO decides whether a case deserves investigation in 45 days during the Appraisal phase, and then conducts a Compliance Investigation which may involve review of documents, interviews and site visits. In cases where the CAO's investigation shows that the IFC or MIGA is not in compliance with their

⁴⁸ Compliance Advisor Ombudsman, CAO Operational Guidelines, 2013, p.12-15, *op. cited*.

rules, the CAO will keep the case open to monitor IFC's actions until compliance has been achieved.⁴⁹

CAO process for handling complaints⁵⁰



⁴⁹ *Compliance Advisor Ombudsman Brochure*, SOMO and Accountability Counsel, www.accountability-counsel.org

⁵⁰ Compliance Advisor Ombudsman, CAO Operational Guidelines, 2013, www.cao-ombudsman.org (FIDH was granted permission to use the graphic)

The CAO in action

As of 2015, the CAO had accepted 151 complaints and requests for audits spanning 42 countries since its inception in 1999.⁵¹

➔ Palm oil production, Wilmar Group, Indonesia⁵²

Between 2003 and 2008, the IFC made several investments in the Wilmar Group, a multinational agri-business company head-quartered in Singapore.

In July 2007, NGOs, smallholders and Indigenous peoples' organisations of Indonesia (under the lead of Forest Peoples Programme, Sawit Watch and Serikat Petani Kelapa Sawit) filed a complaint with the CAO alleging that the Wilmar Group's activities in Indonesia violated a number of IFC standards and requirements.

The complainants raised concerns in particular about the analysis of social and environmental risks and impacts that were examined in a social and environmental assessment which looked at the actions related to provisions given for land acquisition and involuntary resettlement, for biodiversity conservation and sustainable natural resource management, and for Indigenous peoples and cultural heritage.

The CAO concluded that IFC did not meet the requirements of its own Performance Standards for its assessment of the Wilmar trade facility investment and that "the adoption of a narrow interpretation of the investment impacts – in full knowledge of the broader implications – is inconsistent with IFC's asserted role, mandate of reducing poverty and improving lives, and commitment to sustainable development".⁵³

This case clearly relates to indigenous peoples' rights as well as the right to be protected against forced evictions.

"The IFC/World Bank President, Robert Zoellig has then agreed to suspend IFC funding of the oil palm sector pending the development of a revised strategy for dealing with the troubled sector.⁵⁴" Furthermore an in-depth six month review of how the IFC will engage in the palm oil sector in the future was supposed to be implemented through open and extensive consultations. The Wilmar Group's social and environmental procedures were to be analysed and assessed.⁵⁵

⁵¹ Compliance Advisor Ombudsman, Annual Report 2015, www.cao-ombudsman.org

⁵² CAO, Audit of IFC, C-I-R6-Y08-F096, Compliance Advisor Ombudsman, 19 June 2009, www.cao-ombudsman.org.

⁵³ *Ibid.*

⁵⁴ Forest Peoples Programme, *IFC agrees to suspend funding for palm oil sector in response to NGO critique*, Press Release, 9 September 2009, www.forestpeoples.org.

⁵⁵ Robert Zoellig, Letter to Forest Peoples Programme, World Bank, 28 August 2009, available at www.forestpeoples.org.

In April 2011, the World Bank announced its new strategy⁵⁶ in the controversial palm oil sector putting an end to the investments moratorium in the sector. Considering the concerns of the stakeholders, the IFC says it will now pay attention to the careful selection of the clients depending on their ability to address environmental and social issues, the land acquisition in compliance with local regulations, biodiversity conservation, profit sharing with local communities and finally the need to focus on the food and agribusiness supply chain.

This strategy relies on four pillars:

- 1 – Sharing the benefits with people from rural areas, local communities and small farmers;
- 2 – Limiting the palm oil culture's impact on natural habitats through implementing a biodiversity conservation policy;
- 3 – The sustainable development of the private sector investments;
- 4 – Enable small farmers to access markets and finance through the enhancement of the services to improve their productivity and the development of new financial mechanisms.

However, NGOs criticise this strategy⁵⁷ denouncing the weak provisions regarding free, prior and informed consent of indigenous peoples and the lack of clarity on how performance standards will be applied across the entire supply chain.

➔ **Movimiento Unificado Campesino del Aguan (MUCA) v. Corporación Dinant, Honduras**

The Honduran palm oil and food company Corporación Dinant has operating plantations, mills and refineries in the Lean and Aguan Valleys, and around the cities of Tocoa and La Ceiba. It was granted a loan of \$30 million by the IFC, partially financing the increase of its production capacity, the expansion of its distribution networks and the building of a biogas facility to produce electricity.

On 25 July 2014, the MUCA filed a complaint with the CAO against Corporación Dinant, alleging that its operations in the Aguan Valley had a negative environmental impact, and generated land disputes, the displacement of communities, as well as the use of violence and security forces against peasants.

After having found the MUCA's complaint eligible in August 2014, the CAO conducted a first trip to Honduras in October 2014 as part of its assessment of the case. Since discussions had already been initiated between both parties under the supervision of the IFC and CBI, the CAO decided to postpone the completion of its assessment. This decision was discussed and confirmed with the MUCA and Corporación Dinant during a second trip of the CAO in November 2014. The CAO was to resume its assessment in June 2015 but the case has remained suspended.⁵⁸

⁵⁶ See: www.ifc.org/palmoilstrategy.

⁵⁷ See for example Bretton Woods Project, "Open for business: World Bank to reinvest in palm oil amid criticism", 14 April 2011, available at: www.brettonwoodsproject.org/art-568287.

⁵⁸ Compliance Advisor Ombudsman, Honduras/Dinant 03/Aguan Valley, www.cao-ombudsman.org.

In the meantime, the CAO affirmed that it is helping IFC to address the shortcomings in its environmental and social performance regarding its investment in Corporación Dinant, that were highlighted by an investigation report published in January 2014, following concerns raised by FIDH and other civil society groups who continue to monitor the process.⁵⁹

Local groups such as "Plataforma Agraria" are calling on the World Bank to suspend all funding to Honduras and to call on Honduras to ensure effective and meaningful participation of peasant organisations in decision related to land titles, and to hold perpetrators accountable for human rights violations committed.

ADDITIONAL RESOURCES

- **World Bank Inspection Panel**
www.worldbank.org/inspectionpanel
- **Compliance Advisor Ombudsman**
www.cao-ombudsman.org
- **Accountability Counsel**
www.accountabilitycounsel.org/
- **Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development, Accountability Counsel, 8th edition, August 2015, available at:**
www.accountabilitycounsel.org
- **CIEL, "International Financial Institutions Program"**
http://ciel.org/Intl_Financial_Inst/index.html
- **Bank Information Center**
www.bankinformationcenter.org
- **World Bank Inspection Panel brochure, Human Rights & Grievance Mechanisms, SOMO**
<http://grievancemechanisms.org>
- **Compliance Advisor Ombudsman brochure, Human Rights & Grievance Mechanisms, SOMO and Accountability Counsel**
<http://grievancemechanisms.org>
- **Bretton Woods Project**
www.brettonwoodsproject.org
- **Inclusive Development International, Following the Money – An Advocate's Guide to Securing Accountability in Agricultural Investments, Emma Blackmore, Natalie Bugalski and David Pred, September 2015, available at:**
www.inclusivedevelopment.net

⁵⁹ FIDH, *Honduras : World Bank criticized for inadequate supervision of its investments*, Press release, 3 January 2014, www.fidh.org.

An insight into...

The International centre for the Settlement of Investment Disputes (ICSID)

A bilateral investment treaty (BIT) is an agreement between two states which contains guarantees aiming at promoting investment. Over 170 countries have signed one or more bilateral investment treaties⁶⁰ and more than 2,900 BITs have been signed.⁶¹ As of today, the overwhelming majority of BITs contain a clause for recourse to the International Centre for the Settlement of Investment Disputes (ICSID).⁶² Created in 1965 under the Convention on the Settlement of Investment Disputes between States and Nationals of other States [hereinafter “ICSID Convention”]⁶³, the establishment of ICSID was motivated by a desire to promote international investment by providing a neutral forum for dispute resolution.

This means that in case of a dispute, a foreign investor can file a complaint against a state before the ICSID without having to exhaust domestic remedies.⁶⁴ ICSID may also administer disputes under non-ICSID rules; namely, the UNCITRAL Arbitration Rules. While these types of forums were initially created to ensure stability for investors fearing arbitrary decisions by states, they have led to the application of significant protection for investors and the granting of important financial penalties for states. Hence, they have become an important obstacle for states wanting to implement public policy measures which would potentially affect investors’ revenues. The multiplication of investor-state disputes, the tendency of arbitrators to favour investors, the scarce attention paid to human rights law in the settlement of these disputes as well as the ongoing debates surrounding the human rights responsibilities of multinationals have generated wide criticisms in relation to investment tribunals such as ICSID. Numerous trade agreements currently in place include clauses for international investor-state arbitration in case of disputes between foreign investors and governments. Investor-state tribunals are criticized for granting disproportionate protection to investors, at the expense of human

60 For a list of signed BITs, see the website of the United Nations Conference on Trade and Development (UNCTAD): www.unctad.org

61 U.N. CONFERENCE ON TRADE AND DEV., *World Investment Report 2014: Investing in the SDGs: An Action Plan* 114, UN Sales No E.14.II.D.1 (2014).

62 G. Van Harten, *Private authority and transnational governance: the contours of the international system of investor protection*, Review of International Political Economy, vol. 12, 2005, p.608.

63 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, adopted 18 March 1965, entered into force: 14 October 1996, www.icsid.worldbank.org.

64 Besides the World Bank, there are other instances providing for arbitration tribunals such as the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce, the Hong-Kong International Arbitration Center (HKIAC), the Singapore International Arbitration Center (SIAC), and other institutions. For a good introduction on human rights and international investment arbitration, see L.E. Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-state Arbitration*, Rights & Democracy, 2009.

rights, environmental protection and national sovereignty. Part of the opposition to the Trans Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) that are currently being negotiated is based on objections to the investor-state dispute settlements provisions being discussed.

In the face of these criticisms and since many cases brought to these forums were matters of public interest, arbitrators have accepted, in certain cases, the submission of *amicus curiae* by third parties, such as NGOs. It is therefore crucial for victims to have their voices heard during the arbitration proceedings of investment tribunals such as ICSID.⁶⁵ Since the amendment of the ICSID rules of procedures in 2006, third parties can access hearings if both parties agree.⁶⁶ In addition, new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration⁶⁷ were adopted in July 2013, significantly improving the transparency of the proceedings. The rules are not exclusive to UNCITRAL arbitrations. The UNCITRAL Transparency Rules came into effect on April 1, 2014.⁶⁸

Such rules provide for the publication of key documents such as the tribunal's decisions and the **parties' statements (the company's claims and the State's defence). They allow in certain circumstances the participation of non-disputing third parties**, as well as **open hearings**. However, these rules only apply to arbitration proceedings based on investment treaties that entered into force after 1 April 2014. They can apply to earlier treaties only if the parties agreed so. To facilitate such agreement, a UN Convention on Transparency in Treaty-Based Investor-State Arbitration (the Mauritius Convention) was opened for signature in March 2015, so that the UNCITRAL Rules on Transparency apply automatically to the parties of this Convention, regardless of the date of entry into force of their investment treaties. As of October 2015, 15 States had signed the Convention (among them Germany, France, the United Kingdom, Canada and the United States), and one state (Mauritius) had ratified it.⁶⁹ The Convention will enter into force six months after the deposit of the third instrument of ratification, acceptance, approval or accession.⁷⁰

65 For a useful resource see: International Human Rights Program at the University of Toronto, Faculty of Law and the Center for International Environmental Law (CIEL), Guide for Potential Amici in International Investment Arbitration, January 2014, http://ciel.org/Publications/Guide_PotentialAmici_Jan2014.pdf. The Guide provides an overview of ICSID and the guidance to submit *amicus curiae* briefs in the context of these proceedings.

66 J.E. Vinuales, *Human Rights and Investment Arbitration: the Role of Amici Curiae*, International Law: Revista Colombiana de Derecho Internacional, vol. 8, 2006, p.259

67 U. N. Comm'n on Int'l Trade Law, Dec. 16, 2013, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, art. 1, www.uncitral.org.

68 UNCITRAL, Rules on Transparency in Treaty-based Investor-State Arbitration, www.uncitral.org/.

69 UNCITRAL, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014), Status, www.uncitral.org.

70 UNCITRAL, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, www.uncitral.org.

➔ Vivendi case

The Vivendi case⁷¹ is related to a water dispute resulting from a concession contract made between the French Compagnie Générale des Eaux – subsequently Vivendi Universal – and its Argentine subsidiary, the *Compañía de Aguas del Aconquija S.A.* The French investors accused Argentina of having breached the Bilateral Investment Treaty (BIT) it had concluded with France, because it had entrusted the water supply and the management of used waters to another company. Argentina argued that such concession was necessary to ensure access to water to its population, with referring to its obligations under international human rights law. Parts of the Respondent's arguments were built around the necessity to interpret investment clauses, and specifically States' obligation to provide fair and equitable treatment to investors, in light of their human rights commitments on the international plane. In 2007, the ICSID Tribunal accepted to receive amicus curiae briefs written by a coalition of NGOs⁷². It was one of the first times that it decided in favour of the admissibility of such submissions. Like the Respondent, NGOs sustained that Argentina was under an international law obligation to guarantee the right to water under, and that it was therefore constrained to undertake measures ensuring water accessibility and affordability to its citizens.

Registered in 2003, the case ended up with a final decision rendered in July 2010. Despite the central place of their human rights arguments, the tribunal considered that the non-disputing parties had not provided sufficient evidence to prove their capacity to bring “a perspective, particular knowledge or insight that is different from that of the disputing parties”⁷³.

Actually, despite the occurrence of several similar disputes, the Biwater Gauff case that involved an Anglo-German consortium against the Tanzanian State remains one of the very few cases where the arbitral tribunal having accepted the submission of amicus curiae effectively took their content and relevance into account⁷⁴.

71 *Aguas Argentinas, S.A. Suez, Sociedad General de Aguas de Barcelona, S.A. Vivendi Universal, S.A. v. The Argentine Republic*, ICSID case n° ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae of May 19, 2005, 21 ICSID Rev.—FILJ 342 (2006); Order in Response to a Petition by Five Non-Governmental Organisations for Permission to make an Amicus Curiae Submission of February 12, 2007, Decision on Liability of July 30, 2010, available at <https://icsid.worldbank.org>.

72 CIEL, ICSID tribunal accepts civil society organisations as amici curiae, available at www.ciel.org.

73 ICSID, Rule 37 (2), a) of the Arbitration Rules of the ICSID Tribunal, available at <https://icsid.worldbank.org>.

74 *White&Case. No Remedy for an Investor's Own Mismanagement: The Award in the ICSID case Biwater Gauff v. Tanzania*, available at www.whitecase.com.

➔ **Bechtel v. Bolivia the “water revolt” in Cochabamba (Bolivia)**⁷⁵

In 1997 the World Bank informed Bolivia that it would provide additional aid for water development under the condition that the government privatises the public water systems of two of its largest urban centres, El Alto/La Paz and the city of Cochabamba.

In September 1999, in a confidential process involving only one bidder, Bolivia's government turned over Cochabamba's water to a company controlled by the California engineering giant, Bechtel. Within a few weeks, Bechtel raised water rates by an average of more than 50%, sparking a citywide rebellion that has come to be known as the Cochabamba Water Revolt. In April 2000, following the declaration of martial law by the President, the death of a seventeen- year-old boy, Victor Hugo Daza, who was killed by the army, and more than a hundred wounded civilians, the citizens of Cochabamba refused to back down and Bechtel was forced to leave Bolivia. Eighteen months later Bechtel and its Spanish co-investor, Abengoa filed a \$50 million dollar legal demand against Bolivia before the ICSID. For the following four years, Bechtel and Abengoa found their companies and corporate leaders so dogged by protest, damaging press, and public demands from five continents, that they dropped the case.

On January 19, 2006, representatives of Bechtel and Abengoa travelled to Bolivia to sign an agreement in which they abandoned the ICSID case for a token payment of 2 bolivianos (30 cents). This is the first time that a major corporation has ever dropped an international investment arbitration case, as a direct result of public pressure and multi-faceted local and international action.

Other controversial cases have been filed before the ICSID. A case opposing the Canadian-Australian mining company OceanaGold to the state of El Salvador is currently pending before the ICSID.⁷⁶ OceanaGold, formerly known as Pacific Rim, filed a lawsuit against El Salvador in 2009 for not granting permission to the company's El Dorado gold mine, after the project failed to meet national regulatory requirement. The government denied approval to the mining proposal over fears of contamination of the El Salvador's already scarce water resources, and correlated impacts on local communities' health and on the environment. In 2008, the government instituted a moratorium on new mining permits which is still in force and receives broad popular support. OceanaGold originally filed the lawsuit for US\$77 million, and raised it to US\$301 million, which represents just under 2 percent of El Salvador's GDP. Such a fee would significantly weaken the states' capacity to protect and fulfill health and education rights.

⁷⁵ Extracts from the communications of the Democracy Center (<http://democracycenter.org/>) and the Business & Human Rights Resource Centre (<http://business-humanrights.org/>)

⁷⁶ *Pac Rim v. El Salvador*, ICSID case N°. ARB/09/12

NGOs such as la MESA, CIEL and FESPAD worked together to intervene in this case. The arbitral tribunal accepted their submission, but refused them to make an oral presentation at the jurisdictional hearing. Through La MESA's submission, NGOs provided a different perspective on the case, insisting on public participation, democracy principles and respect for human rights. In July 2014, a second submission was filed. A hearing on the merits took place in September 2014. Post-Hearing Briefs and submissions on costs were filed on November and December 2014. To date, the ICSID Tribunal has not given its final verdict.⁷⁷

NGOs involved published a useful report with lessons learned when engaging in investor-state dispute proceedings. (see below)

ADDITIONAL RESOURCES

- ICSID
<http://icsid.worldbank.org> (all cases before the icsid can be found online)
 - Investment Treaty Arbitration - italaw (all cases are available on this webpage)
www.italaw.com
 - International Institute for Sustainable Development (see international trade section)
www.iisd.org
 - Investment Arbitration Reporter
www.iareporter.com
 - Centre for International Environmental Law
www.ciel.org
 - International Human Rights Program at the University of Toronto, Faculty of Law and the Center for International Environmental Law (CIEL), Guide for Potential Amici in International Investment Arbitration, January 2014,
http://ciel.org/Publications/Guide_PotentialAmici_Jan2014.pdf
 - Marcos A. Orellana, Saúl Baños and Thierry Berger, Brining Community Perspectives to Investor-State Arbitration: The Pac Rim Case, IIED, CIEL & FESPAD, July 2015,
www.ciel.org/wp-content
 - Kluwer Arbitration blog
<http://klowerarbitrationblog.com>
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⁷⁷ *When Corporations Sue Governments*, Manuel Pérez-Rocha, Op-Ed, The New York Times, 3 December 2014, www.nytimes.com.

CHAPTER II

Regional Development Banks

A. European Investment Bank

B. European Bank for Reconstruction and Development

C. Inter-American Development Bank

D. African Development

E. Asian Development

* * *

There are regional public financial institutions in every part of the world. Europe has two such banks: the European Investment Bank and the European Bank for Reconstruction and Development.

A. European Investment Bank⁷⁸

The European Investment Bank (EIB), created in 1958 by the Treaty of Rome, is the long-term lending bank of the European Union. In 2010, it approved 79.12 billion Euro worth of loans. The bank's mission is "to contribute towards the integration, balanced development and economic and social cohesion of the EU Member States."⁷⁹ It lends money to projects that further EU policy objectives. These projects cover a number of geographical regions and a wide range of topics⁸⁰. The EIB has a complaint mechanism composed of the **EIB Complaints Mechanism and of the European Ombudsman**. The former is an internal mechanism, independent from operational activities; the latter is an external and independent mechanism. In case of maladministration by the EIB Group, a complaint can be filed with the EIB complaints mechanism. If the complainant is unsatisfied, there is the possibility to lodge a complaint with the European Ombudsman against the EIB. **The European Ombudsman's recommendations are non-binding, and it can only rule on EIB "maladministration".**

In March 2015, the EIB adopted a new Transparency Policy,⁸¹ which defines the EIB procedures concerning information requests from the public, the information that the EIB makes routinely available to the public, and EIB's approach to transparency

⁷⁸ The EIB is not a "development" bank as such but it is increasingly funding development projects. For the sake of clarity, it is therefore discussed in this chapter.

⁷⁹ EIB, *About the EIB*, www.eib.org.

⁸⁰ EIB, *Projects*, www.eib.org.

⁸¹ European Investment Bank Group, *Transparency Policy*, 6 March 2015, www.eib.org.

and stakeholder engagement.⁸² This Transparency Policy replaces the 2010 one,⁸³ which was revised following a public consultation process launched in July 2014, and during which the views and comment of a wide range of stakeholders were collected through written contributions and consultation meetings⁸⁴.

The new Transparency Policy was criticised by several CSOs in particular in relation to: a) provisions expanding exceptions to the disclosure of internal documents, namely by adding in a presumption that all documents related to investigations, reports and audits into irregularities such as corruption and maladministration shall be **confidential**, even if they concern matters of public interest and even once investigations are closed, b) for failing to respect the Aarhus convention and EU Regulation 1367/2006 on disclosure of environmental information, and c) for not imposing an obligation on the EIB to disclose information regarding loans which go through financial intermediaries.⁸⁵

During the public consultation process regarding the policy, the European Ombudsman's representative also recommended against including the exceptions on of internal documents.⁸⁶

1. The EIB complaints mechanism

The EIB established a Complaints Mechanism in 2008. The latest version of the mechanism's policy were released in August 2013.⁸⁷

The Complaints Mechanism has two functions, which apply both to private and public sector EIB operations:

- **Compliance review**
- **Problem-solving**

The EIB decides which approach to follow depending on the case. Complainants may request the compliance review or problem-solving functions, or a combination of the two.

If complainants are not satisfied with the outcomes of the Complaints Mechanism proceeding, they may appeal to the European Ombudsman within two years (see below).

⁸² European Investment Bank, *EIB Group Transparency Policy*, www.eib.org.

⁸³ EIB, *EIB Transparency policy*, 2 February 2010, www.eib.org.

⁸⁴ European Investment Bank, *Public Consultation on EIB's Transparency Policy*, www.eib.org.

⁸⁵ *Draft EIB Transparency Policy*, Letter sent to the Directors of the EIB by 11 CSO groups, 26 December 2015, www.counter-balance.org.

⁸⁶ *EIB's new transparency policy allows for more secrecy*, CEE Bank Watch Network, 11 March 2015, <http://bankwatch.org>

⁸⁷ European Investment Bank, *Complaints Mechanism Operating Procedures*, August 2013, www.eib.org.

② What are the issues that can be dealt with?

The EIB Statement of Environmental and Social Principles and Standards were published in February 2009, following a public consultation process.⁸⁸ The goal is to “increase environmental and social benefits”, while “decreasing environmental and social costs”. These standards and principles are mostly based on EU legislation:

- *Environmental Standards in the EU and Enlargement Countries*: the EIB requires that all projects that it finances comply at least with:
 - Applicable national environmental law;
 - Applicable EU environmental law (EU EIA Directive, the Nature Conservation Directives, Sector-specific Directives, “Cross-cutting” Directives);
 - The principles and standards of relevant international environmental conventions incorporated into EU law.
- *Environmental Standards in the Rest of the World*: For projects in all other regions of EIB activity, the Bank requires that all projects comply with national legislation, including international conventions ratified by the host country, as well as EU standards.
- *Social standards*: The EIB restricts its financing to projects that respect human rights and comply with EIB social standards based on the principles of the Charter of the Fundamental Rights of the European Union and international good practices⁸⁹. “Promoters that seek EIB financing outside the EU are required to adopt the social standards regarding involuntary resettlement, Indigenous Peoples and other vulnerable groups, the core labour standards of the International Labour Organisation (ILO) and occupational and community health and safety.”⁹⁰
- *Cultural heritage* is a broad concept referring to the promotion of human development through inter-cultural dialogue as an essential element in the achievement of balanced spatial development. Thus the Bank shall not finance projects threatening the integrity of sites that have a high level of protection for reasons of cultural heritage, as UNESCO World Heritage Sites for instance.
- *Consultation, participation and disclosure standards*, referring to EIB’s complaint system.

⁸⁸ EIB, *Statement of Environmental and Social Principles and Standards*, February 2009, www.eib.org.

⁸⁹ EIB, the *EIB Statement of Environmental and Social Principles and Standards*, *European Investment Bank*, 2009, p. 16 §, 47: In all other regions of EIB operations, the approach of the EIB to social matters is based on the rights-based approach mainstreaming the principles of human rights law into practices through the application of its Social Assessment Guidelines (SAGs) (see Handbook). These requirements are also consistent with the social safeguard measures developed and applied by those MFIs with whom the Bank works closely. www.bei.org/attachments/strategies/eib_statement_esps_annex2_statement.pdf

⁹⁰ *Ibid.*, p. 16, § 50.

– *Biological diversity.*

- *Climate change:* promoters are encouraged to identify and manage climate change risks. Where risks are identified, the Bank requires the promoter to identify and apply adaptation measures to ensure the sustainability of the project. The Bank also recognises that adaptation is necessary and actively promotes adaptation projects.

The EIB Environmental and Social Handbook⁹¹ provides an operational translation of the policies and principles contained in the EIB Environmental and Social Principles and Standards translating these in due diligence processes and practices. However in practice, the EIB delegates many responsibilities to the project developers, and as a result the principles and standards of the EIB remain largely criticised by NGOs for being nebulous and for not clearly stating what is required from the EIB to act in conformity with its standards and principles.

⑤ Who can file a complaint?

Any EIB stakeholders, individuals, organisations or corporations that have concerns about the EIB Group's activities. Complainants do not need to prove that they are directly affected by an EIB decision, action or omission and are not required to identify the rules, regulations or policies in question.⁹²

⑥ Under what conditions?⁹³

- The EIB does not accept anonymous complaints, but it does treat all complaints confidentially unless that right has been expressly waived by the complainant.
- Any person may write in one of the 24 official languages of the European Union⁹⁴ and has the right to receive a reply in the same language.
- The complaint must concern any alleged maladministration in of the EIB Group in its decisions, actions or omissions.⁹⁵
- Complaints may be about access to information, the environmental and social impact of projects, procurement procedures, human resources issues, customer

⁹¹ EIB, *Environmental and Social Handbook*, December 2013, www.eib.org.

⁹² EIB, *The EIB Complaints mechanism Flyer*, www.eib.org.

⁹³ European Investment Bank, *Complaints Mechanism Operating Procedures*, August 2013, *op cited*

⁹⁴ See European Commission, "Official EU languages" <http://ec.europa.eu>. The EIB also considers complaints in non-EU languages spoken by those affected by EIB projects.

⁹⁵ Complaints must concern alleged failure by the EIB Group to comply with applicable law, internationally recognized human rights, EIB policy, or principles of good administration. See the definition of maladministration in European Investment Bank, *Complaints Mechanism Operating Procedures*, August 2013, p 4-5, *op cited*.

relations, etc. Complaints may also relate to any aspect of the planning, implementation or impact of EIB projects.

- Complaints must be filed within one year of acknowledgment of the matter to which they relate. Complaints concerning access to information must be filed within 20 working days of the date of the correspondence to which the complaint relates.⁹⁶

HOW TO FILE A COMPLAINT?

Content of the complaint must include⁹⁷:

- Name, contact information and location of the complainant;
- The subject of the complaint (e.g., access to information, environmental and/or social impacts of projects, procurement procedures, human resource issues, customer relations, or other issues);
- A description of the circumstances of the complaint (all relevant documents should be provided);
- A description of what the complainant expects to achieve with the complaint.

Written complaints may be emailed, hand delivered, mailed or faxed in the form of a letter to:

European Investment Bank
Secretary General
100 boulevard Konrad Adenauer
L-2950 Luxembourg
Phone: (+352) 43 79-1
Fax: (+352) 43 77 04
Email: complaints@eib.org

Complaint may also be filed using the Complaints Mechanism's online complaint form:
www.eib.org/infocentre/complaints-form.htm.

➡ Process and outcome

The Complaints Mechanism will acknowledge receipt of the complaint within 10 days.

If admissible, the complaint will either be addressed through a Standard Procedure or an Extended Procedure. The Standard Procedure applies to all complaints, except those regarding environmental and social impacts, or governance aspects of EIB lending operations, which are handled through the Extended Procedure.⁹⁸

⁹⁶ EIB, *The EIB Complaints mechanism Flyer*, op. cited

⁹⁷ EIB, *How to complain*, www.eib.org.

⁹⁸ EIB, *Complaints Mechanisms, Procedures*, www.eib.org.

“In the Standard Procedure, an initial assessment of the concerns will be made through an initial meeting with EIB services concerned and a review of the relevant documentations. If the concerns seem well grounded, there will be an investigation including a compliance review and where appropriate, problem solving and dispute resolution techniques such as facilitation of information sharing, mediation, dialogue and negotiation facilitation will be used. The Complaints Mechanism may conduct site visits, request oral or written submissions from the parties, meet with local and international organisations, and rely on expert research. The assessment/investigation of this Standard Procedure process will determine whether or not there was maladministration by the EIB, suggest further corrective, mitigation actions and recommendations or determine that the problem was solved during the complaints handling process and that no further action is required.

The Extended Procedure follows the same basic steps and procedures as the Standard Procedure except that a more extensive and formal process replaces the complaint assessment/investigation. The initial assessment will be completed within 40 working days after admissibility of complaint, and will determine whether or not to proceed with an investigation/compliance review, as decided by the head of EIB-CM in agreement with the EIB Inspector General. Moreover, if there is opportunity for a collaborative resolution process before the issuance of the Initial Assessment Report, and the relevant project stakeholders agree to it, a mediation process will take place. If such a process has not brought the parties to mutually accepted and sustainable solutions within the specified timetable, a recommendation for an investigation/compliance review may follow. At the end of an inquiry, the Complaints Mechanism prepares a Conclusions Report and formulates corrective actions and recommendations. Corrective actions will include an implementation plan that must be carried in any case no later than 12 and 24 months after the date of the Conclusions Report.”⁹⁹

Duration of proceedings

The final reply must be sent to the complainant no later than 40 working days after the date of the acknowledgement. The deadline can be extended to an additional period of 100 working days in case of complex issues.

Confirmatory complaints

If the complainant is not satisfied, the EIB Complaints Mechanism office can review the case. Whether the complainant wishes to appeal the EIB Complaints conclusions or whether it is to follow up on implementation of EIB conclusions, he or she may address, in written form, a confirmatory complaint:

- within 15 working days from the receipt of the EIB’s response;
- or within 6 months from the due date set for the implementation of the action, if the agreed corrective action is not implemented correctly or within the time delay.

⁹⁹ *Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development*, Accountability Counsel, 8th edition, August 2015, p 33-34.

2. The European ombudsman

If unsatisfied by the outcome of a complaint to the EIB Complaints Mechanism, it is also possible to appeal to the European Ombudsman.

🕒 Who can file a complaint?¹⁰⁰

- EU citizens or a person residing or having its registered office in an EU country.
- It should be noted that non-EU nationals can also lodge complaints with the Ombudsman regarding maladministration of the EIB. The Ombudsman will deal with them at his/her discretion.

🕒 Under what conditions?

- The complaint must refer to alleged maladministration of the EIB in its actions and/or omissions;
- it must be lodged within two years of acknowledgement of the facts on which the complaint is based;
- it cannot deal with matters that are being settled in court or have already been settled in court;
- it cannot investigate complaints against national, regional or local administrations in the Member States of the European Union, even when the complaints refer to the EIB's field of activities;
- the remedies provided by the EIB internal complaint mechanisms must have been exhausted; and
- the complaint should be written in one of the 23 official EU languages.

HOW TO FILE A COMPLAINT?

Content of the complaint must include:

- Name, contact information and location of the complainant;
- Grounds of complaint;
- A description of what the complainant expects to achieve with the complaint.

The complaint can be lodged via:

European Ombudsman
1 Avenue du Président Robert Schuman
B.P. 403
FR- 67001 Strasbourg Cedex
Tel. +33 (0)3 88 17 23 13
Fax: +33 (0)3 88 17 90 62
E-mail: complaints@beig.org

¹⁰⁰ The EIB Complaints Mechanism - Principles, *Terms of Reference and Rules of Procedure*, October 2012, Section V www.eib.org.

A complaint form is available on the European Ombudsman's website: <https://secure.ombudsman.europa.eu>

② Process and outcome

The European Ombudsman will first encourage conciliation. If such process fails, he/she will make recommendations to solve the case. For instance, the Ombudsman can request corrective action to be taken or formulate critical remarks relating to the maladministration of the EIB Group. The Ombudsman can further address a special report to the European Parliament, if the EIB Group does not concur with his remarks and recommendations.¹⁰¹

The European Ombudsman's has been challenged by CSOs, in particular as it can only rule on EIB "maladministration", and as its recommendations are non-binding. The European Ombudsman has moreover been criticised for not being proactive enough as far as the EIB was concerned.¹⁰²

* * *

The EIB is expected to go through important changes in 2015, as it will review and reform the Complaints Mechanism's policies and procedures, as well as the Memorandum of Understanding between the European Ombudsman and the EIB, which outlines the competences of the Ombudsman's scrutiny over EIB operations.¹⁰³ The EIB will also play a greater role in the European Fund for Strategic Investments, which entered into force in 2015 under the Juncker investment plan.¹⁰⁴ In a May 2014 report, a European coalition of development and environmental NGOs assessed the track record of the EIB's Complaint Mechanism during its five years of existence.¹⁰⁵ Based on case studies and NGOs' experience, the report concluded that the EIB's Complaint Mechanism had so far struggled to operate effectively because of a lack of capacity, a lack of cooperation from within the EIB, a lack of independence and a lack of binding powers.

¹⁰¹ *The EIB Complaints mechanism – Principles, terms of reference and rules of procedure*, Op. cit., Part V, § 6.

¹⁰² *Holding the EIB to account – a never ending story*, Counter Balance, May 2014, www.counter-balance.org.

¹⁰³ For recommendations on this upcoming revision and on EIB accountability see *Towards a reinforced accountability architecture for the European Investment Bank*, Xavier Sol, Counter Balance, June 2015, www.counter-balance.org.

¹⁰⁴ For more information on the European Fund for Strategic Investments see *The European Fund for Strategic Investments (EFSI)*, European Commission, <http://ec.europa.eu/>.

¹⁰⁵ *Holding the EIB to account – a never ending story*, Counter Balance, May 2014, op cited

ADDITIONAL RESOURCES

- EIB www.eib.org
 - Holding the EIB to account – a never ending story, Counter Balance, May 2014, www.counter-balance.org.
 - The Bretton Woods Project www.brettonwoodsproject.org.
-

B. EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Established in 1991, the European Bank for Reconstruction and Development (EBRD), is the largest single investor in the region and mobilises significant foreign direct investment beyond its own financing. It is owned by 64 countries, the European Union (EU) and the EIB¹⁰⁶. The aim of the EBRD is to provide project financing for banks, industries and businesses, both new ventures and investment in existing companies. It also works with publicly owned companies that aim to support privatisation, restructure state-owned firms and improve municipal services.

🕒 What are the issues that can be dealt with?

The EBRD doesn't mention the term 'human rights standards' in its guiding policies¹⁰⁷; yet, it focuses on environmental sustainability in the broad sense of the term to encompass not only ecological impacts but also worker, health and safety and community issues. The Bank chooses the projects it may finance according to **three principles**:

- 1 – Social and environmental sustainability;
- 2 – Respect for the rights of affected workers and communities; and
- 3 – Compliance with applicable regulatory requirements and good international practices¹⁰⁸.

To ensure the respect of these principles, the EBRD adopted, on May 6, 2009, a new Project Complaint Mechanism (PCM) to replace and render more effective the existing Independent Recourse Mechanism (IRM) which had been in use since 2004. The PCM Rules of Procedure, which set out the rules about how a complaint may be filed and how it will be processed, were revised in 2014 and the new Rules entered into force on November 7, 2014.¹⁰⁹

¹⁰⁶ EBRD, *Who we are*, www.ebrd.com.

¹⁰⁷ EBRD, *Strategies and Policies*, www.ebrd.com/what-we-do.

¹⁰⁸ EBRD, *Environmental and social sustainability*, www.ebrd.com.

¹⁰⁹ Project Complaint Mechanism (PCM), *Rules of Procedure*, May 2014, www.ebrd.com.

The PCM has **two functions**.¹¹⁰

- The **Problem-solving Initiative**, which has the objective of restoring dialogue between the parties and of trying to resolve the underlying issues giving rise to the complaint or grievance where possible.
- The **Compliance Review function**, which seeks to assess whether a Bank approved project complies with relevant EBRD policies, relevant environmental policies and project-specific provisions of the Public Information Policy.

Complainants may request a Problem-solving Initiative, a Compliance Review, or both.

► NOTE

As the EBRD is an international financial institution which is owned by 64 countries, the EU, and the EIB, it is not possible to lodge complaints concerning this bank with the European Ombudsman.

② Who can file a complaint?

- With regard to the **Problem solving Initiative**: one or more individual(s), located in an area adversely affected by an EBRD-project, or who has or have an economic interest in such area.
- With regard to the **Compliance Review**: one or more individual(s) or organisation(s).

② Under what conditions?¹¹¹

- The PCM will not accept complaints relating to the adequacy or suitability of EBRD policies, or to matters in regards to which a Complaint has already been processed by the PCM or its predecessor IRM (unless there is new evidence or circumstances), or if the complaints raises allegations of fraud or relates to procurement matters.¹¹²
- Anonymous complaints will not be accepted. However, complainants who are not organisations may ask for the complaint to be treated confidentially.¹¹³
- Complaints can be submitted in any of the working languages of the Bank (English, French, German and Russian) or in any of the official languages of the Bank's countries of operation¹¹⁴.

¹¹⁰ EBRD, *About the Project Complaint Mechanism*, www.ebrd.com.

¹¹¹ EBRD, *Project complaints mechanism – A user's Guide and Rules of Procedure*, Novembre 2014

¹¹² Project Complaint Mechanism (PCM), *Rules of Procedure*, op. cited, §14

¹¹³ EBRD, Project Complaint Mechanism, *Rules of Procedure*, op. cited §4

¹¹⁴ *Ibid.*, §6.

- Complaints can be submitted in any written format, and the PCM officer can be contacted for guidance on how to write and submit a complaint¹¹⁵.

In case of a complaint filed under the **Problem-solving Initiative**, the complaint must¹¹⁶:

- relate to a project in which the Bank has presented a clear interest in financing the project;
- relate to a project in which the Bank maintains a financial interest, in which case the complaint must be received within 12 months of the last disbursement of funds from the Bank.
- describe the efforts made to address the issues pointed out in the complaint through discussions with the Bank and/or its Client, and the results of such efforts. This obligation may be waived by the PCM Officer if he/she considers them futile or detrimental to the Complainant.
- be filed after the EBRD has shown clear interest in financing the project, and no later than 12 months after the last disbursement of funds, or in the case of equity funding, where the Bank has not sold or exited from its investment.

In case of a complaint filed under the **Compliance Review**, the complaint must relate to a Project that has been approved for financing by the Board or the Bank Committee¹¹⁷.

The complaint must be submitted after the EBRD has approved the project, and no later than 24 months after the Bank has ceased to participate in the project.

HOW TO FILE A COMPLAINT?

- Content of the complaint must include:¹¹⁸
- The names of the complainants;
- The name of the authorised representative, if any, and proof of the authorisation;
- Contact information of the complainant and of the authorised representative, if any;
- The name or the description of the project at issue;
- A description of the harm caused or likely to be caused by the project;
- in the case of a complainant requesting a compliance review, where possible, the relevant EBRD policy that has allegedly been violated;
- In case of a complainant requesting a Problem-solving initiative, a description of the good faith efforts the complainant has made to address the issue at stake either with the Bank or the client.
- if possible, which PCM function is expected to be used as well as the outcome expected;
- if possible, copies of the correspondence between the Bank and relevant parties.

¹¹⁵ *Ibid.*, §3.

¹¹⁶ *Ibid.*, §12.

¹¹⁷ *Ibid.*, §13.

¹¹⁸ *Ibid.*

The complaint must be sent (post, fax, email or hand delivery) to:

Project Complaint Mechanism
Attn: PCM Officer
European Bank for Reconstruction and Development
1 exchange Square
London EC2A 2JN
United Kingdom
Fax: +44 20 7338 7633
Email: pcm@ebrd.com

Complaints may also be delivered, at any one of the Bank's Resident Offices¹¹⁹, indicating that it is for transmission to the PCM.

② Process and Outcome

- The PCM Officer will consider whether to register, and will notify the relevant parties of its decision.
- Once the complaint is registered, the Bank Management will send its response to the Complainant within 21 business days, and within 5 days following registration of the complaint, the PCM Officer will appoint a PCM Expert to conduct an Eligibility Assessment.
- Once eligibility has been determined, and within 40 business days after the submission of the Bank Management response to the Complainant, the Eligibility Assessors will issue an Eligibility Assessment Report that will notify whether the complaint is eligible for a Problem-solving Initiative, Compliance Review or both.
- The eligibility of the complaint will **not** suspend the Bank's interest in the project. However, interim recommendations to suspend the Bank's proceeding with the process or disbursements can be made by the PCM Officer to prevent irreparable harm¹²⁰.

In case of a complaint filed under the Problem-solving Initiative:

The objective is to restore dialogue between an affected group and the client, as well as any relevant party, to try to resolve the issues underlying a complaint without attributing blame or fault to any party. It may be undertaken instead of, or as well as, a compliance review.

The Problem-solving Initiative is considered completed when the relevant parties reach an agreement, or when no further progress can be made according to the Problem-solving Expert. Upon completion, the Expert will issue a report available to all relevant parties, the President and the Board. The report and the decision

¹¹⁹ Addresses for the Bank's Resident Offices can be found at www.ebrd.com.

¹²⁰ EBRD, Project Complaint Mechanism, Rules of Procedure, *op. Cited* §35

will be publicly released and posted on the PCM website, if the parties agree. **The PCM will monitor the implementation of any agreements reached during a Problem-solving initiative. A Problem-solving initiative might include independent fact-finding, mediation, conciliation, dialogue facilitation, investigation or reporting.**

In case of a complaint filed under the Compliance Review:

The objective is to establish whether any of the Bank's action (or failure to act) in respect of an approved project has resulted in non-compliance with a relevant EBRD policy. In carrying out the assessment, the PCM expert might use any of the following methods:

- Review of the key documents;
- Consultations with relevant parties; and
- Site visits¹²¹.

If the Compliance Review Expert concludes the Bank was not in compliance with relevant EBRD policies, she/he will issue a draft Compliance Review Report with recommendations to address these non-compliance issues, either with adapting the Bank's systems or procedures, for similar issues not to happen in the future, or with changing the scope and implementation of the relevant Bank-financed project, if possible. A final Compliance Review Report will then be drafted on the basis of the Bank Management's Action Plan and Complainants' comments. The PCM Officer monitors the implementation of the recommendations and the Action Plan by issuing a Compliance Review Monitoring Report at least twice a year until the PCM determines that such monitoring is no longer needed. These reports will be made publicly available on the PCM website¹²².

The PCM in action

The PCM mechanism received **73** complaints between 2010 and 2014 (it received 14 in 2014). Among them, **19** were registered, while **54** were considered ineligible. These complaints were mainly related to projects in the power and energy sector, and to a lesser extent, to projects related to the transport sector.¹²³ Three complaints registered in 2015 are currently under process, such as one regarding the financing of Tayan Nuur iron ore mining project in Tseel soum Mongolia.

¹²¹ *Ibid.*, §41 and 42

¹²² *Ibid.*, §44

¹²³ EBRD, Project Complaint Mechanism, Annual Report 2014, p. 6, www.ebrd.com.

➔ BTC pipeline complaint

The complaint which was examined concerned the BTC (Baku-Tbilisi-Ceyhan) pipeline in Georgia, a project operated by the company British Petroleum (BP). A complaint was submitted by seven residents of the Atskuri village. It was determined eligible for further processing through a problem-solving initiative, but not through a compliance review.

The individual complaints brought under the then IRM covered the following issues:

- The clearance work and the damage to land on the oil pipeline construction route exceeded the area indicated in the proposal package for which compensation was available;
- The area covered by the pipeline passage exceeded the area indicated in the proposal package for which compensation was available;
- Heavy construction traffic and road improvements carried out during construction of the pipeline caused loss due to vibration, and subsequently damage to houses and other buildings;
- Damage to the irrigation channel of the village during the construction of the pipeline caused loss of harvests;
- The lack of economic viability of ‘orphan’ land caused loss of harvests;
- There have been undue delay and uneven treatment in the payment of compensation for damage to land and plants and for uncollected harvests; and
- There have been a lack of responsiveness and undue delay in the project grievance procedure and an inadequate application of that procedure.

Previous attempts to carry out a problem-solving initiative under the IRM in relation to two other complaints concerning alleged impacts of the BTC pipeline construction on residents in the Gyrakh Kesemenli village in Azerbaijan and in the Akhali Samgori village in Georgia had both been unsuccessful.

Following the review of the individual complaints against BP/BTC during Spring 2008, BP/BTC subsequently made an additional compensation payment to one complainant for crop loss related to the years 2004 and 2005, and also commissioned a geological survey to investigate the damage to property allegedly arising from road widening in connection with the pipeline project. BP/BTC also undertook a field survey concerning the alleged damage to the irrigation channel serving one of the agricultural plots, and subsequently agreed that construction had indeed impacted on it. Since then, BP/BTC has informed the particular complainant that it will compensate for the work required to re-build the channel. BP/BTC also reviewed its records in relation to several of the claims regarding alleged crop loss, and presented evidence from satellite imagery of pre and post pipeline construction to the problem-solving facilitator supporting its rejection of several of the individual claims for compensation. In relation to alleged vibration damage to three properties from the passage of heavy construction vehicles, BP/BTC considered that a technical review conducted by the International Finance Corporation (IFC)’s Office of Compliance Advisor/Ombudsman (CAO) and the decision of CAO in June 2006 to close the complaints concerning cultural monuments in the village had adequately dealt with the issue of vibration damage. In light of BP/BTC’s reliance on that review and its view that complaints to the IRM concerning alleged damage

to property as a result of vibration damage during construction of the pipeline should be similarly dealt with, the IRM decided it would not be productive to pursue this aspect of the IRM complaint any further¹²⁴.

Therefore, all complaints before the IRM were closed, and the problem-solving completion report was published in September 2008.

Yet this project remains highly controversial and the individual country strategy used by the Bank has been criticised as overestimating development possibilities while severely disregarding the environmental risks and the poverty issues caused by the BTC pipeline project¹²⁵.

* * *

The EBRD, like other banks, remains highly criticised by civil society groups for financing a number of environmentally and/or socially harmful projects, for its lack of transparency and for its approach (such as the use of country strategies mostly based on economic indicators) which is considered contrary to its guiding policies.¹²⁶

ADDITIONAL RESOURCES

- EBRD Project Complaint Mechanism, PCM Register, www.ebrd.com
 - SOMO, Human Rights and Grievances Mechanisms, www.somo.nl
-

C. Inter-American Development Bank (IDB)

The Inter-American Development Bank (IDB) was established in 1959 and is “the main source of multilateral financing and expertise for sustainable development” in Latin America and in the Caribbean. The IDB is owned by 48 sovereign states, which are its shareholders and members. Among these 48 shareholders, 26 are eligible to receive loans from the IDB (Latin American and Caribbean countries) and 22 are not (Western Europe, United States, Canada, South Korea and Japan)¹²⁷.

The IDB Group is composed of the Inter-American Development Bank, the Inter-American Investment Corporation (IIC) and the Multilateral Investment Fund

¹²⁴ IRM, *Problem-solving completion report - Complaint: BTC Georgia/Atskuri Village*, Georgia, Independent Recourse Mechanism Register, www.ebrd.com.

¹²⁵ CEE Bankwatch Network, <http://bankwatch.org/>.

¹²⁶ For a critical assessment of the EBRD's Policies and Case studies, see www.counter-balance.org and <http://bankwatch.org>.

¹²⁷ IDB, About Us, Inter-American Development Bank, www.iadb.org/aboutus.

(MIF). According to its mandate, the IDB is meant to promote environmental sustainability through the process of Environmental Impact Assessments (EIAs) that are prepared by the borrower/client for projects with potentially substantial environmental impacts¹²⁸. **In February 2010, the Board of the Bank approved the policy establishing the Independent Consultation and Investigation Mechanism (MICI under its Spanish acronym)**, which replaced the former Independent Investigation Mechanism (IIM)¹²⁹ and covers all operations financed by the IDB, from the date of their approval up to 24 months after the last disbursement by the Bank. On December 17, 2014, the IDB's Board approved the new Policy of the MICI¹³⁰. The MICI provides for **two different procedures: a consultation phase and a compliance review phase**.

Although it will not be looked at in this guide, the Bank has other specialized offices that can address other issues:

- Fraud, Corruption, and Prohibited Practices (Office of institutional Integrity)
- Fraud and Prohibited Practices involving Bank staff (Office of Ethics)
- Process for the procurement and hiring of consultants (Office of Procurement and Financial Management for IDB-Financed Projects)
- Requests for information unrelated to the mandate of the MICI (Public Information Center)

The Independent consultation and Investigation Mechanism (MICI)

② What are the issues that can be dealt with?

The MICI applies to all “Relevant Operational Policies” of the Bank, including the following:¹³¹

- Access to information (OP-102);
- Environment and Safeguards Compliance (OP-703, including environmental assessment requirements, consultation with affected parties, supervision and compliance, natural habitats and cultural sites protection, pollution prevention);
- Disaster Risk Management Policy (OP-704);
- Public Utilities (OP-708)
- Involuntary Resettlement (OP-710)
- Gender Equality in Development (OP-761)
- Indigenous Peoples (OP-765)

¹²⁸ IDB, *Environmental Impact Assessments*, Inter-American Development Bank, last viewed on 23/10/09, www.iadb.org/aboutus/III/environmental.cfm.

¹²⁹ This change corresponds with the Bank's ninth request for a capital increase (whereas the creation of the 1994 IIM mechanism corresponded with the 8th).

¹³⁰ Policy of the Independent Consultation and Investigation Mechanism, December 17th 2014, <http://iadb.org>.

¹³¹ IDB, *Policy of the Independent Consultation and Investigation Mechanism*, December 17th 2014, § 11

The MICI will be applicable to other Relevant Operational Policies approved following the entry into effect of the 2014 Policy and explicitly designated by the Board as falling within the purview of the MICI.

② Who can file a request?

A request may be filed by¹³²:

- Any group of two or more people residing in the country where a Bank-Financed Operation is implemented who are or anticipate being affected by such Operation;
- A representative residing in the country where the Bank-Financed Operation is implemented or in another country, provided he or she indicates the persons on whose behalf he or she is acting and provides written evidence of the authority to represent them.

② Under what conditions?

There is no particular format to follow to file a request. However, anonymous requests will not be accepted; although confidentiality will be respected if requested.¹³³

The Bank will **not** consider a request eligible if¹³⁴:

- the matter has already been reviewed by the MICI, unless justified by new evidence or circumstances not available at the time of the initial request,
- the matter relates to procurement decisions or processes, internal finance or administration, complaints of corrupt practices, considerations of ethics or fraud, and specific actions by Bank employees. (Requests relating to these issues will be forwarded to the relevant IDB office),
- the request raises issues that are under arbitral or judicial review in an IDB member country,
- the request related to operations that have not yet been approved by the Board or the President,
- the request was filed more than 24 months after the last disbursement of the bank.

The fact that a Consultation phase or a Compliance review phase is initiated or ongoing will **not** halt the processing, execution or disbursements for a project funded by the IDB.¹³⁵ If the MICI Director determines that serious irreparable harm may result from the execution of a project, he may recommend to the Board that execution be suspended.

¹³² *Ibid.*, §13

¹³³ *Ibid.*, §15

¹³⁴ *Ibid.*, §19

¹³⁵ *Ibid.*, §18

HOW TO FILE A REQUEST?

The request should include¹³⁶:

- the name, address, and other contact information of the Requester;
- when a Request is made through a representative, it must clearly identify the people on whose behalf the Request is made and provide written evidence of the authority to represent the Requesters;
- an indication of whether the Requesters wish to maintain their identity confidential and the reasons why;
- a description of the Bank-Financed Operation and the country where it is implemented;
- an allegation that the Bank failed to correctly apply one or more of its Relevant Operational Policies;
- a clear explanation of the alleged Harm and its relation to the non-compliance of the Relevant Operational Policy in a Bank-Financed Operation, if known;
- a description of the efforts made by or on behalf of the Requesters to address the issues in the Request with Management, and the results of those efforts;
- a statement as to whether the Requesters wish to use the Consultation Phase, the Compliance Review Phase, or both, or to request further information.

The request can be sent in writing, via electronic or regular mail or fax.

Unlike in the mechanisms provided by other regional banks, oral requests will be accepted, though subject to subsequent receipt of a signed communication.

The IDB's official languages are Spanish, English, Portuguese, and French. Requests submitted in other languages will be accepted, but additional time will be required for their translation and processing.

Requests should be addressed to the MICI, and sent to any IDB Country Office (addressed "To the attention of the ICIM Office") or directly to the MICI office:

Independent Consultation and Investigation Mechanism Office
Inter-American Development Bank
 1300 New York Ave., N.W., Washington, D.C. 20577 USA;
 Email: mecanismo@iadb.org
 Telephone: +1 202-623-3952
 Fax: +1 202 312-4057

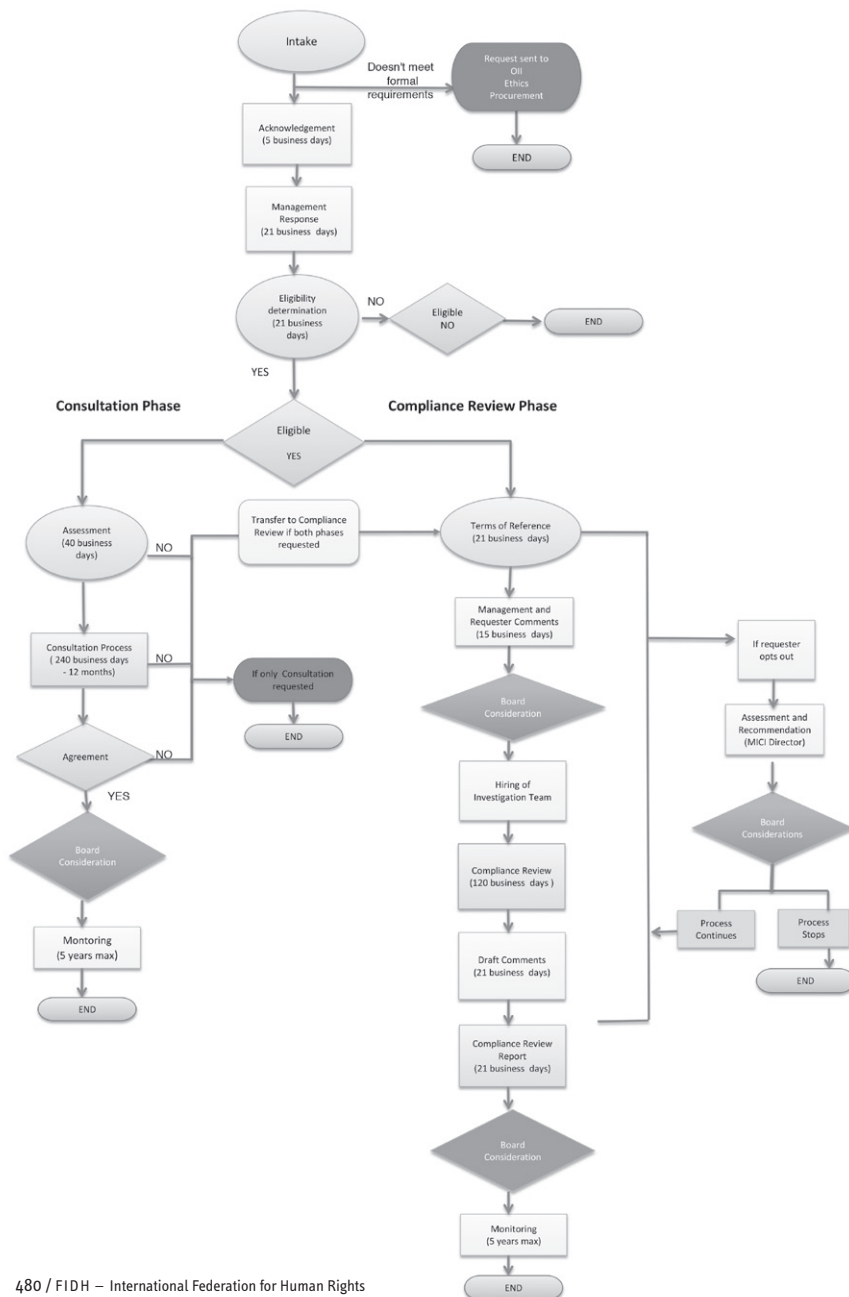
More information on the procedural requirements for submission of a Request can be obtained from on the MICI's website (www.iadb.org/icim) or by contacting MICI's staff at mecanismo@iadb.org

¹³⁶ *Ibid.*, §14

➡ Process and Outcome

MICI Process Flowchart

MICI PROCESS FLOWCHART



After receiving the request, the MICI will verify that the request contains all required information and is not ineligible in maximum 5 working days. If the request can be moved forward with, the MICI will issue a notice of registration and request a response from Management, which has 21 business days to do so. Upon reception of the Management's response, the MICI will have 21 working days to determine the request's eligibility.

The mechanism then provides for **two distinct phases**:

- **Consultation phase**
- **Compliance review phase**

Requesters may choose the Consultation phase, the Compliance review phase, or both. If both phases are requested, processing will begin with the Consultation phase.

Consultation phase

The Consultation phase provides an opportunity to address the issues raised in the request in a flexible and consensus-based approach, using methods including but not limited to information gathering, joint fact-finding, facilitation, consultation, negotiation, and mediation. Participation in the Consultation phase is voluntary and requires the consent of all Parties. Any of the Parties may unilaterally withdraw from the Consultation phase at any time.

The Consultation phase begins with the **assessment stage**, which aims at understanding the harm related to potential policy non-compliance, identifying and gathering information, determining whether the Parties would agree to seek a resolution using consultation methods, and if so, determining the best process for addressing any policy non-compliance. The assessment stage, which may include meetings with relevant stakeholders and visits to the project site, will conclude whether a Consultation phase process should be conducted within 40 business days after the declaration of eligibility. After the assessment, the MICI will either:

- Work with the Parties to reach an explicit agreement to move forward with the Consultation Phase process, establishing a method for addressing the issues raised, which should include an agreed course of action, consultation method and time line; or
- forward the request to the Compliance Review Phase, if it had been requested. If not, the MICI process will be declared concluded.

The results of the assessment will be set forth in an assessment report. The MICI will complete the Consultation Phase process within a maximum period of 12 calendar months from the date of issue of the assessment report, extensible if deemed necessary to reach a consensus-based resolution to the issues raised.

Upon completion of the Consultation Phase process, the MICI will distribute a results report to the Management and to the Board for consideration, after which the report will be made available to the requesters and published on the Public Registry. When applicable, the MICI will develop, in consultation with the Parties, a monitoring plan and time frame for the agreement reached. The monitoring plan may not exceed 5 years of duration.

Compliance review phase

The objective of the **Compliance Review Phase** is to investigate allegations of non-compliance with a Relevant Operational Policy in operations financed by the IDB and of harm caused to the Requesters.

The Compliance Review process is fact-finding in nature. It is not a judicial or adjudication process. The MICI does not have a mandate to investigate actions of governments, public entities, local authorities, Borrowers, Executing Agencies or other lenders, sponsors, or investors in connection with the Bank-Financed Operation.

The Compliance Review process begins with the Compliance Review Phase Coordinator drafting, within 21 business days and in consultation with Management and the Requesters, the recommendation and Terms of Reference (TOR) for the investigation. The TOR will include, but not be limited to, the objectives of the investigation, the items to be investigated, a description of the Bank-Financed Operation, a proposed timeline and budget for the investigation, and anticipated use of consultants. The Management and the Requesters will each have up to 15 business days to comment on the TOR. The Board then considers these comments and the MICI's recommendation on whether or not to conduct a Compliance Review investigation.

Upon approval of the Compliance Review, the MICI Director, in consultation with the Compliance Review Phase Coordinator, will identify and hire two independent experts to form the Panel that will conduct the Compliance Review. The Panel will be made up of the Compliance Review Phase Coordinator, who will act as Panel Chair, and two additional members who will be selected from the Roster based on the experience required in each case.

The time required to conduct the Compliance Review will depend on the complexity and scope of the Bank-Financed Operation, and on the number of Relevant Operational Policies involved. However, a maximum term will be defined in the TOR, and the MICI will attempt to complete the investigation within a maximum term of six calendar months as of formation of the Panel. Upon completion of its investigation, the MICI will issue a draft report including a review of its main findings of fact and recommendations, which the Management and Requesters will have 21 days to comment on. The contents of the final report are however the exclusive decision of the MICI.

The Compliance Review report will include the Panel's findings as to whether (and if so, how and why) an action or omission by the Bank relating to a Bank-Financed Operation resulted in the failure to comply with one or more Relevant Operational Policies, and in Harm to the Requesters. It should also include a description of the Compliance Review Phase methodology used, and should provide the factual and technical basis for a decision by the Board on preventative or corrective action. The Board will make the final decision, and can demand that an action plan be prepared by the Management.

When applicable, the MICI will monitor implementation of any action plans or remedial or corrective actions agreed upon as a result of a Compliance Review, for a maximum of 5 years as of the date on which the Board approves the Management's action plan.

As of March 2016, the MICI had examined 34 requests since 2010¹³⁷.

* * *

Civil society organisations continue to work towards democratizing the bank and ensuring it is accountable. In particular, groups are calling for timely access to information on the bank's operations (including to be informed prior to the approval of the projects), for public participation in the design, implementation, monitoring and implementation of the bank's projects and for the bank to effectively prevent and mitigate the social and environmental impacts of the bank's operations.¹³⁸

ADDITIONAL RESOURCES

– MICI

<http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39629936>

– IDB, Bank Information Centre

www.bankinformationcenter.org

– Accountability Counsel, Inter-American Development Bank (IDB),

www.accountabilitycounsel.org

¹³⁷ Interamerican Development Bank, Independent Consultation and Investigation Mechanism, Public Registry, Chronological Public Registry 2010 – 2014, www.iadb.org/en/mici.

¹³⁸ Bank Information Centre, IDB, www.bicusa.org/idb.

D. African Development Bank

The African Development Bank (AfDB) is a regional multilateral development finance institution, established in 1964 and engaged in mobilising resources towards the economic and social progress of its Regional Member Countries (RMCs). It is head-quartered in Abidjan (Côte d'Ivoire), but has been operating from Tunis since 2003. It includes 54 African countries and 27 non African countries¹³⁹.

Similar to the World Bank, its mandate is “to combat poverty and improve the lives of the people on the African continent.” According to the AfDB, its mission is to promote economic and social development through loans, equity investments and technical assistance. Many projects funded by the AfDB are co-financed with other major financial institutions such as the World Bank. The AfDB has specific mandates from the New Partnership for Africa's Development (NEPAD) and is now taking the lead in certain areas such as infrastructure projects in Africa¹⁴⁰.

In 2004, the AfDB put in place an **Independent Review Mechanism (IRM)**¹⁴¹, operated by the **Compliance Review and Mediation Unit (CRMU)**, which provides people affected by a project financed by the Bank with an independent mechanism through which they can request the Bank to comply with its own policies and procedures. The IRM handles requests through two functions:

- Compliance Review
- Problem-Solving

In 2011, the AfDB approved a new Disclosure and Access to Information Policy,¹⁴² which was developed in consultation and with input from CSOs, and requires the AfDB to publicly disclose all documents unless there is a compelling reason for confidentiality. Should a request for information be denied by the Information Disclosure Committee of the AfDB, an appeal may be lodged to an Appeal Panel. In January 2015, the AfDB issued revised Operating Rules and Procedures for the IRM¹⁴³. According to the new rules, the IRM will, at the President and/or the Boards' request, be able to provide advisory services to the Bank on its projects, programs, policies and procedures, in particular in relation to the Bank's social and environmental impacts.¹⁴⁴ The advisory function is yet to be activated.¹⁴⁵

¹³⁹ African Development Bank. *About Us*, <http://www.afdb.org/en/about-us/>

¹⁴⁰ Bank Information Centre, *Examining the African Development Bank: A Primer for NGOs*, May 2007, www.bicusa.org

¹⁴¹ AfDB, *About the IRM*, www.afdb.org.

¹⁴² AfDB, Disclosure and Access to Information Policy, www.afdb.org.

¹⁴³ AfDB, The Independent Review Mechanism, Operating Rules and Procedures, January 2015 www.afdb.org.

¹⁴⁴ AfDB, The Independent Review Mechanism, 28 January 2015, Resolution B/BD/2015/03, www.afdb.org.

¹⁴⁵ *AfDB Board approves revised Resolution establishing Bank's Independent Review Mechanism*, AfDB Press Release, 30 January 2015, www.afdb.org.

② What are the issues that can be dealt with?

The Bank's policies address several topics such as food production, poverty reduction, quality assurance and results, regional integration, or financial crisis¹⁴⁶. On 17 December 2013, after a one-year process that involved public participation through consultations¹⁴⁷, the Bank's environmental and social policies were replaced for the first time¹⁴⁸. The policies, now called the Integrated Safeguards System (ISS), entail five operational safeguards¹⁴⁹:

- *Environmental and social assessment*: This operational safeguard aims to integrate environmental and social considerations into the Bank's operation – including those related to climate change – for the Bank's activities to contribute to sustainable development.
- *Involuntary resettlement: land acquisition, population displacement and compensation*: This operational safeguard aims at ensuring fair and equitable treatment to those who will have to be relocated as a result of the implementation of a project financed by the Bank, as well as compensation and resettlement assistance.
- *Biodiversity, renewable resources and ecosystem services*: This operational safeguard underlines the requirement for the Bank's clients to sustainably use biodiversity and natural habitats.
- *Pollution prevention and control, hazardous materials and resource efficiency*: This operational safeguard underlines the requirement for the Bank's clients to prevent pollution and achieve high-quality environmental performance.
- *Labour conditions, health and safety*: This operational safeguard underlines the requirement for the Bank's clients to respect and protect the workers' rights and provide with their basic needs.

Although civil society organisations denounced serious flaws in relation to the protection of Indigenous Peoples in the ISS, the latter remains a significant improvement of the Bank's former safeguards. It is especially the case for risk management in lending operations, as the new standards will enable the automatic screening of policy loans according to the environmental and social risks they imply, and their categorization per risk level. A Strategic Environmental and Social Assessment (SESA) tool has been put in place to provide for public consultation processes and for the elaboration of Environmental Social Management Plans to address the issues related to projects involving moderate or significant environmental and/or social risks.¹⁵⁰

¹⁴⁶ AfDB, *Topics and Sectors*, African Development Bank, www.afdb.org.

¹⁴⁷ AfDB, Africa-wide consultation on AfDB Integrated Safeguards System, www.afdb.org.

¹⁴⁸ Bank Information Center, *African Development Bank safeguards coverage sets standard for the World Bank to emulate*, www.bankinformationcenter.org.

¹⁴⁹ AfDB, *Integrated Safeguards System*, p. 21-51, www.afdb.org.

¹⁵⁰ Bank Information Center, *African Development Bank safeguards coverage sets standard for the World Bank to emulate*, www.bankinformationcenter.org.

② Who can file a complaint?¹⁵¹

- **Any group of two or more** people in the country or countries where the Bank-financed project is located who believe that as a result of the Bank Group's violation of its policies and/or procedures, their rights or interests have been, or are likely to be, adversely affected in a direct and material way. They may be an organisation, association, society or other grouping of individuals.
- A duly appointed **local representative** acting on the instructions and as the agent of adversely affected people. Foreign representatives may act as agents in cases where no adequate or appropriate representation is available in the country or countries where the project is located.
- The Boards of Directors of the Bank Group

② Under what conditions?¹⁵²

The CRMU will accept requests that allege that an actual or threatened material adverse effect on the affected persons' rights or interests arising directly from an act or omission of a member institution of the Bank Group, as a result of the failure by the said institution to follow any of its own operational policies and procedures during the design, appraisal and/or implementation of a Bank Group-financed project.

Matters related to fraud or corruption, or to procurement from bidders and suppliers are handled by other units within the Bank Group.

There is no specific format for requests. Requests may be treated confidentially if requested, and must be submitted in writing, in the language of the Bank (English or French), and dated and signed.

The CRMU will **not** accept requests that:

- are filed more than 24 months after the physical completion of the project concerned or more than 24 months after the final disbursement under the loan or grant agreement or the date of cancellation of the disbursement amount, whichever comes first.
- relate to matters before the Administrative Tribunal of the Bank, **or** before other judicial review or similar bodies;
- relate to adequacy or unsuitability of Bank Group policies or procedures;
- relate to matters considered frivolous, malicious or anonymous complaints;

¹⁵¹ AfDB, *The Independent Review Mechanism, Operating Rules and Procedures*, January 2015, op. cited, III b)

¹⁵² AfDB, *The Independent Review Mechanism, Operating Rules and Procedures*, January 2015, op. cited, II

- relate to matters over which the CRMU, a Panel, the President or the Boards has/ have already made a recommendation or reached a decision after having received and reviewed a Request, unless justified by new evidence or circumstances;
- allege human rights violations, other than those involving social and economic rights alleging any action or omission on the part of the Bank Group;
- Actions that are the sole responsibility of other parties, including the borrower or potential borrower, and which do not involve any action or omission on the part of the Bank Group.

The filing of a Request or carrying out of a compliance review or problem-solving exercise will **not** suspending processing or disbursements for Bank Group-financed project. Interim recommendations to suspend further work or disbursements may be issued if the project's processing or implementation is deemed to cause irreparable harm.¹⁵³

HOW TO FILE A COMPLAINT?¹⁵⁴

The content of the complaint must include:

- Explanation on how the Bank group's policies, procedures, and/or contractual documents were seriously violated.
- Description on how the act or omission on the part of the Bank group has led or may lead to a violation of the specific provision.
- Description on how the parties are, or are likely to be, materially and adversely affected by the Bank group's act or omission.
- Description of the steps taken by the affected parties to resolve the violation with Bank group staff, and explanation on how the Bank group's response was inadequate.

The request must be sent to AfDB field offices¹⁵⁵ or sent by mail, fax or email to:

Compliance review and mediation unit (CRMU) P.O. Box 323-1002
10th Floor, EPI-C,
African Development Bank Group
Tunis-Belvedere, Tunisia
Tel: +216 71 10 20 56, +216 71 10 29 56
Fax: +216 71 10 37 27
Email: crmuinfor@afdb.org

¹⁵³ *Ibid*, III, f)

¹⁵⁴ *Ibid*, III

¹⁵⁵ AfDB, *Countries*, <http://www.afdb.org/en/countries/>

➤ Process and Outcome¹⁵⁶

The process before the CRMU can be divided into two main procedures: Problem-solving (mediation) or Compliance review (investigation).

Common procedures for both mediation and compliance review:

- Preliminary review by the Director CRMU upon receipt of a request to determine whether the request contains a bona fide allegation of harm from a Bank Group- financed operation.
- Within 14 days of receipt, the Director CRMU shall decide whether to:
 - register the request;
 - ask for additional information, in which case the decision period may be extended until the necessary information and documents have been filed, or
 - decide that the request is outside the mandate of IRM.
- If the request contains a bona fide allegation of harm arising from a Bank Group-financed operation, the Director CRMU shall determine whether the request shall be registered for mediation exercise, or for further consideration for a compliance review.

These two procedures are not exactly independent; it is possible that both be used for the same request.

Problem-solving

“If requests are eligible for problem-solving, the Director will initiate a process that could include mediation, fact-finding or dialogue facilitation. At the end of the process, the Director reports to the President and the AfDB Boards regarding any results achieved and any recommendations or comments from relevant parties. The President or Boards will then decide whether to accept or reject the recommendations and a summary is made public.”¹⁵⁷

Compliance review

“If the complaint presents evidence of a violation of Bank policy, the Director of the CRMU or the IRM Roster of Experts may recommend a compliance review. It is up to the President or Boards to approve a compliance review. Experts from the CRMU Roster conduct the investigation of compliance review, which could include site visits and meetings with the affected community. Once completed, the experts submit the compliance review report and any recommendations for remedial action to the President or Boards.

¹⁵⁶ See AfDB, The Independent Review Mechanism, Operating Rules and Procedures, January 2015, *op. cited*,

¹⁵⁷ Extract from *The Independent Review Mechanism of the African Development Bank Extract from*, Human Rights & Grievance Mechanisms Project, SOMO and Accountability Counsel, September 2013, <http://grievancemechanisms.org>.

Following the release of the compliance review report, Bank Management has 90 days to prepare a response and action plan. Thereafter, Bank Management and the CRMU jointly present the findings to the Boards. The President or Boards will make the final decision to accept or reject the findings and recommendations of the compliance review report. The relevant parties are informed of their decision, and it is published on the AfDB's website. CRMU and one of the experts monitor the implementation of the approved Management remedial action plans."¹⁵⁸

To date, the CRMU has ten registered cases.¹⁵⁹

The CRMU in action

➔ The Bujagali Hydropower Project in Uganda

On 8 May 2007, the CRMU received a request from local NGOs and individuals to conduct a compliance review of the Bujagali Hydropower Project and the Bujagali Interconnection Project in Uganda. This project was managed by Bujagali Energy Limited, a company jointly owned by subsidiaries of the international development company Sithe Global Power, LLC and of the Aga Khan Fund for Economic Development, an international development agency. The request alleged non-compliance with the Bank Group's policies regarding the assessment of hydrological and environmental risks, the project's economics, and more specifically its affordability and alternatives analysis, consultations with affected people on resettlement and compensation and cultural and spiritual issues.¹⁶⁰

Upon finding *prima facie* evidence of harm or potential harm, the CRMU director made a recommendation to the Board of Directors to approve the compliance review of the Bujagali projects.

On 7 September 2007 the Board of Directors authorised the compliance review together with the establishment of the review panel. Since a similar request for investigation of the Bujagali Hydropower Project had been submitted to the World Bank's Inspection Panel (IPN), the CRMU and the World Bank agreed to collaborate on the Bujagali review.

The Inspection Panel and IRM Bujagali Review Panel, accompanied by specialists on key issues raised in the request, undertook a fact-finding mission in Uganda from 26 November to 8 December 2007. In addition, the IRM Bujagali Review Panel conducted document research and interviews with the staff at the Bank.

¹⁵⁸ Extract from *The Independent Review Mechanism of the African Development Bank*, Human Rights & Grievance Mechanisms Project, SOMO and Accountability Counsel, *op. cited*

¹⁵⁹ See AfDB, IRM, Requests Register www.afdb.org.

¹⁶⁰ Compliance With Safeguard Policies Of The World Bank And African Development Bank, Emmanuel Kasimbazi, 'IAIA09 Conference Proceedings', Impact Assessment and Human Well-Being, 29th Annual Conference of the International Association for Impact Assessment, 16- 22 May 2009, www.iaia.org.

On June 20, 2008, the IRM released its report on the Bujagali projects compliance review¹⁶¹. In March 2009, the Bank management published its action plan in response to the IRM's report, including actions to be taken to comply with the Bank's policies¹⁶².

An IRM Monitoring Team was authorised on 9 July 2009 by the Board of Directors of the Bank Group to monitor the implementation of the findings of non-compliance issues raised by the IRM Review Panel's Compliance Review Report and the related management action plan. The IRM Monitoring Team conducted a mission to Uganda in May 2009.

The mission found the project lacking in compliance in the following 3 areas: resettlement and compensation, cultural and spiritual issues, and Forest Reserves Mitigation Measures. Between 2009 and 2012, four monitoring reports assessing the implementation of the Action Plan were submitted to the Board. The completion report is meant to be published in 2015¹⁶³, however little progress seems to have been made and this project remains one of the world's most controversial and expensive hydro-power plant projects.¹⁶⁴

* * *

As the AfDB appears to be having a growing influence on the development agenda of the African continent, civil society organisations are slowly starting to pay more attention to the AfDB's conduct. Whilst the bank remains under-staffed and has been criticised in the past for being secretive and deprived of any significant influence, it has undergone changes and its growing influence on the African continent should be accompanied by increased efforts by civil society to monitor its actions. The review process of the Independent Review Mechanism (IRM)'s, which took place between 2013 and 2015, was criticised by CSOs for providing highly inadequate opportunity for public comment on the IRM's new policy. CSOs also provided recommendations on to improve the IRM's accessibility and independence.¹⁶⁵

¹⁶¹ AfDB, Rapport de vérification de la conformité sur le projet d'hydroélectricité et le projet d'interconnexion de Bujagali, AfDB, 20 June 2004.

¹⁶² "AfDB Management Action Plan in response to the independent review panel's report on the Bujagali hydropower and interconnection projects", www.afdb.org.

¹⁶³ AfDB, The Independent Review Mechanism, Annual Report 2013, www.afdb.org.

¹⁶⁴ *Bujagali Dam, Uganda*, International Rivers www.internationalrivers.org, *Dwellers Protest Dam Blasts [Uganda]*, Franck Mugabi, October 2010, Business and Human Rights Resource Center <http://business-humanrights.org/en/dwellers-protest-dam-blasts-uganda>. BIC, "Over Priced Bujagali Dam to Raise Power Costs", 30 October 2009, www.bicusa.org.

¹⁶⁵ *2013-2015 Review of the IRM's Policy*, Accountability Counsel, www.accountabilitycounsel.org.

ADDITIONAL RESOURCES

- African Development Bank (AfDB)
www.afdb.org
- Bank Information Center (BIC)
 - African Development Bank
www.bicusa.org
 - Examining the African Development Bank: A Primer for NGOs, May 2007,
www.bicusa.org
- International Rivers
www.internationalrivers.org
- The Independent Review Mechanism of the African Development Bank, Human Rights & Grievance Mechanisms Project, SOMO and Accountability Counsel, September 2013
<http://grievancemechanisms.org>

E. Asian Development Bank

The Asian Development Bank (ADB) is a regional development bank established in 1966 in Manila to promote economic and social development in Asian and Pacific countries through loans and technical assistance. It is owned by 67 members, 48 from the region and 19 from other parts of the globe. According to its stated mission, its objectives should be aimed at helping its developing member countries reduce poverty and improve the quality of life of their citizens. ADB provides assistance to governments and private enterprises in its developing member countries based on a member's priorities.¹⁶⁶

On 29 May 2003, the ADB approved a new accountability mechanism to address the concerns of persons affected by ADB-assisted projects. A revision of the Accountability Mechanism was conducted between 2010-2012, including through public consultations,¹⁶⁷ and the new Accountability Mechanism policies entered into force in May 2012.¹⁶⁸

The Accountability Mechanism consists of **two separate but related functions**:

- A **problem-solving function** led by the Special Project Facilitator (SPF), and focusing on finding satisfactory solutions to problems caused by projects supported by the ADB; and

¹⁶⁶ ADB, *About ADB*, www.adb.org/about/main

¹⁶⁷ 2010-12 ADB AM Policy Review, Accountability Counsel, www.accountabilitycounsel.org.

¹⁶⁸ ADB, *Accountability Mechanism Policies 2012*, www.adb.org.

- A **compliance review function** composed of the independent Compliance Review Panel (CRP), that focuses on compliance with ADB’s operational policies and procedures.

Complainants can request a Problem-solving, a Compliance Review, **or both**.

A complaint that requests Problem Solving will not be accepted if the matter has already been considered by the SPF (unless the complaint includes new information that was not previously available). A complaint that requests Problem Solving after a Compliance Review process has already occurred will not be accepted unless the CRP found the complaint ineligible.¹⁶⁹

🕒 What are the issues that can be dealt with?

ADB activities are governed by its Operational Policies which also include Operational Procedures that spell out procedural requirements and guidance on the implementation of development projects. In July 2009, ADB’s Board of Directors approved a new Safeguard Policy Statement (SPS) governing the environmental and social safeguards of ADB’s operations. It entered into force on 20th January 2010 and includes two main documents: the Safeguard Policy Statement (SPS) and a corresponding section in the ADB Operations Manual. The SPS describes policy principles, a policy delivery process, and roles and responsibilities.

The SPS includes safeguard requirements in **four areas**¹⁷⁰:

- *Environment*, which encompasses environmental assessment, environmental planning and management, information disclosure, consultation and participation, a grievance redress mechanism, monitoring and reporting, unanticipated environmental impacts, biodiversity and sustainable natural resource management, pollution prevention and abatement, health and safety, and physical cultural resources;
- *Involuntary resettlement*, which includes compensation, assistance and benefits for displaced persons, a social impact assessment, resettlement planning, negotiated land acquisition, information disclosure, consultation and participation, a grievance redress mechanism, monitoring and reporting, unanticipated impacts and special considerations for Indigenous Peoples;
- *Indigenous Peoples*, which includes consultation and participation, a social impact assessment, information disclosure, a grievance redress mechanism, monitoring and reporting, and consideration of unanticipated impacts;

¹⁶⁹ Extract from *Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development, Accountability Counsel*, 8th edition, August 2015, p 27, available at www.accountabilitycounsel.org.

¹⁷⁰ ADB, *Safeguard Policy Statement*, June 2009, www.adb.org/Documents/Policies/Safeguards/default.asp

- Special requirements for different finance modalities are outlined in the “Appendices” section of the SPS. They are designed to ensure that ADB staff will apply **due diligence** to ensure borrowers comply with the requirements both during the project preparation and its implementation.

A consolidated Operations Manual section includes procedures for ADB staff for due diligence, review and supervision of projects. General specifications on safeguard requirements include consultation and participation, such as the necessity for the borrower to undertake meaningful consultation with affected Indigenous Peoples. It is worth mentioning that **the SPS refers to the UN Declaration on the Rights of Indigenous Peoples and explicitly mentions the need to ascertain the consent of affected indigenous peoples’ communities** in case projects financed by the ADB affect their cultural resources and knowledge, and/or involve the exploitation of natural resources on traditional lands and thereby impacting their livelihoods or cultural, ceremonial, or spiritual uses of the lands, and/or leading to their physical relocation from traditional and customary land. In the SPS, consent refers to a collective expression of broad community support.¹⁷¹ The requirements notably include the necessity to undertake a social impact assessment, to disclose information of key documents to the ADB, including corrective action plans, and to plan for the establishment of grievance redress mechanisms and monitoring and reporting measures.

Civil society criticisms

Despite the fact that some important improvements in the language of the content of the Operations Manual have been made over earlier drafts, civil society groups remain deeply concerned by the fact that the Operations Manual may not adequately protect vulnerable groups and the environment. In particular, civil society groups criticise the lack of clear consultation requirements for non-indigenous affected populations, the absence of reference to common property resources and the lack of gender issues analysis and instructions given to staff on how to implement the gender policy of the Bank (now main-streamed in the 2009 new safeguard policy).¹⁷²

Regarding environmental procedures, civil society groups remain concerned over the lack of transparency –especially when it comes to environmental classification of projects – as well as by the consultation process, which is still considered insufficient. NGOs who have been involved in the review process also criticise the narrow definition given to involuntary resettlement. The procedure has also been criticised for the weakness of its evaluation process, deemed to insufficiently address the need to design and implement action plans to remedy any damage caused.

¹⁷¹ ADB, *Safeguard Policy Statement*, article 33

¹⁷² For an analysis on women’s experiences in ADB funded projects, see (notably) NGO Forum on ADB, “They Drive Faster, We Walk Longer: a case study featuring the impacts of the ADB-funded Highway One Project in Cambodia on women”, 2010

In light of these criticisms and of the current review process of the WB's safeguards, the ADB has recently conducted an evaluation of its own policies, of which the report was published on 16 October 2014¹⁷³. Two interesting elements were pointed out to make the ADB's safeguards more efficient. First, the Bank should be alert to the implementation of its environmental and social policies for **all** risky projects, no matter their different likeliness to adversely impact the environment and/or human rights. Second, the Bank should improve follow-up in the implementation of its safeguards with supporting the countries' existing environmental and social frameworks, when those are equivalent to its own policies¹⁷⁴.

② Who can file a complaint?

- Any group of two or more people who are directly, materially, and adversely affected by an ADB assisted project;
- A local representative of affected people;
- In exceptional cases, a non local representative of affected persons, where local representation cannot be found and the Special Project Facilitator or Compliance Review Panel agrees.

If a complaint is made through a representative, it must clearly identify the project-affected people on whose behalf the complaint is made and provide evidence of the authority to represent such people.

② Under what conditions?

- The **direct and material harm must be the result of an act or omission of the ADB** in the course of the formulation, processing, or implementation of the ADB-assisted project. For a Compliance Review, the harm must relate to non-compliance by ADB of its operational policies and procedures;
- The complaint must be filed within two years of the grant or loan closing date;
- Attempts to resolve the issues through the ADB's Operations Department must be made prior to filing the complaint;
- Certain matters are excluded from the accountability mechanism, including complaints that are not related to ADB's actions or omissions, procurement matters, allegations of fraud or corruption, matters concerning projects for which a project completion report has been issued, the adequacy or suitability of ADB's existing policies and procedures, and non-operational matters such as finance and administration.

¹⁷³ Asian Development Bank, *Safeguards Operational Review : ADB Processes, Portfolio, Country Systems, and Financial Intermediaries*, www.adb.org.

¹⁷⁴ *Ibid.*

HOW TO FILE A COMPLAINT?¹⁷⁵

- Complaints must be submitted in writing, preferably in English or in any of the official or national languages of ADB's developing members. The identity of the complainant will be kept confidential if requested, but anonymous complaints will not be accepted.
- Complaints must be addressed to the Complaints Receiving Officer, who will forward the complaint either to the Office of the Special Project Facilitator (problem-solving function) or the Office of the Compliance Review Function, depending on complainants' request. The complaint letter must specifically state if complainants are directly requesting a compliance review by the Compliance Review Panel.
- A sample Complaint letter and a complaint form is available at www.adb.org.
- Complaints must be sent to any ADB office or directly by mail, fax, email or hand delivery to:

Complaints Receiving Officer
Asian Development Bank (ADB)
6 ADB Avenue
Mandaluyong City 1550
Philippines
Tel: (+632) 632-4444
Fax: (+632) 636 2086
Email: amcro@adb.org
- Complaints must include:
 - A description of the direct and material harm, i.e., the rights and interests that have been, or are likely to be, directly affected materially and adversely by the ADB-assisted project;
 - A brief description of the ADB-assisted project, including the name and location if available;
 - The desired outcome or remedies that the project-affected people believe ADB should provide or the help expected to be obtained through the accountability mechanism;
 - The identity of the complainant (and of any representatives) and contact information, and if applicable, a request for confidentiality;
 - If a complaint is made through a representative, identification of the project-affected people on whose behalf the complaint is made and evidence of authority to represent them;
 - A description of the complainant's good faith efforts to address the problems directly with the operations department concerned before using the ADB accountability mechanism.

¹⁷⁵ ADB, *Complaints Receiving Officer, How to file a complaint*, www.adb.org.

② Process and Outcome

Once the complaint has been sent to the Complaints Receiving Officer, it is forwarded either to the Problem solving function through the Special Project Facilitator (1), or to the Compliance review function through the Compliance review panel (2).

Problem-Solving Function

If the SPF determines the complaint is eligible, it conducts an assessment, which could include one or more site visits and meetings with the person submitting the complaint and other relevant parties. Based on the assessment and comments received from the parties, the SPF will decide whether to proceed with problem-solving.

Generally, the objective of the Problem-Solving Function is to bring the parties together and come to an agreement about how to address the problem without determining whether a breach has occurred.

Once a problem-solving process has begun, either party can withdraw at any time, and you can request a compliance review. At the end of the process, the SPF will issue a public report that includes a summary of the complaint, steps taken to resolve the issues and any decisions made by the parties. The SPF will monitor the implementation of any agreement reached.¹⁷⁶

Compliance Review Function

If the Office of the CRP that oversees the Compliance Review Function determines that a case is eligible, it will issue an eligibility report for consideration and approval by the Board. If the Board approves the report, the CRP will conduct an investigation that may include one or more site visits, meeting with relevant parties and desk reviews. There is no timeline for an investigation. The review will assess whether the ADB failed to comply with its policies and whether serious harm has happened or could happen. To conclude the investigation, the CRP will issue a report with its findings.

If the CRP finds that the ADB violated its policies, ADB Management will propose ways to bring the project into compliance. The CRP will provide comments on Management's proposed actions, and then the report will be submitted to the Board for final consideration. The CRP's report will be made public after the Board approves any remedial actions, and the CRP will monitor any remedial actions.¹⁷⁷

¹⁷⁶ Extract from The Asian Development Bank's Accountability Mechanism, SOMO and Accountability Counsel, www.accountabilitycounsel.org.

¹⁷⁷ Extract from The Asian Development Bank's Accountability Mechanism, SOMO and Accountability Counsel, *op cited*

The Accountability mechanism in action

By 2015, the Office of the Special Project Facilitator (OSPF) had received 51 complaints.¹⁷⁸

➔ Community empowerment for rural development project (CERDP) in Indonesia

On 9 March 2005, the SPF received the complaint from 3 NGOs – Yayasan Cakrawala Hijau Indonesia (YCHI) in Banjarbaru, Lembaga Kajian Keislaman & Kemasyarakatan (LK3) in Banjarmasin, and Yayasan Duta Awam (YDA) with offices in Solo, Central Java – together with populations from 5 villages concerning the Community Empowerment for Rural Development Project (CERDP) in Indonesia. This project, which is supported by the ADBank, intended to improve the standards of living in rural communities. Indeed, three issues had been identified: rural poverty, poor people's lack of access to services, and the need to promote the role of women in development. The goal of the CERDP was to empower communities by building the capacity of rural communities and supporting local investment activities. It was implemented with a US\$ 170, 2 million dollar budget and started on 15 March 2001.

The issues raised in the complaint relating to this project were the lack of villagers' participation in planning and design before the construction of rural roads, bridges and water supply began which turned out to be unsatisfactory and which subsequently negatively impacten the agricultural productivity. The complaint was declared eligible on 23 March 2005.

According to the SPF, the implementation of the project violated 5 principles: acceptability, transparency, accountability, sustainability and integration. The project did not respect the approach agreed upon, that is to say: participatory, partnership, public real demand, autonomy and decentralization as well as increasing the role and capacity of women. The project's management did not respect either local knowledge and practices, human rights ("the right to a feeling of security and the right to freedom from fear") and good governance principles.

An agreement was reached in September 2005, and an action plan was agreed¹⁷⁹. According to the SPF, most of the villagers' requests were accepted, especially those concerning their lacking involvement in planning, implementing and supervising the project, their training for the maintenance of the infrastructures, and the necessary repairs to the damaged buildings.¹⁸⁰

¹⁷⁸ ADB, Accountability Mechanism, Problem Solving Function, Complaints Registry by Year, www.adb.org.

¹⁷⁹ ADB, "Final Report of the Special Project Facilitator on the Community Empowerment for Rural Development project in Indonesia", December 2005, www.adb.org.

¹⁸⁰ NGO Forum on ADB, "Community Empowerment for Rural Development (CERD)", South Kalimantan, Indonesia", www.forum-adb.org/inner.php?sec=13&ref=extras&id=20.

➔ Rehabilitation of the Railway in Cambodia project¹⁸¹

The case concerns communities who have been involuntarily resettled to make way for the rehabilitation of Cambodia's railway system. The resettled families are experiencing severe hardships, including unmanageable indebtedness, loss of income and lack of access to basic services, as they are made to bear the externalized costs of this major infrastructure project. The Asian Development Bank (ADB) is financing the project through a USD 84 million concessional loan.

On August 28, 2012, IDI submitted a request for investigation of the resettlement process to the Compliance Review Panel (CRP), the ADB's internal accountability mechanism, on behalf of affected families who have asked IDI to represent them through the process.

The complaint describes a litany of problems and non-compliance with the resettlement process that have inflicted hardships on hundreds of poor families. It calls for a number of remedies from the ADB including reimbursement for the actual costs of replacing lost assets, at least enough compensation to build an adequate home and meet basic needs, debt relief, adequate basic services at the relocation sites, and support to get their children back into school. The complaint was registered by CRP on September 4, 2012.

After a 17-month investigation, the CRP issued a scathing report, which found that the ADB failed to comply with its policies and procedures, leaving a substantial number of affected households worse off and impoverished. The Panel found that families affected by the Railway project "suffered loss of property, livelihoods, and incomes, and as a result have borne a disproportionate cost and burden of the development efforts funded by ADB." According to the Panel, ADB's "inadequate attention to addressing the resettlement, public communications and disclosure requirements of its own policies...has led to significant yet avoidable adverse social impact on mostly poor and vulnerable people."

The Panel emphasized: "the need for an urgent, firm, and clear message to ADB Management that resettlement, environmental, and public disclosure issues should be taken seriously and accorded the priority consideration they deserve." It found that in this case, as in other cases that it had reviewed, these issues were treated by ADB as "mere add-ons." The Panel concluded that: "ADB operational, sectoral, and regional staff must undergo a mind shift in the treatment of resettlement, environment, and public disclosure and consultation. Their perspective must be based on the recognition already existing in ADB's safeguard policies that involuntary resettlement is a development opportunity, intrinsic to achieving the developmental goals of projects."

The Panel made a number of recommendations for remedies, including establishing a \$3–\$4 million 'compensation deficit payment scheme'; improving facilities at resettlement sites; extending and expanding the income restoration program; establishing of a debt workout

¹⁸¹ Authorized extract from Inclusive Development International, *Cambodia: ADB and Australia-financed railway project*, available at www.inclusivedevelopment.net.

scheme for highly indebted households; improving the functioning of the grievance redress mechanism; capacity-building for the Cambodian authorities responsible for resettlement; and adopting specific safeguards for the development of a freight facility which respects the land rights of families in the “Samrong Estate” area.

On January 30, 2014, ADB’s Board of Directors approved the Panel’s findings and slightly modified recommendations.

IDI, Equitable Cambodia and the affected communities who brought the complaint welcomed the CRP’s report and the Board’s decision and have called upon ADB Management to develop a robust remedial action plan to operationalize the decision.

On August 30, 2015, 22 representatives of families remaining along the railway tracks filed another complaint to the CRP with support from IDI and Equitable Cambodia. The complaint presents new evidence of ADB acts and omissions that threaten material harm to the complainants which were not previously addressed by the CRP in its earlier investigation.

* * *

Civil society organisations who have tried to seize the mechanism have raised numerous concerns about the process and have expressed serious doubts about the Bank staff’s real power to address controversial matters with the Bank management or Board. Moreover, communities that have attempted to seize the ADB mechanism report to have been intimidated when seeking confidentiality and to fear reprisals.¹⁸² In the past years, the Bank has witnessed an important increase in the number of complaints received, mostly due to greater awareness amongst civil society organisations on the existence of this mechanism. It is to be hoped that complaints filed will contribute to ensure that projects supported by the ADB comply with the Bank’s policies, do not negatively impact on human rights and that its accountability mechanism can effectively address human rights concerns of affected people, which still remains to be seen.

¹⁸² *Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development*, Accountability Counsel, 8th edition, August 2015, p 30, *op. cited*.

ADDITIONAL RESOURCES

- Asian Development Bank
www.adb.org
 - Compliance Review Panel
www.compliance.adb.org
 - Inclusive Development International (IDI)
www.inclusivedevelopment.net
 - International Accountability Project,
www.accountabilityproject.org
 - ASrIA (Asia)
www.asria.org
 - NGO Forum on ADB
www.forum-adb.org
 - The Asian Development Bank's Accountability Mechanism, SOMO and Accountability Counsel,
www.accountabilitycounsel.org
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* * *

In conclusion, if all development banks do now have policies in place that deal with issues related to human rights, in practice, they are still being largely criticised for not taking into account their own policies when financing projects and for too often acting as private banks.

The mechanisms available within the financial institutions are mostly focused on dialogue, and since they do not have adjudicative power, the decisions taken by the different bodies are not legally binding upon the parties.

However, they represent powerful administrative mechanisms that have the advantage of treating complaints relatively quickly. They can also contribute to ensure that procedures are respected and safeguards are in place in the design and execution of projects. In certain cases, they can be instrumental in providing some form of reparation for individuals and communities. Available complaints mechanisms of financial institutions still remain largely unknown to many, including affected people, borrowers and even consultants working for these banks. Awareness raising on the existence of these mechanisms is therefore necessary to ensure that different groups can subsequently make use of bank policies and mechanisms to ensure projects financed by these banks comply with human rights standards. Complaints registered can also be used as a powerful lobby tool.

In some regions, fear of reprisals from oppressive governments and the lacking confidentiality in these mechanisms', as well as their inability to provide a remedy

will prevent affected people from taking advantage of the complaint mechanisms. Although they major shortcomings, a case-by-case evaluation should be undertaken to evaluate potential usefulness of using these mechanisms. Despite the fact that the recommendations resulting from these complaints processes are non-binding, the use of these mechanisms as an advocacy tool may contribute to halt a project or alter its consequences on populations. In parallel, continuous advocacy for human rights norms to be fully integrated by these institutions is needed.

Two new players have appeared on the stage of multilateral development banks, Asian Infrastructure Investment Bank (AIIB) and the New Development Bank (NDB). It remains to be seen whether the environmental and social policies that will develop will be in line with those of other multilateral development banks, and if efficient recourse mechanisms for those affected by the projects they will finance will be established.

The Asian Infrastructure Investment Bank (AIIB) was created in October 2014 with an initial capital of \$50 billion. This new multilateral development institution launched on China's initiative should count at least 21 member States and respond to Asia's huge financing needs for investments in infrastructure projects. According to the Asian Development Bank, Asia's investment infrastructure needs could reach \$750 billion per year between 2010 and 2020. The main concern regarding the creation of this multilateral development bank is its ability to put in place and implement efficient environmental and social standards, and the U.S. did not hesitate to express its scepticism on this point. Probably for similar reasons, South Korea and Australia did not react to the invitation to join the new financial institution¹⁸³. In September 2015, the AIIB released draft environmental and social safeguards, which are opened for consultation. NGOs are closely monitoring this process and have already formulated criticisms.¹⁸⁴

Similar concerns as to the design of efficient environmental and social policies have been expressed regarding the creation of the New Development Bank (NDB) in July 2015, on the initiative of five emerging countries commonly known as the BRICS (Brazil, Russia, India, China and South-Africa). Civil society organisations and social movements are urging the institution to commit to basic principles of sustainable development and respect for human rights.¹⁸⁵ With an initial capital of \$50 billion, the new multilateral development bank's goal is to finance infrastructure and sustainable development projects in these countries, although other states willing to obtain financing will be able to apply¹⁸⁶.

¹⁸³ The Diplomat, *Asian Infrastructure Investment Bank : An Idea Whose Time Has Come?* <http://thediplomat.com>.

¹⁸⁴ NGO Forum on ADB, *Gaps in AIIB's ESF Further Highlighted in Forum's Updated Submission*, 5 Novembre 2015, <http://forum-adb.org>.

¹⁸⁵ Conectas, *Four Principles for the BRICS Bank*, www.conectas.org.

¹⁸⁶ The Washington Post, "What the new bank of BRICS is all about", www.washingtonpost.com. See notably Conectas, *Four Principle for the BRICS bank*, www.conectas.org.

➤ Comparative table of the IFIs' mechanisms

MECHANISM	WORLD BANK INSPECTION PANEL	WORLD BANK COMPLIANCE ADVISOR OMBUDSMAN	EUROPEAN INVESTMENT BANK COMPLAINT MECHANISM AND THE EUROPEAN OMBUDSMAN	
Financial Institutions' members	International Bank for Reconstruction and Development (IBRD) International Development Association (IDA)	International Finance Corporation (IFC) Multilateral Investment Guarantee Agency (MIGA)	European Investment Bank (EIB)	
Parties permitted to submit a request	<ul style="list-style-type: none"> - A community of persons (not an individual) living in the territory of the borrower State and believing they are suffering or may suffer harm from a WB-funded project, that the WB may have violated its operational policies or procedures with respect to the project, and that the violation is causing the harm. - Another person if provide documentation authorizing them as representatives who represents the complainant; - a local NGO - a foreign NGO, but only where local representation is not available 	<ul style="list-style-type: none"> - Any individual, group, or community directly impacted or likely to be impacted by social or environmental impacts of an IFC or MIGA project. - Representatives of an affected group may submit a complaint on their behalf if they provide their names and authorisation of representation. 	<ul style="list-style-type: none"> - Any natural or legal person affected, or feeling affected, by a decision of the EIB which relates to maladministration of EIB group in its action or omission. - For the European Ombudsman: EU citizens or a person residing or having its registered office in an EU country (at possibly non-EU nationals at the discretion of the Ombudsman, non-EU nationals) 	
Subject of the complaints	Non-compliance with WB policies or procedures, including environmental assessment, indigenous peoples and involuntary resettlement; and current or future harm stemming from a project with at least some funding from the World Bank's IBRD or IDA.	Non-compliance with IFC and MIGA Performance Standards including social and environmental assessment, labour and working conditions, land acquisition and involuntary resettlement, biodiversity conservation, indigenous peoples. These operational policies are undergoing a review process that should be finalised in early 2015."	Non-compliance with EIB' standards, including environmental and social standards, consultation, participation and disclosure standards as well as standards related to indigenous peoples, climate change and cultural heritage; and non-compliance to Applicable law, Internationally recognized human rights, or Principles of good administration.	

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT'S IPROJECT COMPLAINT MECHANISM (PCM)	INTER-AMERICAN DEVELOPMENT BANK INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM	AFRICAN DEVELOPMENT BANK - INDEPENDENT REVIEW MECHANISM (IRM)	ASIAN DEVELOPMENT BANK OFFICE OF SPECIAL PROJECT FACILITATOR (OSPF) AND ACCOUNTABILITY MECHANISM (SPECIAL PROJECT FACILITATOR (SPF) AND COMPLIANCE REVIEW PANEL (CRP))
European Bank for Reconstruction and Development (EBRD)	Inter-American Development Bank (IADB) Inter-American Investment Corporation (IIC) Multilateral Investment Fund (MIF)	African Development Bank (AfDB)	Asian Development Bank (ADB)
<ul style="list-style-type: none"> - In case of Problem solving Initiative: one or more individual(s), located in an impacted area, or who has or have an economic interest in an impacted area. - In case of Compliance Review: one or more individual(s) or organisation(s) (including an NGO if it is registered in a member country of the Bank) in relation to a project that has been approved for financing 	<ul style="list-style-type: none"> - One or more persons, groups, associations, entities or organisations whose rights or interests have been or are likely to be directly and materially adversely affected by an action or omission of the Bank as a result of a failure of the Bank to follow its policies. - Authorized representative 	<ul style="list-style-type: none"> - Any group of two or more persons or organisations, associations in the country or countries where the Bank Group-financed project is located who believe that as a result of the Bank Group's violation of its policies and/or procedures, their rights or interests have been, or are likely to be, adversely affected in a direct and material way or; - A duly appointed local representative. - Foreign representation is allowed only when local representation cannot be found. The Boards of Directors can also refer a project to IRM to conduct a compliance review 	<ul style="list-style-type: none"> - Any group of two or more persons (such as an organisation) in a borrowing country where an ADB-assisted project is located or in a member country adjacent to the borrowing country, or a local representative of the affected group; and believing they are or are likely to be, directly affected materially and adversely by an ADB-assisted project - local authorized representative - non-local representative only where local representation is not available
Non-compliance with EBRD's Environmental and Social Policy (2014) and the bank principles such as environmental sustainability, health, safety and community issues and compliance with applicable regulatory requirements and good international practice.	Non-compliance with the IDB's Relevant Operational Policies, including environmental safeguards, gender policies and information disclosure policies.	Violation of policies/ procedures including non-compliance with its environmental and social impact, poverty reduction, gender, integrated Water Resources Management; and involuntary resettlement.	Non compliance with ADB procedures and policies including the Safeguard Policy Statement (including on Environment, Involuntary Resettlement and Indigenous Peoples) and the Sector Policy Papers (including Energy, Forestry and Water).

➤ Comparative table of the IFIs' mechanisms (continued)

MECHANISM	WORLD BANK INSPECTION PANEL	WORLD BANK COMPLIANCE ADVISOR OMBUDSMAN	EUROPEAN INVESTMENT BANK COMPLAINT MECHANISM AND THE EUROPEAN OMBUDSMAN	
Time limits for complaints	Complaints must be submitted before the project is closed and before 95 percent of the funding has been disbursed. Complaints may also be submitted before the Bank has approved financing for the project or program.	Not stated time limit	Within one year from the date after which the respondent could be in a position to acknowledge the facts upon which the allegation is grounded.	
Type of mechanism and outcome	<p>The Panel decides whether to recommend an investigation. If it decides so, the Panel will complete an investigation and issue a report of their findings.</p> <p>The Bank Management is required to respond and to indicate how it will address the findings with an action plan.</p> <p>The Board makes a final decision which is made public.</p>	<p>The CAO will investigate the complaint and will determine how to move forward.</p> <p>For Dispute Resolution the CAO will facilitate a process designed to address the issues in the complaint with the goal of reaching a mutually agreeable solution.</p> <p>For Compliance the CAO conducts an appraisal and may conduct a full compliance investigation. Compliance investigation reports are made public, and the CAO monitors changes until the IFC/ MIGA take steps to resolve noncompliance.</p>	<p>If the complaint is eligible, the Office will conduct an investigation using a flexible approach, which may include compliance review and/ or problem-solving. The Office concludes its work by issuing recommended corrective actions in its Conclusions Report.</p> <p>The complainant can appeal the EIB Complaints conclusions or ask for a follow up on implementation of EIB conclusions by submitting a confirmatory complaint. He/she can also turn to the European Ombudsman if the complainant is not satisfied with the EIB process.</p>	

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT'S IPROJECT COMPLAINT MECHANISM (PCM)	INTER-AMERICAN DEVELOPMENT BANK INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM	AFRICAN DEVELOPMENT BANK - INDEPENDENT REVIEW MECHANISM (IRM)	ASIAN DEVELOPMENT BANK OFFICE OF SPECIAL PROJECT FACILITATOR (OSPF) AND ACCOUNTABILITY MECHANISM (SPECIAL PROJECT FACILITATOR (SPF) AND COMPLIANCE REVIEW PANEL (CRP))
For Problem-Solving Initiative: 12 months from last disbursement. For Compliance Review: no more than 24 months after the date on which the EBRD ceased to participate in the project.	Within 24 months after the last disbursement of funds by the Bank.	Up to a year after the final disbursement of the loan or physical completion of the project.	Up to two years after the loan or grant closing date.
<p>- In case of Problem solving Initiative: the aim is to restore dialogue between the complainant and the client. If an agreement is reached, the PCM will conduct any necessary monitoring.</p> <p>- In case of Compliance Review: the aim is to determine if the EBRD has complied with its policies.</p> <p>Possible outcomes include a report with recommendations for corrective action. The PCM can also monitor changes arising from the compliance review process.</p>	<p>In Consultation Phase, MICI conducts an assessment and facilitates dialogue between the parties. If an agreement is reached, MICI monitors its implementation.</p> <p>In Compliance Review Phase, MICI investigates whether the IDB failed to comply with its policies and thereby harmed complainants. MICI presents its report to the Board, which determines what action to take, including whether Management should develop an Action Plan to address any noncompliance. The report is released to the public along with the Board's decision. MICI will monitor implementation of the Action Plan or other agreed remedial actions.</p>	<p>After examination of the complaint, the Unit will decide if it is more efficient to conduct a problem-solving process and/or a compliance review. The panel submits a report to be approved by the President or the Board and which includes findings and recommendations, as well as a designated person to monitor the implementation of proposed changes.</p>	<p>The Complaints Receiving Officer forwards complaint to the Problem Solving or Compliance Review functions.</p> <p>In Problem Solving, the SPF attempts to facilitate an agreement between the parties involved, and monitors the implementation of this agreement.</p> <p>In Compliance Review, the CRP conducts an investigation into whether the ADB has complied with its policies and procedures. The CRP presents its findings to the ADB Board, which decides whether to take action.</p>

Extracts from: *Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development*, Accountability Counsel, 8th edition, August 2015, *op cited*.

Human Rights & Grievance Mechanisms Brochures, SOMO and Accountability Counsel, *op cited*.

SECTION IV
WHO IS FUNDING THE PROJECT OR OWNS THE COMPANY?
Using Financial Institutions' Mechanisms
and Engaging with Shareholders

PART II

Export Credit Agencies

Export Credit Agencies (ECAs) are national public institutions that offer private companies three different kinds of support: direct credit (1), credit insurance (2) and /or guarantees (3). This support which is guaranteed by the state allows companies to reduce the financial risk when signing contracts abroad especially in fragile developing countries. Some of these agencies are governmental, such as the ECGD (Export Credits Guarantee Department) in the United Kingdom, whereas others are private organisations working on behalf of the state, such as COFACE in France. Most industrialised countries have at least one official Export Credit Agency. Their aim is to support the establishment of national industries abroad. The agencies help finance high risk projects (dams, mining, pipelines, chemical projects,...) which due notably to their environmental or social impact could not be carried out without this support¹⁸⁷.

In 1963, the OECD established the “Working Party on Export Credits and Credit Guarantees” (ECG) which is in charge of carrying forward the work of the OECD concerning export credits. Its objectives are to analyse export credit and guarantee policies, to determine potential problems and to resolve or mitigate these through multilateral discussions.

Civil society criticisms of the ECAs

Civil society organisations often criticize ECAs either for not (or else very rarely) applying human rights, social and/or environmental standards in their decision making processes. Since these agencies are state organs, the states may be violating their obligations under international human rights law if they do not make sure that the ECAs act in conformity with human rights standards. According to Transparency International¹⁸⁸, these agencies actually contribute to reinforce the corruption in developing countries in which they invest (bribes for civil servants to see through contracts and projects). In its 2011 annual report, Mr. Cephas Luminas, then UN Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, affirmed

¹⁸⁷ ECA Watch - International NGO Campaign on Export Credit Agencies, www.eca-watch.org

¹⁸⁸ ECA Watch, *Exporters fail on pledge to curb on bribery: Transparency International*, www.eca-watch.org.

that “a significant number of the projects supported by export credit agencies, particularly large dams, oil pipelines, greenhouse gas- emitting coal and nuclear power plants, chemical facilities, mining projects and forestry and plantation schemes, have severe environmental, social and human rights impacts.”¹⁸⁹

Progressive integration of social and environmental considerations into the ECAs

Due to growing criticism from civil society, Export Credit Agencies have been showing more willingness over the past few years to integrate human rights standards into their work. However, the pace at which they are changing their policies and attitudes is still very slow. Some agencies, such as the Export Development Canada (EDC) (see example below) have defined policies or made declarations concerning their social responsibility. On 13 May 2004, Eksport Kredit Fonden, the Danish export credit agency, was the first to adopt the Equator Principles which were developed by private sector banks (see Part III on the Equator Principles)¹⁹⁰ and then followed by the Canadian export credit agency. In 2003, the Coface (France’s ECA) adopted environmental guidelines; however, these were the subject of severe criticism owing to the fact that they do not apply to all of the project categories. Some agencies have established complaint mechanisms (see Canada and US below).

In June 2000, 347 NGOs criticized the persisting inadequacies of the ECAs (absence of transparency, corruption, absence of follow up investigations, etc.) and published the **Jakarta Declaration**¹⁹¹ directed at the OECD member states with the aim of reforming the rules governing export credit agencies. This document demands, among other things, more transparency, public access to information, consultation with civil society and with those affected by the projects, as well as the adoption of guidelines in conformity with environmental and human rights standards.

In June 2007, within the framework of the Working Party on Export Credits and Credit Guarantees (ECG), the OECD Council adopted a revised version of its 2003 Recommendation which calls for the implementation of stricter environmental rules and regulations¹⁹². This Recommendation also includes social impact assessments. One of its main objectives is to contribute to **sustainable development** by insuring **coherent policies** that export credit agencies will be required to adhere to and which are in accordance with international instruments. Through the adoption of the Recommendation, the OECD members have accepted to apply the International Finance Corporation’s (IFC) social and environmental standards (themselves

¹⁸⁹ Mr. Cephas Luminas, *UN Independent Expert on the effects of foreign debt on the full enjoyment of all human rights*, 5 August 2011, UNGA, A/66/271

¹⁹⁰ The Equator Principles, *Eksport Kredit Fonden adopts the international “Equator Principles” guidelines*, The Equator Principles, 13 May 2004, www.equator-principles.com.

¹⁹¹ *Jakarta Declaration*, May 2000, available at www.eca-watch.org.

¹⁹² OECD, *OECD Adopts Stronger Environmental Common Approaches for Export Credits*, available at www.oecd.org.

criticized by NGOs, see Part I, Chapter I) to their ECAs¹⁹³. This recommendation was updated in June 2012¹⁹⁴.

Although not explicitly mentioned in their statute or their policies, a few agencies publicly state that they take into consideration the human rights issues through their due diligence process. However, the reality is still characterised by the absence of legally binding instruments which would oblige the export credit agencies to consider human rights standards, the absence of control over their functioning, and by a lack of transparency in the way they conduct business. Regrettably, the present state of affairs does not require agencies to undertake public environmental and social impact assessments or even to consult with communities affected by the projects.

Examples of agencies with complaints mechanisms...

CANADA – Export Development Canada (EDC)

The Export Development Agency is autonomous, functions like a corporation and is entirely owned by the Canadian government¹⁹⁵. The EDC financially supports companies with the aim of developing the Canadian export market and to profit from the possibilities and opportunities offered by the international marketplace¹⁹⁶. The EDC has implemented a complaints mechanism which is run by the **Compliance officer**.

② What are the issues that can be dealt with?

Although human rights standards are not mentioned anywhere in its statute or its regulations, the EDC has implemented a declaration covering its social responsibilities¹⁹⁷. The **five main principles** governing social responsibility are embedded in the organisation's policies and, in a nutshell, they cover the following:

- *Business Ethics*: establishment of a code of conduct, code of business ethics and an anti-corruption program;
- *Environment*: EDC is committed to the environment by facilitating and encouraging exports of Canadian environmental solutions to review the environmental

193 OECD, Working Party on Export Credits and Credit Guarantees, *Revised Council Recommendation on common approaches on the environment and officially supported export credits*, TAD/ECG (2007) OECD Adopts Stronger Environmental Common Approaches for Export Credits, *Op. cit.*

194 OECD Recommendations (Common Approaches), *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence* (the "Common Approaches"), as adopted by the OECD Council on Thursday 28 June 2012, www.oecd.org.

195 EDC, *Introduction to Corporate Information*, Supporting Canadian Exports and Foreign Direct Investments, www.edc.ca.

196 EDC, Mandate and Role, EDC's mandate, www.edc.ca.

197 EDC, *Corporate Social Responsibility at EDC*, www.edc.ca.

- impacts of prospective projects;
- *Transparency*;
- *Employee Engagement*; and
- *Community Investment*

Every year since 2004, the agency publishes an annual report concerning its corporate social responsibility (CSR). The agency has established a consultative council which is in charge of advising the agency on its CSR and helps to improve its social and environmental practices.

EDC adopted a “**statement of commitment on human rights**” in which the agency affirms its respect for human rights and recognises the need to be coherent with Canada’s international obligations, including the Universal Declaration of Human Rights and the necessity for financial institutions to evaluate potential negative impacts of their activities on human rights¹⁹⁸. The agency furthermore confirms that it will undertake impact assessments to evaluate the impact of its projects on human rights. EDC uses international standards in its review of prospective clients, including the IFC performance standards and the Equador principles. However it remains unclear whether EDC requires that its clients comply with these standards.¹⁹⁹ Unfortunately the EDC does not make its methodology or results public²⁰⁰. **EDC is been criticized for funding numerous controversial projects**²⁰¹.

⑩ Who can file a complaint?

Any individual, group, community, entity or other party “can request a review on issues relating to EDC’s public disclosure of information, environmental reviews, human rights and business ethics. If a request is being made on behalf of another party, that group should be identified and evidence of authority to represent that group provided.

⑩ Under what conditions?

There is no particular deadline for filing a complaint. The complaint must be in writing in either English or French.

¹⁹⁸ EDC, *EDC statement on human rights*, www.edc.ca.

¹⁹⁹ Above Grand, *FAQs on Export Credit Agencies*, www.aboveground.ngo

²⁰⁰ K. Keenan, *Export Credit Agencies and the International Law of Human Rights*, *Halifax Initiative Coalition*, January 2008.

²⁰¹ See notably ECA Watch, www.eca-watch.org.

HOW TO FILE A COMPLAINT?

The complaint must include the following:

- The name of the complainant, as an anonymous complaint cannot be accepted. However, material to support the complaint can be submitted confidentially.
- If a third party is representing a complainant, contact information has to be provided and the relevant documents justifying the third party representation must be included.
- A clear statement describing the policies, guidelines or procedures which in the opinion of the complainant have not been respected by the EDC.
- What has been done to solve the problem, including any previous contact with EDC.
- Background information on the complaint, including the names of any person the complainant may have dealt with in an attempt to resolve the issue or raise the concerns.
- Complaints can be sent to:

Compliance Officer
Export Development Canada
151 O'Connor Street,
Ottawa ON K1A 1K3
Fax: (613) 597-8534
E-mail: complianceofficer@edc.ca

- You can also fill in a request for review form online: https://www19.edc.ca/edcsecure/eforms/csr/request_review_e.asp.
-

➤ Process and outcome

“EDC’s Compliance Officer (“CO”) provides a mechanism for resolving complaints either through dispute resolution and mediation or through a compliance audit to determine if EDC is following its corporate social responsibility practices and policies. Within a “reasonable” amount of time, the Compliance Officer will let you know whether your complaint is eligible. If eligible, the Officer will use a preliminary assessment to determine which method to use to handle the complaint (such as dialogue, facilitation or negotiation). If the issue is not resolved, the Compliance Officer can make a recommendation to EDC’s Board of Directors about future action that should be taken to address the concerns raised in the complaint. If a compliance audit is recommended, the audit will be performed by the EDC’s internal auditor or an external third party at the oversight of the Compliance Officer.²⁰²”
The Compliance officer can decide to end the dispute if he or she considers that the matter has been resolved satisfactorily.

The Compliance officer can also make recommendations to the Board of Directors and become in charge with the follow up of their implementation.

202 Extract from Accountability Counsel, *Export Development Canada*, www.accountabilitycounsel.org.

Recommendations made by the Officer are not binding on EDC. However, the Compliance Officer reports quarterly to the Audit Committee of the Board of Directors of EDC on the highlights of recommendations made during the quarter and the status of these recommendations. According to the official website²⁰³. The Compliance officer can decide to end the dispute if he or she considers that the matter has been resolved satisfactorily.

The Compliance officer can also make recommendations to the Board of Directors and become in charged with the follow up of their implementation.

According to civil society actors, such as Above Ground EDC's due diligence process remains inadequate.

ADDITIONAL RESOURCES

- Above Ground, FAQs: Export Credit Agencies www.aboveground.org
 - Accountability Counsel, Export Development Canada's Co, www.accountabilitycounsel.org.
 - Halifax Initiative, Counter Current, Forum Suape, Both Ends and Movimiento Ríos Vivos, Export Credit Agencies and Human Rights: Failutre to Protect, 2014, www.aboveground.ngo.
 - ECA Watch, EDC, www.eca-watch.org.
-

USA – Overseas Private Investment Corporation (OPIC)

The **Overseas Private Investment Corporation (OPIC)**²⁰⁴ is a US government agency which works in over 150 countries. OPIC has established an independent Office of Accountability (OA) which has two main functions: Problem-Solving and Compliance Review²⁰⁵. The next section mainly looks at the process which follows the compliance review, although it is worth noting that the problem-solving mechanism works in a similar fashion.

② What are the issues that can be dealt with?

The compliance review process assesses and reports on complaints regarding OPIC's compliance with its policies related to environment, social impacts, worker rights and human rights under an OPIC-supported project. These policies include sections 231 (n), 231A, 237(m), 239(g) and 239(i) of the 1961 Foreign Assistance Act, as amended, as well as tnd OPIC's Environmental Handbook, that was published – February 2004²⁰⁶. Most of the OPIC's policies are based on the policies

²⁰³ See EDC, *EDC's Compliance Officer Steps to Resolution*, www.edc.ca.

²⁰⁴ OPIC – Overseas Private Investment Corporation, www.opic.gov.

²⁰⁵ OPIC, Office of Accountability, *Overseas Private Investment Corporation*, www.accountabilitycounsel.org.

²⁰⁶ Extract from OPIC, *Compliance Review*, www.opic.gov.

and standards of financial institutions such as the IFC (the International Financial Corporation, which is part of the World Bank Group). The US Code requires the OPIC to issue a “comprehensive set of environmental, transparency and internationally recognized worker rights and human rights guidelines with requirements binding on the Corporation and its investors that shall be consistently applied to all projects, funds and sub-projects supported by the Corporation (...)” (22 U.S. Code, paragraph 2291b – Worker rights and human rights guidelines)²⁰⁷.

According to its policies, the OPIC must ensure the respect of:

Strict Environmental and Social Norms

Such norms are described in the OPIC Environmental Handbook. The Handbook²⁰⁸ is intended to provide guidance to OPIC’s investors, as well as the interested public, with respect to the environmental and social standards. The Handbook also presents the assessments and monitoring procedures that the OPIC applies to prospective and ongoing investment projects. Furthermore, it contains a section on the publication of information concerning, for example, the number of potentially displaced persons, the impacts on lifestyle as well as the level of general acceptance and consent for the project (identification of affected people, consultations, etc.).

Worker’s Rights

The OPIC may operate in countries if they currently have, or are taking steps to adopt and implement, laws that extend internationally recognized worker’s rights. The OPIC cannot provide assistance to any program, project, or activity that contributes to the violation of “internationally recognized workers rights”, including the freedom of association and collective bargaining, the prohibition of forced labour, the respect of the minimum employment age and of acceptable conditions of work²⁰⁹. The OPIC includes a clause on the respect of workers’ rights in every contract it signs. Exceptions can be made by invoking sections 231A (3) and 231A (4) of the 1961 Foreign Assistance Act if a solid justification is provided which supports the need to stimulate the economic situation of a country.

Human Rights

The OPIC human rights clearance process is designed to ensure that OPIC-supported projects meet their statutory requirements, and thus comply with the 1961 Foreign Assistance Act. The latter states that no assistance can be given to projects in countries in which serious and systematic human rights violations are taking place, such as torture and abduction, or in which the right to life, liberty and security of individuals are endangered²¹⁰.

²⁰⁷ Referred to in the *Report of the UN Special Representative on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, A/HRC/14/27, 9 April 2010.

²⁰⁸ OPIC, *OPIC Environmental Handbook 2004*, www.opic.gov.

²⁰⁹ OPIC, *Worker & Human Rights*, www.opic.gov.

²¹⁰ Children’s rights are also mentioned. See the *Foreign Assistance Act*, section 116 as amended, 1994.

Economic Analysis

The project should not have a negative impact on the US Economy. For example, OPIC will not finance projects which favour the outsourcing of the production chain. Furthermore, restrictions are in place for the tobacco, gaming, and alcohol and arms industry.

Development Impact in the Host Country

The OPIC undertakes a development impact analysis in each country and takes social practices and corporate social responsibility into account.

Projects that are likely to have significant adverse environmental or social impacts are disclosed to the public for a comment period of 60 days²¹¹.

In October 2010, the OPIC adopted a framework for the evaluation and the monitoring of its environmental and social policies, called the Environmental and Social Policy Statement (ESPS).²¹² Currently, in order to ensure that the policy remains an effective tool, a revision process is taking place. The final version of the ESPS will be adopted by fall of 2016. Following this revision updated procedures will be developed accordingly.

② Who can file a complaint?

- Member/s of the local community affected by adverse environmental, social, worker rights or human rights impacts of an OPIC-supported project, or their authorized representative
- The OPIC’s President & CEO
- The OPIC’s Board of Directors

② Under what conditions?²¹³

The request must relate to a project for which the OPIC has concluded a financial agreement or insurance contract with the sponsor responsible for the project and the OPIC maintains a contractual relationship with the project.

HOW TO FILE A COMPLAINT?

- The content of the request must include:
- The requester’s identity and contact information.
- The identity, contact information and credentials of any representative, and evidence of the nature and scope of the representative’s authority.

²¹¹ They are available for consultation in the section “Investment Policy / Environment”: www.opic.gov.

²¹² OPIC, Environmental and Social Policies, www.opic.gov/content.

²¹³ OPIC, Who We Are, Compliance Review www.opic.gov.

- Whether the requester wishes his/her identity and/or information provided to the office of accountability to be kept confidential, and the reasons why if applicable.
- The nature and location of the project that is the subject of the request, the identity of the project sponsor, and whether the project is supported by the OPIC.
- A clear statement of evidence (or perceived risk) of adverse environmental, social, worker rights or human rights outcomes attributed to the project.
- if possible, the identification of the OPIC statutes, policies, guidelines or procedures related to environmental, social, worker rights or human rights of which the violation is alleged.
- A complaint, problem-solving or compliance review, can be sent via e-mail to: accountability@opic.gov
- or by post to the director:

Office of Accountability
Overseas Private Investment Corporation
1100 New York Ave., NW
Washington DC 20527
Tel. 1-202-336-8543
Fax 1-202-408-5133

➡ Process and Outcome

At the time of publication of this guide, the OA conducted three compliance reviews. The the cases and reports are available on the website²¹⁴.

The office of Accountability in action

➡ **Baku-Tbilissi-Ceyhan Pipeline Project (BTC) – Azerbaijan, Georgia and Turkey**

In March 2006, Manana Kochladze, a Georgian national, and the NGO Central and Eastern European Bankwatch Network filed a request for a compliance review concerning the Baku- Tbilissi-Ceyhan Pipeline Project (Azerbaijan – Georgia – Turkey). The allegations brought forward concerned the environmental obligations of the public agency. In its report, the Office of Accountability (OA) assessed that due diligence processes were followed and respected in all areas apart from the anticipated date for the audit²¹⁵.

➡ **Cœur d’Alene Mines corporation - Bolivia**

In April 2008, an indigenous community affected by the Cœur d’Alene Corporation Mining project, the biggest silver mine in the world, filed a request for a compliance review. The complaint concerns violations of the public agency’s policies and procedures concerning

²¹⁴ OPIC, Who We Are, Public Registry of Cases, www.opic.gov.

²¹⁵ Office of Accountability, Compliance Review of OPIC’s Environmental Due Diligence and Monitoring of the Baku-Tbilisi-Ceyhan Oil Pipeline Project, Overseas Private Investment Corporation, 12 February 2007

relocation of indigenous people. The report concluded that the agency had indeed violated its policies. The report recommended continuing the dialogue in order to establish a sustainable relocation and development plan for the affected indigenous population²¹⁶.

The OPIC has been recently criticised for its failure in being diligent when it comes to the assessment of the social and environmental risks of a project seeking its financing. In 2011, protests against the construction of a hydroelectric plant in **Mexico** that was causing serious harm in the area of residents led to its shut-down²¹⁷. In 2012, a biomass project in **Liberia** collapsed as a result of bad working conditions and impacts on Liberian farmers, charcoal producers and workers, including sexual abuse by company employees of local women. NGOs such as Somo, Accountability Counsel and Green Advocates took action to denounce such institutional failures²¹⁸. OPIC later published an independent investigation confirming the agency's role in harm to communities and with actions to address accountability gaps.²¹⁹ These are only some examples illustrating serious shortcomings of the U.S. Export Credit Agency.

CSO's recommendations to improve ESPS include: stronger environmental and social risk identification and management; stronger engagement with local communities and civil society organizations, conductive comprehensive analyses of project alternatives; public disclosure of all relevant documentation necessary to determine compliance; and a requirement for the Office of Accountability to be fully staffed with highly qualified personnel at all times.

Other ECAs in action

➔ Turning around the situation: the Ilisu Dam - Turkey

The Ilisu Dam is an extremely controversial project due to its social, environmental, cultural and political impact. Various companies such as the Swiss company Alstom and the Austrian company Va Tech – that is now part of Siemens – banks and export credit agencies from diverse countries (Germany, Austria and Swiss) helped finance the project. Initially the governments made assurances that the project respected international standards. However an expert report published in July 2008 claimed the contrary saying that forced migration threatened 78000 Kurds, archaeological sites were being buried among others. Following the report, the German, Austrian and Swiss export credit agencies decided to abandon the project, as they recognised that Turkey was not respecting the social and environmental standards demanded

²¹⁶ Office of Accountability, Bolivia Coeur d'Alene Mines/ San Barolome Reports, Overseas Private Investment Corporation, 24 February 2009.

²¹⁷ Associated Press, *US-Backed Mexico Dam Project Triggered Protest, Rare Defeat*, DailyMail, 30 January 2015, www.dailymail.co.uk.

²¹⁸ SOMO, *Independent Report Confirms U.S. Agency's Role in Harm to Communities in Liberia*, 17 October 2014, <http://somo.nl>.

²¹⁹ OPIC, OA Review: Buchanan Renewable Energy Projects in Liberia, September 2014, www.opic.gov.

for the project²²⁰. Although this withdrawal does not illustrate a general tendency of all ECAs, it does show their increasing consideration for social and environmental standards. This is most likely due to the pressure they have faced from the critics. However and despite this relative success, expropriations without compensation are said to be continuing and the Turkish government has voiced its intention to move forward with the project.²²¹

* * *

As of today, only a few ECAs consider the human rights impacts of the projects they support²²². Most export credit agencies such as COFACE in France²²³, Ducreux in Belgium and Euler Hermes Kreditversicherungs-AG in Germany, still do not have complaint mechanisms in place. Furthermore, the existing mechanisms have no legally binding powers. Victims can only hope that the recommendations in their favour are seriously taken into consideration by the agencies. Since the mechanisms are based on dialogue, they cannot offer any compensation or reparation to the victims. Yet export credit agencies can be used as a powerful tool to exercise public pressure. The withdrawal of the export credit agencies from the Ilisu Dam project demonstrates the positive impact that civil society may have.

The ECAs are facing increasing pressure from the international community. NGOs argue that by failing to protect human rights in the operations of ECAs, States fail to respect their duty to protect human rights.²²⁴

ADDITIONAL RESOURCES

- ECA Watch (International NGO campaign on export-credit agencies)
www.eca-watch.com
 - Accountability Counsel
www.accountabilitycounsel.org
-

220 ECA, German, Swiss and Austrian ECAs confirm cancellation of Ilisu credits, What's New?, ECA, vol. 8, n°7, July 2009

221 Stop Ilisu Campaign, www.stopilisu.com.

222 Report of the Special representative of the Secretary-general on the issue of human rights and transnational corporations and other business enterprises, A/HRC/14/27, §29.

223 The French Finance Ministry recently considered to give the mandate held by Coface to the public investment bank Bpifrance. See the following newspaper article published on 23 February 2015 in *Les Echos*: www.lesechos.fr#

224 Halifax Initiative, Counter Current, Forum Suape, Both Ends and Movimiento Rios Vivos, *Export Credit Agencies and Human Rights: Failure to Protect*, 2014, www.aboveground.ngo See also for instance reports on ECA in Sweden: www.amnesty.se

SECTION IV
WHO IS FUNDING THE PROJECT OR OWNS THE COMPANY?
 Using Financial Institutions' Mechanisms
 and Engaging with Shareholders

PART III

Private Banks

Private Banks' responsibilities: the Equator Principles

The Equator Principles²²⁵ (the “Principles”) were established in 2003 by a group of private banks led by Citigroup, ABN AMRO, Barclays and WestLB and can be defined as voluntary environmental and social standards to be respected by private banks in project financing. The corporate projects are, in most cases, limited to major projects such as mining, dams and telecoms. Hence the Equator Principles do not apply to general, mainstream loans to companies.

The first version of the Principles (EP I) only applied to projects exceeding 50 million dollars US and concerned only around a dozen international banks. The second version adopted in July 2006 (EP II) is based on criteria developed by the IFC (International Finance Corporation), as the World Bank Group institution in charge of the private sector. The last version of the Principles (EP III) has been effective from June 2013 and applicable to all new transactions entered into from 1 January 2013²²⁶. In February 2016, 83 financial institutions in 37 countries have adopted the Equator Principles Financial Institutions (EPFIs). In 3 years (from January 2013 to February 2014), 11 new financial institutions adhered to the Equator Principles, which highlights the growing interest for responsible financing.

① What is the scope of the Principles?

The EPFIs are actually committed to provide loans only to projects supporting sustainable development, the protection of health, of cultural heritage and of biological diversity, the prevention and control of pollution, and to consider the impact the projects may have on indigenous populations and communities.

²²⁵ The Equator Principles, A financial industry benchmark for determining, assessing and managing social & environmental risk in project financing, www.equator-principles.com/principles.shtml

²²⁶ Equator Principles III, www.equator-principles.com.

The 10 Equator Principles are guidelines intended to assist the banks in deciding which projects to finance. They apply “globally and to all industry sectors”²²⁷ and to four different financial products²²⁸:

- Project Finance Advisory Services (for projects with a total capital cost of at least US\$10 million)
- Project Finance (for projects with a total capital cost of at least US\$10 million)
- Project-Related Corporate Loans in certain circumstances²²⁹
- Bridge Loans (short-term loan advanced to cover the period between the termination of one loan and the start of another²³⁰)

The application of the Principles for Project-Related Corporate Loans and Bridge Loans was excluded in EP I and EP II. The latter only applied to project-financing, which represents about 1% to 2% of corporate and investment banks’ activities.

EP III state²³¹:

Principle 1: Review and Categorisation

When a project is proposed for financing, the EPFI will, as part of its internal social and environmental review and due diligence process, categorise the project based on the magnitude of its potential impacts and risks in accordance with the environmental and social screening criteria of the IFC.

Principle 2: Environmental and Social Assessment

For each project assessed, the borrower is required to conduct an Environmental and Social Assessment to address the relevant social and environmental impacts and risks of the proposed project. The Assessment should also propose relevant mitigation and management measures appropriate to the nature and scale of the proposed project.

Principle 3: Applicable Environmental and Social Standards

The assessment of environmental and social risks will refer to the applicable IFC Performance Standards revised in 2011, to the applicable Industry Specific Environmental, Health and Safety Guidelines (“EHS Guidelines”), but also to the host country environmental and social laws and regulations.

²²⁷ Equator Principles, June 2013, p. 3, www.equator-principles.com.

²²⁸ *Ibid.*

²²⁹ *Ibid.* (for more details about these circumstances)

²³⁰ Business Dictionary, www.businessdictionary.com

²³¹ Equator Principles, June 2013, *Op. cit.*, p. 5 -11

Principle 4: Environmental and Social Management System (ESMS) and Equator Principles Action Plan

For each project assessed, the borrower is required to develop or maintain an Environmental and Social Management System (ESMS) to deal with the social and environmental risks involved by the implementation of the project.

Such ESMS will be completed with the development by the borrower of an Environmental and Social Management Plan (ESMP) describing the actions needed to implement mitigation measures, and monitor the measures necessary to manage the impacts and risks identified during the assessment process.

If compliance of the project with the applicable standards is still not considered satisfactory by the EPFI, the latter will agree on an Equator Principles Action Plan (AP) with the borrower to outline gaps and commitments to meet EPFI requirements in line with the applicable standards.

Principle 5: Stakeholder Engagement

For each project assessed, the EPFI will require the borrower to demonstrate its effective engagement with all stakeholders of the project. An Informed Consultation and Participation Process will have to be conducted by the borrower for all projects with a potentially adverse impact on communities. Such process will have to be realised in a culturally appropriate manner, and tailored to the language preferences and decision-making processes of the affected communities, as well as to the needs of their most vulnerable groups. Projects affecting indigenous peoples will be subject to a similar consultation process and require **Free Prior and Informed Consent (FPIC)** consistently with IFC Performance Standard 7, to establish whether they have adequately incorporated the concerns of these communities.

Principle 6: Grievance Mechanism

For each project assessed, the borrower will establish a grievance mechanism as part of the above-mentioned ESMS to receive and facilitate resolution of concerns and grievances about the project's social and environmental performance raised by individuals or groups from among project-affected communities. Such mechanisms will need to be scaled to the risks and adverse impacts of the project

Principle 7: Independent Review

For project financing, an Independent Social and Environmental Consultant not directly associated with the borrower will review the risk assessment documentation including the ESMS and the Equator Principles AP, as well as the consultation process documentation in order to assist EPFI's due diligence, and assess Equator Principles compliance.

For project related corporate loans, the Independent Social and Environmental Consultant will need review only projects with potential high-risk impacts including damage to indigenous peoples, critical habitats impacts, significant cultural heritage impact, and large-scale resettlement, inter alia.

Principle 8: Covenants

Where a borrower is not in compliance with its social and environmental covenants, EPFI will work with the borrower to bring it back into compliance to the extent feasible, and, if the borrower fails to re-establish compliance within an agreed upon grace period, EPFI reserve the right to exercise remedies, as they consider appropriate.

Principle 9: Independent Monitoring and Reporting

For project-finance, either the Independent Environmental and Social Consultant or a qualified and experienced external expert appointed by the borrower will have to monitor and assess project compliance with the Equator Principles.

The same process will have to be followed **for projects-related corporate loans** requiring an independent review under Principle 7.

Principle 10: Reporting and Transparency

Each EPFI adopting the Equator Principles commits to report publicly at least annually on its Equator Principles implementation processes and experience, taking into account appropriate confidentiality considerations.

In August 2009, a best practice guidebook to EPFI on incorporating environmental and social considerations into loan documentation was published. This best practice includes guidelines concerning the establishment of action plans which conform to the IFC standards²³².

The Equator Principles, changes and criticisms

EP III are considered as an improvement of the old principles. This is mainly due to the fact that they now encompass more projects because their applicability is no longer limited to project financing. In terms of commitment to respect international environmental and social standards, one can only welcome the explicit engagement to address human rights in the preamble of the new principles, especially through the reference to the Guiding Principles on Business and Human Rights, Implementing the UN Protect, Respect and Remedy Framework. EP III's new preamble also explicitly expresses the commitment to address climate change issues, and project reporting requirements on greenhouse gas emission levels have been included in the EP framework. Despite these important and positive changes, the principles

²³² Equator Principles, *Guidance to EPFIs on Incorporating Environmental and Social Considerations into Loan Documentation*, August 2009, www.equator-principles.com/bestpractices.shtml.

remain criticised mainly for their vagueness (a) and the fact that they do not include a recourse mechanism (2)²³³.

Vagueness in the formulation of the principles

Many NGOs demand a review of the principles and of their application with denouncing the imprecision and vagueness of their formulation²³⁴. Banktrack²³⁵ criticises the principles notably for their lack of transparency - they did not take up IFC's policy of disclosure - and the fact that there are no provisions made for compensation to those affected by the projects.

Lacking independent review or recourse mechanism

Any bank can adopt the Principles but it should be noted that the EPFI have not implemented any control or review mechanisms to ensure that the Principles are being adhered to. The review of the Equator Principles is carried out on a voluntary basis by one of the member banks on another member bank involved in a project. No doubt this lack of transparency leads to a conflict of interests or to a situation in which favours are exchanged. Moreover the Principles have not implemented any recourse mechanisms for affected communities. Despite the lack of an official complaint mechanism, it is possible to alert the equator principles' Board of violations.

The Equator Principles in Action

➔ Nine NGOs press charges against Calyon

On 18 May 2006, nine NGOs including Amis de la Terre (Friends of the Earth France) and BankTrack pressed charges against Calyon, a subsidiary of the Crédit Agricole Group, for violating the Equator Principles in the Botnia Paper Pulp Factory project in Uruguay. Due to the absence of an official complaints mechanism, the NGOs directly addressed the Crédit Agricole Group. The NGOs rejected an internal expert considered to be barring the participation of the local community. The charges were rejected by the Crédit Agricole who claimed the Principles were not applicable in this case, because they maintained that they were not doing 'project financing'. Considering that financing a project involves gathering and structuring various financial contributions necessary for large scale investments and considering that in this case Calyon financially supported a Finnish factory in Uruguay, there is no doubt that this response renders this bank's commitment to the Principles highly questionable and taints the usefulness of the Principles in general.

²³³ See part I, criticism of the Performance Standards of the IFC which are also applicable to the Equator Principles.

²³⁴ Novethic, Le financement des industries extractives: les principes d'Equateur mis à mal, Novethic, (only available in French) www.novethic.fr.

²³⁵ BankTrack, About BankTrack, www.banktrack.org.

ADDITIONAL RESSOURCES

- **Equator Principles**
www.equator-principles.com/principles.shtml
 - **Bank Track** (global network of civil society organisations and individuals tracking the operations of the private financial sector)
www.banktrack.org
 - Fair Finance Guide International,
www.fairfinanceguide.org
-

* * *

In addition to the Equator Principles, civil society organisations can look for environmental and social standards and complaint mechanisms that may be present within other private banks. For instance, the China Banking Regulation Commission (CBRC) issued in 2017 the Chinese Green Credit Guidelines. The Guidelines were revised in 2012. Sometimes called directives²³⁶ they require Chinese banks to “effectively identify, measure, monitor and control environmental and social risks associated with their credit activities, establish environmental and social risk management system, and improve relevant credit policies and process management.”²³⁷

²³⁶ Friends Of The Earth. *Assessing China's commitment to greening its overseas finance, one year later*, March 2013, www.foe.org.

²³⁷ CBRC. *Notice of the CBRC on Issuing the Green Credit Guidelines* (Article 4), February 2012, www.cbrc.gov.cn.

➤ EPFI members per country²³⁸

Argentina	Banco Galicia
Australia	ANZ National Australia Bank Westpac Banking Corporation Export Finance and Insurance Corporation (EFIC)* Commonwealth Bank of Australia
Bahrain	Ahli United bank B.S.C
Belgium	KBC Group
Brazil	Banco Bradesco Banco do Brasil Caixa Economica Federal Itaú-Unibanco S/A
Canada	BMO Financial Group Canadian Imperial Bank of Commerce Export Development Canada (EDC)* Manulife Royal Bank of Canada Scotiabank TD Bank Financial Group
Chile	CORPBANCA
China	Industrial Bank Co., Ltd
Colombia	Bancolombia S.A.
Denmark	Eksport Kredit Fonden*
Egypt	Arab African International Bank
France	BNP Paribas Crédit Agricole Natixis Societe Generale
Germany	DekaBank KfW IPEX-Bank* UniCredit Bank AG
India	IDFC
Italy	Intesa Sanpaolo
Japan	Mizuho Corporate Bank, Ltd. SMBC The Bank of Tokyo-Mitsubishi UFJ, Ltd Sumitomo Mitsui Trust Bank
Mauritius	Mauritius Commercial Bank
Mexico	Banco Mercantil del Norte and the CIBAnco

Morocco	Banque Marocaine Du Commerce Extérieur (BMCE Bank)
Nigeria	Acces Bank PLC Fidelity Bank
Norway	DNB Eksportkreditt Norway
Oman	BankMuscat S.A.O.G.
Panama	CIFI
Peru	Banco de Crédito
Portugal	Banco Espírito Santo S.A.
South Africa	Absa Bank Ltd. Nedbank Group Standard Bank Group FirstRand Ltd.
Spain	BBVA S.A. Caixa Bank Banco Santander Banco Sabadell Banco Popular Español
Sweden	Nordea SEB
Switzerland	Credit Suisse Group
Togo	Ecobank transnational Inc.
The Netherlands	ABN Amro Group ASN Bank NV FMO ING Group NIBC Bank Rabobank Group
United Kingdom	Barclays plc HSBC Holdings plc Lloyds Banking Group plc Standard Chartered Bank UK Green Investment Bank
United States	Bank of America Citigroup Inc. Ex-Im Bank JPMorgan Chase & co. Wells Fargo N.A.
Uruguay	Banco de la República Oriental del Uruguay

*Official export-credit agencies

²³⁸ Source: www.equator-principles.com.

SECTION IV
WHO IS FUNDING THE PROJECT OR OWNS THE COMPANY?
USING FINANCIAL INSTITUTIONS' MECHANISMS
AND ENGAGING WITH SHAREHOLDERS

PART IV

Engaging with Shareholders of the Company

More and more, companies' shareholders are being proactive in questioning the management of companies regarding alleged human rights and environmental abuses. Indeed, shareholders of companies can exert a lot of influence due to their capacity to question the company's board and their influence on management through the threat to disinvest.

If a company's shares are traded on a stock exchange, the company must abide by the laws and regulations of the country of jurisdiction applicable to the said stock exchange. Most countries around the world have implemented common laws to protect shareholders' interests which range from financial reporting to disclosure of information. Each shareholder is a joint owner of the company in which he/she owns shares. Shareholders may be individuals, shareholder associations, institutional shareholders, NGOs, managers of socially responsible investment funds, etc. Over the past few years, many shareholders have shown growing concern for the social and environmental practices of the companies in which they invest. Religious groups which are important investors have played a pioneering role in the development of socially responsible investment or investing (SRI). For instance, the group Interfaith Center on Corporate Responsibility which is based in New York and represents more than 275 institutional shareholders (syndicates, religious groups, etc.) has been particularly influential in the United States.

Socially Responsible Investment (SRI) takes into account ethical, social and environmental criteria in financial management. Over the last couple of years, the interest in SRI has increased considerably especially in the United States, Canada and Europe. Institutional investors, particularly pension funds, were among the first to exert pressure to take ethical criteria into consideration when investing. Financial scandals, the changes in legislation concerning the disclosure of information as well as the concern shown by investors explain the growth of socially responsible investment funds²³⁹.

²³⁹ Umlas, Investing in the workforce: social investors and international labour standards, ILO, Geneva, 2009.

SRI can take different forms:

- the adoption of principles and codes of conduct which favour responsible investing;
- SRI or sustainable development funds;
- funds with a negative screening element;
- Shareholder advocacy or activism;
- Thematic funds.

1. Adoption of principles and codes of conduct that support responsible investment

United Nations Principles for Responsible Investment (PRI)

Following the establishment of the Global Compact in 2000 that aimed at encouraging the private sector to commit for environmental, social and human rights issues with taking seriously their social responsibility, the UN upon the initiative of its Secretary General, invited a group of the world's largest institutional investors to join a multistakeholder process and develop the Principles for Responsible Investment (PRI). The PRI are aimed at pension, insurance and institutional investors. They are based on six main principles which require investors to consider environment, social and corporate governance issues (ESG) in their management of investment portfolios²⁴⁰:

- Incorporating of ESG issues into investment analysis and decision-making processes;
- Becoming active owners and incorporate ESG issues into the ownership policies and practices;
- Seeking disclosure on ESG issues in corporations in which investments have been made.
- Promoting acceptance and implementation of the Principles within the investment industry
- Promoting collective work to enhance effectiveness in the implementation of the Principles
- Reporting activities and progress towards implementing the Principles.

There are 3 categories of signatories: asset owners, investment managers and professional service partners. As of February 2016, there are 1488 signatories²⁴¹ and they all pledged to respect the aforementioned principles. Signing the PRI/Global Compact remains a voluntary commitment to the principles and does not put the signatories under any legal obligation. The only obligation signatories have is to answer the annual questionnaire concerning the measures taken to implement the six principles. In August 2009, the Secretariat dismissed 5 signatories (DESBAN, Christopher Reynolds Foundation, Foresters Community Finance, Oasis Group

²⁴⁰ PRI, The six Principles, www.unpri.org.

²⁴¹ PRI, Signatories to the Principles for Responsible Investment, www.unpri.org.

Holdings and Trinity Holdings), as they did not fulfil this one and only condition. Such principles for responsible investment are all the more relevant that there has been a growing tendency from pension funds to divest from high risks situations. For example, investors have announced withdrawal from Israeli banks and companies operating in Israeli settlements in the Occupied Palestinian Territory (OPT). In January 2014, The Dutch pension fund PPGM that divested from five Israeli banks operating in Israeli settlements²⁴². Although it stated its intentions to remain invested in three Israeli banks related to settlements in the OPT, APB, another Dutch pension fund also decided in July 2014 to divest from two Israeli arms companies (Aryt Industries Ltd and Ashot Ashkelon Industries, respectively manufacturing detonators and operating in the aerospace and defence sector)²⁴³. In Luxembourg, the pension fund FDC decided to excluded investments in the five major Israeli banks, as well as in several top Israeli companies for their involvement in settlements in the OPT. In July 2014, 17 EU Governments (Austria, Britain, Belgium, Croatia, Denmark, Finland, France, Germany, Ireland, Italy, Greece, Luxemburg, Malta, Portugal, Slovakia, Slovenia and Spain) made statements warning companies against doing business with or investing in Israeli companies involved in the settlements in the OPT²⁴⁴.

Private Equity Council's Guidelines

On 10 February 2009, a year after having signed the PRI, the Private Equity Council, an advocacy, communications, research organisation and resource centre for the private equity industry, adopted a code of conduct based on the PRI. The Private Equity Council requires that all members apply this code of conduct when taking over other firms/companies. The code of conduct expects investors to be more aware of environmental, public health issues, workers' rights and social issues throughout the evaluation of companies in which the private equity funds invest. The private equity funds finance the purchase of companies which sometimes results in the private equity fund becoming heavily indebted. NGOs and public institutions among which the European Commission, have heavily criticised these funds, as they are accused of having allowed the development of debt bubbles in the financial markets. It is considered today that private equity funds and hedge funds, as well as some other types of funds and financial instruments, need to be more closely regulated.

242 REUTERS, UPDATE 1, Major Dutch pension firm divests from Israeli banks over settlements, www.reuters.com.

243 Middle East Monitor, Dutch pension fund APB divest from two Israeli arms companies, www.middleeast-monitor.com.

244 Middle East Monitor, 17 EU countries warn against doing business with Israeli settlements, www.middleeastmonitor.com.

2. SRI funds or sustainable development

These funds are made up of shares and bonds of companies or states which have been chosen due to their track records concerning environmental, social and corporate governance (ESG) criteria. Non-financial rating agencies have specialised in classifying companies according to their environmental, social and corporate governance policies. Each agency has developed its own methodology and research criteria as no standards concerning sustainable development have so far been established globally. The main agencies are Vigeo (France) and which has now merged with EIRIS (UK), Innovest (US and Canada), Ethiscan (Canada), and SiRi Company (international network based in Switzerland)²⁴⁵.

3. Funds with a negative screening element

These funds apply a negative screening and exclude companies which provide services and products in business sectors such as weapons, gaming and the tobacco industry and companies that do business with corrupt regimes.

An insight into...

The Norwegian Government Pension fund Global (formerly Petroleum Fund)

As Norway is the sixth biggest oil producer and the third biggest oil exporter in the world, the Norwegian Government Pension Fund (founded in 1990) is financed by the revenues from the country's oil and gas exploitation. At the end of June 2015, aggregate market value of the Government Pension Fund was 7,093 billion Norwegian kroner.²⁴⁶ The fund belongs to the government and is managed by Norway's Central Bank, Norges Bank. The Norwegian government developed ethical guidelines which the fund management has to abide by concerning the observation and exclusion of companies from the portfolio of the Government Pension Fund.

The fund has exclusion criteria:

- produce weapons that violate fundamental humanitarian principles through their normal use;
- produce tobacco;
- sell weapons or military material to states that are subject to investment restrictions on government bonds.

²⁴⁵ FIDH has for its part develop its own methodology which it applies to its ethical investment fund "Libertés & Solidarité", www.fidh.org.

²⁴⁶ Government Pension Fund, Market Value, www.regjeringen.no.

The fund may also exclude companies if there is an “unacceptable risk that the company contributes to or is responsible for:

- serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour and the worst forms of child labour
- serious violations of the rights of individuals in situations of war or conflict
- severe environmental damage
- gross corruption
- other particularly serious violations of fundamental ethical norms.²⁴⁷

This ethical management, active since 2004, gave rise to various decisions to disinvest. It is useful to look at the annual reports produced by the Council on Ethics for the Fund.

To ensure the application of the ethical guidelines, a committee comprised of five persons, the Council on Ethics for the Government Pension Fund – Global was established. The Council’s task is to study the companies and industries to exclude and to report back to the Finance Ministry once a year.

Currently the fund holds shares in approximately 9000 companies in 82 countries, and divested from 49 companies in 2014 due to environmental, social and government issues²⁴⁸.

HOW TO GET IN TOUCH WITH THE FUND?

- Any individual can share information with the fund or submit questions via the following email address: postmottak@fin.dep.no
- Or by writing to the following postal address:

Etikkrådet for Statens pensjonsfond - Utland
Postboks 8008 Dep
0030 Oslo

➔ The Norwegian Government Pension fund in action

Exclusion of various companies producing arms:

Due to the exclusion criteria, almost 20 companies throughout the world have been excluded from the fund. Amongst those are: EADS, Lockheed Martin Corp (USA), Safran SA (France), BAE Systems Plc (United Kingdom) and Hanwha Corporate (South Korea).

²⁴⁷ Guidelines for Observation and Exclusion from the Government Pension Fund Global, adopted 18 December 2014, www.regjeringen.no.

²⁴⁸ Council of Ethics for the Government Pension Fund Global, Annual Report 2014, www.nbim.no/en/the-fund.

The Exclusion of Wal-Mart

In 2006, Wal-Mart, the global retail leader (US), was excluded from the fund following recommendations by the Council on Ethics. The decision was based on allegations of serious and systematic workers' and human rights violations (child labour, unpaid overtime, gender discrimination concerning salaries and various violations of freedom of association). This exclusion led to the sale of the funds tied up in Wal-Mart and amounted to a total value of 415 million dollars.

Before excluding Wal-Mart, the Council on Ethics had sent Wal-Mart a letter asking the company to explain the various violations mentioned earlier, but Wal-Mart never replied. Hence the fund judged that obtaining a promise of commitment from Wal-Mart would not contribute to reducing the risk for the fund of violating its ethical guidelines.

Mining companies excluded due to their environmental degradation

In January 2009, the company Barrick Gold (Canada) was excluded due to the pollution generated by its mining activities in Papua New Guinea²⁴⁹. In October 2014, the Peruvian and Chinese companies Volcan Compañía Minera and Zijin Mining Group were also excluded because of severe environmental risks related to their activities had been assessed²⁵⁰.

4. Thematic funds

Thematic funds refer to funds that are tied up in companies whose activities contribute to sustainable development. These funds are mainly involved in sectors such as renewable energy, water and waste management or the health sector. It is worth noting, however, that these funds do not systematically conform to the ESG (environment, social and corporate governance) principles which are generally taken into account by other responsible investment funds. Novethic, a French resource centre on corporate social responsibility (CSR) and socially responsible investment (SRI), identified 7 thematic funds which also include all the ESG criteria: Parworld Environmental Opportunities (BNP PAM), FLF Equity Environmental Sustainability World (Fortis IM), CA Aqua Global (I.DE.A.M) Sarasin Oekosar Equity Global (Sarasin), Living Planet Fund (Sarasin), Sarasin new Power fund (Sarasin) and UBS Equity Fund-Global Innovators (UBS GAM)²⁵¹.

5. Shareholder activism or advocacy

Shareholders can participate and be active in different ways: some shareholders attempt to influence the management team whilst others attempt to influence the policies of the company with writing to the directors of the company and by their participation at the Annual General Meeting (AGM). At the AGM, individual shareholders can make formal proposals to all of the shareholders which could,

²⁴⁹ Ministry of Finance, Companies excluded from the Investment Universe, www.regjeringen.no.

²⁵⁰ Government. no, Decisions about active ownership and divestment, www.regjeringen.no.

²⁵¹ Novethic, Le Media Expert du Développement Durable, www.novethic.fr.

as a result of a vote, require the company directors to implement socially just and environmentally responsible policies. Shareholders can also oppose or make amendments to resolutions put forward by the board of directors. Regrettably the responsible shareholders' holdings in the company, and therefore number of votes, generally only represent a very small proportion of the total number of shares in large companies.

NGOs can also exercise influence on a company by either becoming shareholders themselves or by putting pressure on shareholders who have a large stake in the company. Votes on the various issues can often be submitted online through the Internet. Active shareholders, who wish to influence the proposals submitted at the AGM, need to be fully informed on the company's policies and developments prior to the AGM.

The various ways in which a shareholder can exercise influence on a company will often depend on the country where the company has its headquarters.

In Canada, the shareholders of a company can ask questions during the time devoted to questions during the AGM. Shareholders can also submit written proposals according to the established procedure under Canadian law (article 137 and following of the 1985 Canada Business Act). To be eligible to submit a proposal, a person²⁵²:

A contradictory amendment to a resolution proposed by the Board of Directors can be proposed. This is more difficult as this depends on the agenda of the AGM:

The adoption of one

- must be, for at least the prescribed period, the registered holder or the beneficial owner of at least the prescribed number of outstanding shares of the corporation; or
- must have the support of persons who, in the aggregate, and including or not including the person that submits the proposal, have been, for at least the prescribed period, the registered holders, or the beneficial owners of, at least the prescribed number of outstanding shares of the corporation.

If the information to be provided²⁵³ and the proof required have been given²⁵⁴, the company must include the proposal either as an appendix or a separate document in the notice of the meeting according to article 150²⁵⁵.

252 Canada Business Corporations Act, (R.S.C., 1985, c. C-44), art 137, <http://laws-lois.justice.gc.ca/PDF/C-44.pdf>,

253 *Ibid.*, §1.2.

254 *Ibid.*, §1.4.

255 *Ibid.*, §2.

In the United states, shareholders participation in the activities of a company has been a part of the national business culture for longer than in most other countries; the rules governing shareholders' rights in the US tend to be more flexible than in other countries. Shareholders can submit resolutions' proposals more easily in the US. For more information, go to the website of the "Securities and Exchange Commission"²⁵⁶.

➔ Shareholder activism in action

In December 2015, 20 institutional investors managing over £352 billion in assets under management joined forces to call on some of the world's largest companies to commit to using 100% renewable power.

The investors called on companies to demonstrate their commitment to clean energy by signing up to join RE100.²⁵⁷ RE100 is a collaborative business initiative that supports companies that make a public pledge to switch to 100% renewable electricity for their international operations by an agreed date.

The RE100 initiative is being coordinated by ShareAction, a UK-based Responsible Investment charity. The initiative's founding members include Aviva Investors, Strathclyde Pension Fund, Environment Agency Pension Fund, French pension fund ERAFP, Norwegian fund KLP and Menhaden Capital. Companies from all over the world and from a wide range of industrial sectors – from telecommunications and IT to retail and food have joined the initiative, including Google, Pearson and BMW Group at the end of 2015.

The new investor engagement programme, supported by ShareAction, sees investors engaging with companies through letters, meetings and AGMs, to encourage them to switch to 100% renewable energy. ShareAction has also developed an online platform through which savers can email the person managing their savings at their pension fund, asking them what they are doing to support renewable energy.²⁵⁸

➔ The British oil company BP sees its annual report rejected by a coalition of "socially responsible" investors²⁵⁹

An international coalition of 10 minority shareholders refused to approve the annual report of BP during one of their general meeting held on 14 April 2011. These investors consider that the reaction of the company to the explosion of the oil platform Deepwater Horizon, which it was operating, is insufficient. They also oppose the re-election of certain directors of the

²⁵⁶ US Security and Exchange Commission, Shareholder Proposals, www.sec.gov.

²⁵⁷ See <http://there100.org/>

²⁵⁸ For more information see <http://shareaction.org>

²⁵⁹ Ethos, "Ethos opposes BP's Annual Report and Accounts", 7 April 2011, www.ethosfund.ch.

committee who deal with corporate security questions. According to the investors of the coalition, this committee does not communicate seriously on the strategy of the company, especially on the oil exploration in sensitive zones, which requires strict control measures that must be presented to the shareholders.

Concerning the annual report, the “responsible investors” coalition considers that it does not allow to estimate to what extent the risk management was evaluated, enhanced and controlled following the catastrophic oil spill in the Gulf of Mexico. Finally, the report does not address in detail the “transition to a low carbon economy”, while, according to the oil company, this is an aim at the heart of its strategy. Thus, they regarded the report as “incomplete”.

* * *

Shareholder participation can prove to be a useful and influential tool. Although it is not an easy task, companies can be forced to react and modify their policies with respect to human rights as a result of the financial pressure that shareholders can exercise. The results of this kind of activism is often more efficient if it is combined with advocacy actions.

Following closely the work of institutional investors and advocating for greater inclusion of ESG (environmental, social and governance) criteria in their investment strategy, can also represent a powerful point of leverage. NGOs are increasingly using this strategy to call on companies to take measure to address human rights and climate change issues.

ADDITIONAL RESOURCES

- ShareAction, The Movement for Responsible Investment
www.shareaction.org
 - See in particular: Capital Markets Campaigning: A short guide for NGOs, Unions and Civil Society
www.shareaction.org/capitalmarkets
 - Human Rights and Grievance Mechanisms
<http://grievancemechanisms.org/>
 - Interfaith Centre on Corporate Responsibility
www.iccr.org
 - Social Investment Organisation (Canada)
www.socialinvestment.ca
 - US SIF (USA)
www.socialinvest.or
 - Eurosif (Europe)
www.eurosif.org
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SECTION V

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VOLUNTARY COMMITMENTS : USING CSR INITIATIVES AS A TOOL FOR ENHANCED ACCOUNTABILITY



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SECTION V

VOLUNTARY COMMITMENTS: USING CSR INITIATIVES AS A TOOL FOR ENHANCED ACCOUNTABILITY

* * *

For over a decade, a number of voluntary initiatives on Corporate Social Responsibility (CSR) have been established in response to stakeholders' growing concerns on the role of multinational companies in human rights and environmental abuses, in particular in developing countries. Most of these initiatives are based on a set of principles, including human rights and/or labour rights, that participating companies voluntarily commit to respect in their operations and within their sphere of influence. Most initiatives propose tools to companies to integrate human rights concerns in their daily activities. The structure of these initiatives vary: some are anchored in international organisations (the Global Compact was initiated by the UN); others were launched by governments (EITI, the Kimberley Process); some bring together a number of stakeholders (so-called “multi-stakeholder initiatives” gathering businesses, governments, NGOs, trade unions); some are business-led, while others are sector-oriented.

In parallel to joining these initiatives, most of the world's largest companies have adopted their own CSR policies, code of ethics, ethical charter, or code of conduct. Some of these policies are based on the company's own values, while others explicitly refer to internationally recognised human rights standards. The Business and Human Rights Resource Centre has listed over 300 companies whose policy statements explicitly refer to human rights.¹

Another trend is the conclusion of International Framework Agreements (IFA) within multinational companies, which are negotiated between the company and a Global Union Federation (GUF). Through these IFAs, the parties commit to respect labour rights standards in all of the company's operations throughout the world. These types of agreements usually include a monitoring mechanism.

Furthermore, some countries are developing legislation imposing companies financial and non-financial reporting obligations. Following the adoption of Regulation

¹ Business and Human Rights Resource Centre, Company policy statements on human rights, <http://business-humanrights.org>

2014/95/EU, countries such as the UK² and France³, have adopted laws introducing general and specific reporting obligations. Likewise, the US has for instance modified its legislation potentially allowing civil society to petition customs authorities to halt the import of slave-made products⁴. In France, a bill aiming at imposing a duty of care on large companies is currently being discussed.⁵

In 2015, the Swiss Coalition for Corporate Justice launched a Swiss Popular Initiative aiming at introducing a new article 101a “Responsibility of business” in the Swiss Constitution, in order to impose companies the obligation to respect international human rights. The initiative will be submitted to popular vote.

To respond to criticisms of CSR initiatives that are deemed too “soft” because they lack power to sanction companies that do not respect the principles they have committed to follow, some initiatives have recently established procedures to review companies’ policies and, ultimately, to remove those not in compliance from the list. Such exclusion can be considered to be extremely weak compared to the harm that the company may have caused. However, NGOs and communities can make use of these procedures to shed light on abuses and “name and shame” companies that use CSR initiatives for so-called “green-washing”. It is difficult to assess the usefulness of some of these complaint mechanisms because some initiatives disclose information regarding complaints that were filed against companies, including their outcomes, while others remain silent. Where available and relevant, this section provides an insight into concrete cases handled through grievance procedures. It can be helpful to conduct certain actions in parallel to filing a case before such a grievance mechanism, including public campaigning to raise awareness on the complaint in order to pressure the company and the CSR initiative in question to solve the matter.

A company’s public commitment to respect human rights and environmental standards, even if considered to be “voluntary”, may be used against it in legal procedures such as those involving competition or consumer protection laws.

The current chapter briefly reviews a number of existing initiatives that include some kind of procedure for complaints; describes international framework agreements; and, finally, suggests ways in which to use voluntary commitments in legal procedures.

2 Modern Slavery Act, 2015. Since its adoption, only 22 of the 75 statements met the formal conditions and only 9 included all the elements of information required by the law. See: <http://corporate-responsibility.org>

3 Loi No. 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement (Loi Grenelle II) complemented by its application decree 2012-557. The congress is now deliberating on a modification of this law in order to comply with all the elements of the European directive.

4 Trade Facilitation and Trade Enforcement Act (H. R. 644), Sec. 910.

5 ECCJ, "Duty of Care of Transnational Corporations: waiting is no longer an acceptable way forward", 3 March 2016, available at: www.corporatejustice.org

PART I

Overview of CSR initiatives

CHAPTER I

The UN Global Compact

* * *

What is the Global Compact?

Officially launched on 6 July 2000 by the United Nations, the Global Compact (UNGC or GC) is a voluntary initiative which supports companies to “do business responsibly by aligning their strategies and operations everywhere with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption” and to “take strategic actions to advance broader societal goals, such as the UN Sustainable Development Goals (...)”.⁶

With over 12,000 participants in 162 countries around the world, including over 8,000 companies, the Global Compact has become the largest corporate responsibility initiative.

THE TEN PRINCIPLES OF THE UN GLOBAL COMPACT⁷

Human Rights

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: ensure non-complicity in human rights abuses.

Labour Standards

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: eliminate all forms of forced and compulsory labour;

Principle 5: effective abolition of child labour; and

Principle 6: eliminate discrimination with regard to employment and occupation.

⁶ UNGC, *Our Mission*, www.unglobalcompact.org

⁷ UNGC, *The Ten Principles of the UN Global Compact*, www.unglobalcompact.org

Environment

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: undertake initiatives to promote greater environmental responsibility; and

Principle 9: encourage the development and diffusion of environmentally friendly technologies.

Anti-Corruption

Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

② Who participates in the Global compact?⁸

- **Companies from any industry sector**, except those companies involved in the manufacture, sale, and distribution of anti-personnel land mines or cluster bombs, companies that are the subject of a UN sanction, or that have been blacklisted by UN Procurement for ethical reasons. Private military companies and tobacco companies, often excluded by other initiatives or ethical funds, are allowed to become participants. To participate, a company simply sends a letter signed by its CEO to the UN Secretary General in which it expresses its commitment to (i) the Global Compact and its ten principles; (ii) engagement in partnerships to advance broad UN goals; and (iii) the annual submission of a Communication on Progress (COP).
- Companies joining the Global Compact commit to implement the ten principles within their “sphere of influence”. They are expected to make continuous and comprehensive efforts to advance the principles wherever they operate, and integrate the principles into their business strategy, day-to-day operations, and organisational culture.
- Other **stakeholders** can also participate in the Global Compact, including civil society organisations, labour organisations, business associations, cities, and academic institutions.

Although these will not be discussed in detail in this guide, the Global Compact counts on different multi-stakeholder working groups (comprised of NGOs, companies, and other representatives) established to provide advice, and to promote implementation of the principles. These groups draw from the work of the UN Special Representative on the issue of business and human rights, and aim to develop practical tools for businesses.

⁸ The list of participants can be accessed at UNGC, *Our Participants*, <https://www.unglobalcompact.org/what-is-gc/participants>

How to use the Global Compact to denounce human rights violations by companies?

Since its creation, the Global Compact has been criticised by many civil society organisations for offering companies an easy way of “green-washing” or “blue-washing”. Participants are listed on the UN website, can request permission to use a version of the Global Compact logo, and can present their company as acting in accordance with the 10 principles without having to prove that they do so.⁹ In 2004, as a result of numerous criticisms against the Global Compact for allowing companies which blatantly violate the principles to participate in the initiative, the Global Compact adopted “integrity measures” in order to restore its credibility.¹⁰ In December 2008, the UN Secretary General, Ban Ki-Moon encouraged the Global Compact “to further refine the good measures that have been taken to strengthen the quality and accountability of the corporate commitment to the Compact. As we move forward, it will be critical that the integrity of the initiative and the credibility of this organisation remain beyond reproach”.

For its part, the Global Compact emphasises that the initiative focuses on learning, dialogue and partnerships as a complementary voluntary approach to help address knowledge gaps and management system failures.¹¹

Participation may now be questioned in cases of misuse of the UN or the Global Compact logo. Moreover, two procedures by which companies may ultimately be de-listed from the initiative have been introduced, although the Global Compact insists it is not a “compliance based initiative”.

② Serious allegations of human rights violations¹²

Serious allegations of human rights violations in which a business participant is involved **may be brought to the attention of the Global Compact Office** to “call into question whether the company concerned is truly committed to learning and improving”. The Office gives some examples of such violations: murder, torture, deprivation of liberty, forced labour, the worst forms of child labour and other child exploitation, serious violations of individuals’ rights in situations of war or conflict, severe environmental damage, and gross corruption or other particularly serious violations of fundamental ethical norms.

9 For more information on the limits of the Global Compact, visit: <http://globalcompactcritics.blogspot.com>

10 UNGC, *Integrity Measures Policy*, www.unglobalcompact.org

11 See UNGC, *The Importance of Voluntarism*, www.unglobalcompact.org

12 UNGC, *Note on Integrity Measures*, www.unglobalcompact.org

The Global Compact Office “will generally decline to entertain matters that are better suited to being handled by another entity, such as a court of law, local administrative agency, or other adjudicatory, governmental, or dispute resolution entity”.¹³

► NOTE

The Global Compact Board insisted on using the term “matter” instead of “complaint” in order not to raise false expectations, highlighting that the process relates to dialogue facilitation rather than complaint resolution.

HOW TO SUBMIT AN ALLEGATION?

- Anyone may send the matter in writing to the Global Compact Office.
Contact: info@unglobalcompact.org
- The matter can also be sent directly to the Chair of the Global Compact Board, who is the UN Secretary General. This may contribute to drawing media attention to the complaint.

🕒 Process and Outcome¹⁴

Process

Upon receipt of a matter, the Global Compact Office will:

- Filter out prima facie frivolous allegations. If a matter is found to be prima facie frivolous, the party raising the matter will be so informed and no further action will be taken by the Global Compact Office.
- If an allegation of systematic or egregious abuse is found not to be prima facie frivolous, the Global Compact Office will forward the matter to the company concerned, requesting:
 - written comments, which should be submitted directly to the party raising the matter, with a copy to the Global Compact Office;
 - that the Global Compact Office be kept informed of any actions taken by the participating company to address the situation which is the subject matter of the allegation. The Global Compact Office will inform the party raising the matter of the above-described actions taken by the participating company.
- The Global Compact Office will be available to provide guidance and assistance, as necessary and appropriate, to the company concerned, in taking actions to remedy the situation.

¹³ UNGC, Integrity Measures, *Frequently Asked Questions*, www.unglobalcompact.org

¹⁴ UNGC, *Integrity Measures Policy*, *op. cited*

- The Global Compact Office may, at its sole discretion, take one or more of the following steps, as appropriate:
 - Use its own good offices to encourage resolution of the matter, ask the relevant country/regional Global Compact network, or another Global Compact participant organisation, to assist with the resolution of the matter.
 - Refer the matter to one or more of the UN entities that are the guardians of the Global Compact principles for advice, assistance, or action.
 - Share information with the parties about the specific instance procedures of the OECD Guidelines for Multinational Enterprises and, in the case of matters relating to the labour principles, the interpretation procedure under the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.
 - Refer the matter to the Global Compact Board, drawing in particular on the expertise and recommendations of its business members.

Outcomes

- If the concerned participating company refuses to engage in dialogue on the matter within the first two months of being contacted by the Global Compact Office, **it may be regarded as “non-communicating”**, and would be identified as such on the Global Compact website a dialogue commences.
- If the continued listing of the participating company on the Global Compact website is considered to be detrimental to the reputation and integrity of the Global Compact, the Global Compact Office reserves the right **to remove that company from the list of participants**, and to so indicate on its website. To this date, this situation has never occurred.
- A participating company that is designated as “non-communicating” or is removed from the list of participants will not be allowed to use the Global Compact name or logo if such permission had previously been granted.
- If the concerned participating company has subsequently taken appropriate actions to remedy the situation, it may seek reinstatement as an “active” participant in the Global Compact, and in the list of participants on the Global Compact’s website.

The procedure in action

➔ Activists demand the removal of PetroChina from the list of Global Compact participants - Global Compact says the complaint is not suitable for further action.

In December 2008, Investors Against Genocide (IAG) and the Centre for Research on Multinational Corporations (SOMO) submitted a formal “matter” to the Global Compact Office requesting that it formally apply its “Integrity Measures” against PetroChina, and that the company be removed from the list of participants if no satisfactory resolution of the issues raised was found after three months.¹⁵ The groups alleged that PetroChina,

¹⁵ Details of the engagement with the UNGC can be found at www.investorsagainstgenocide.org

through its investments in Sudan, contributed to grave human rights violations in Darfur, amounting to genocide.

On 12 January 2009, the Global Compact Office refused to accept and act on the complaint of “systematic or egregious abuse” of the Global Compact’s overall aims and principles by PetroChina. Georg Kell, Executive Director of the Global Compact Office, stated that the UNGC “decided not to handle this matter as an integrity issue of an individual company, PetroChina”. He noted that “the matters raised could equally apply to a number of companies operating in conflict-prone countries”. In his response to the NGOs, Kell further asserted that the “Global Compact’s approach to business and peace emphasises engagement rather than divestment, and the power of collective action rather than focusing on any one individual company”. He further stated that “handling this matter as an integrity issue of one company would run counter to the Global Compact’s approach of looking for practical solutions on the ground”.

Following the refusal by the Global Compact Office to accept and act upon the allegations against PetroChina, a participant in the Global Compact, the complainants decided to write a letter to all the members of the Global Compact Board, asking them to reconsider the ill-advised initial response. This approach had a positive impact. The group of complainants received a letter from Sir Mark Moody-Stuart, Vice-Chair of the Global Compact Board. In the letter, Mr. Moody-Stuart said that the Board would discuss the matter “fully” at its next meeting, and that it would “review the processes described” in the Global Compact’s Integrity Measures.¹⁶

In July 2009, the Board finally decided to maintain PetroChina as a participant in the Global Compact. The Vice-Chair of the Board stated that CNPC, PetroChina’s parent company, “...has been active in supporting sustainable development in [Sudan] and engaged in the newly formed and embryonic Local Network, although not itself a Global Compact signatory”. The Board also took note that CNPC “had engaged in Global Compact learning and dialogue activities on conflict-sensitive business practices”.

The Global Compact Board explained that “the Board agreed that the operation of a company in a weakly-governed or repressive environment would not be sole grounds for removal from the initiative and that the Global Compact, as a learning platform, cannot require a company to engage in advocacy with a government. Given this, and the fact that the matter did not involve a Global Compact participant, the Board unanimously agreed that the matter had been handled appropriately by the Global Compact Office, and was not suitable for further action”. It was also noted that CNPC “has been willing and prepared to engage in learning and dialogue activities on conflict-sensitive business practices and that positive efforts are being made through the Global Compact Local Network to embed good business practices in Sudan, which is all that could be expected in the situation”.

¹⁶ The letter can be accessed at www.unglobalcompact.org

➔ Call for Nestlé to be expelled from the UN Global Compact¹⁷

In June 2009, a report was submitted to the Global Compact Office alleging that Nestlé's reports were misleading, and that Nestlé used its participation in the initiative to divert criticism so that abuses of human rights and environmental standards could continue. Concerns raised by the International Labour Rights Fund, trade union activists from the Philippines, Accountability International, and Baby Milk Action included:

- aggressive marketing of baby milks and foods, and undermining of breastfeeding, in breach of international standards;
- trade union busting and failing to act on related court decisions;
- failure to act on child labour and slavery in its cocoa supply chain;
- exploitation of farmers, particularly in the dairy and coffee sectors; and
- environmental degradation, particularly of water resources.

The report claims that Nestlé used the Global Compact to cover up its malpractice so that abuses could continue.

The Global Compact Office dealt with this matter under its integrity measures dialogue facilitation process. The matter was forwarded to Nestlé and both Nestlé and those raising the matter exchanged correspondence. According to the Global Compact Office, Nestlé has indicated that it remains willing to engage in further dialogue about the matters raised and therefore it has not been designated as “non-communicative”. In the meantime, activists denounced that Nestlé remained one of the main sponsors of the Global Compact Summit held in June 2010.

Companies under review are unfortunately not listed on the Global Compact website. Although the process is outlined in the Integrity Measures Policy and FAQ, the extent to which other stakeholders may access and comment on the allegations made against a participating company remains vague. The decision to bar a company belongs to the Global Compact Office, which may seek advice and guidance from a variety of sources including Global Compact local networks and relevant UN agencies. Nevertheless, de-listing companies from the initiative is perceived as a last resort, and the criteria that are applied by the Global Compact – apart from a failure to communicate on part of the company – to finally de-list a company remain unclear.

¹⁷ *International campaign calls for Nestlé to be expelled from UN initiative*, Press release 17 June 2009 www.nestlecritics.org. For more info, see Nestlé Critics, Presse release, www.nestlecritics.org/index.php?option=com_content&task=view&id=61&Itemid=79

Annual Communication on Progress (COP)¹⁸

A Communication on Progress (COP) is a disclosure on progress made in implementing the ten principles of the Global Compact, and in supporting broad UN development goals.¹⁹

Since 2005, business participants are required to annually submit a COP on the Global Compact's website and to share the COP widely with their stakeholders. Non-business participants are required to produce an annual Communication on Engagement (COE) that describes the ways that they advance the initiative. The absence of a COP will result in a change in a participant's status, which can be considered as "non-communicating" and, after a lapse of a year, in the de-listing of the participant.

In 2010, the Global Compact Board introduced a one-year moratorium on de-listing companies from non-OECD and non-G20 countries, following the recent removal of a high number of companies in these countries.²⁰ According to the Global Compact Office, the purpose of the moratorium was to give the Global Compact Office time to undertake further capacity building efforts so that participants could fully understand what is required by the COP. As a result, 347 companies that had been de-listed between 1 January 2010 and 1 March 2010 were reinstated.

The total number of businesses which were removed for failure to meet the Global Compact's mandatory annual reporting requirement stands at over 5000.²¹ The high number of de-listings over a relatively short period is due to a policy adjustment which led to the elimination of the "inactive" status in the Global Compact database. Companies are de-listed after one year of being identified as "non-communicating". To re-join the Global Compact, companies must send a new commitment signed by their CEO to the UN Secretary-General, and submit a COP to the Global Compact database.

¹⁸ UNGC, *The Communication on Progress (COP) in Brief*, www.unglobalcompact.org

¹⁹ *UN Global Compact Policy on Communicating Progress*, March 2013, www.unglobalcompact.org

²⁰ UNGC, News and Events, *Global Compact Board Addresses Delistings, Calls for Review of COP Procedures*, www.unglobalcompact.org/news/20-03-25-2010

²¹ UN News Centre, Interview with Georg Kell, Executive Director, UN Global Compact, 23 June 2015, available at www.un.org

➔ Investors write to companies not living up to Global Compact commitments

An international coalition of investors, including Aviva Investors, Boston Common, and Nordea Investment Funds, have been encouraging companies to comply with their commitment to submit a COP to the Global Compact. In 2010, the coalition sent letters to 86 major Global Compact participants which had failed to produce an annual COP on the implementation of the ten principles of the Global Compact. In 2008, the engagement resulted in 33 percent of laggard companies subsequently submitting their progress reports. In 2009, positive responses increased to 47.6 percent (50 out of 105 companies).²²

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The mandate of the Global Compact is to provide guidance rather than to act as a watchdog. Part of its mission is to encourage companies to undertake efforts to become more transparent. However, although some progress has been made since 2004 to give teeth to the Global Compact, the requirements to participating companies remain – from a civil society perspective – extremely weak.

Submitting a COP is the only requirement for companies and the content of these reports is neither monitored nor verified by the Global Compact Office administrative staff, or any other external independent body. As a result, companies that are involved in human rights violations may continue to refer to their participation in the Global Compact. Civil society organisations have suggested that it would be preferable for companies to be accepted into the Global Compact only when they are ready to publish their first COP. While the Global Compact does transmit information to its local networks about existing recourse mechanisms, such as the OECD national contact points (NCPs), the procedure for handling complaints for systematic or egregious abuses should be reviewed and strengthened. The articulation between this procedure and other quasi-judicial mechanisms described in this guide (ILO, OECD etc.) could be reflected upon, as could the articulation between the Global Compact (and its local branches) and other envisaged quasi-judicial mechanisms at the UN level for complaints of corporate-related human rights abuses.

²² UNCG, News and Events, *Investors Give New Twist to Good COP/Bad COP*, www.unglobalcompact.org/NewsAndEvents/news_archives/2009_01_12.html

In September 2010, the United Nations Joint Inspection Unit (JIU) published a report on the Global Compact's role, putting forward the need to review its functioning.²³ The report highlights “the lack of a clear and articulated mandate, which has resulted in blurred impact, the absence of adequate entry criteria, and an ineffective monitoring system to measure actual implementation of the principles by participants”. Ten years after its creation, and despite its intense activity and an increasing budget, the report highlights that the results of the Global Compact remain mitigated.

The JIU's main criticisms are:

- the lack of regulatory and institutional framework;
- the lack of effective monitoring of engagement of participants;
- the lack of consolidated, transparent, and clear budgetary and financial reporting;
- the costly and questionably effective governance; and
- the need for an unbiased and independent regular monitoring of the performance of the Global Compact.

More than fifteen years after its creation, the Global Compact continues to be criticised by numerous civil society organisations for its lack of adequate monitoring and accountability mechanisms.

ADDITIONAL INFORMATION

– UNGC

www.unglobalcompact.org

– Global Compact Critics (No longer updated but available as a reference)

<http://globalcompactcritics.blogspot.com>

²³ UN Joint Inspection Unit, *United Nations corporate partnerships: The role and functioning of the Global Compact*, JIU/REP/2010/9, 2010, www.unjiu.org

CHAPTER II

ISO – International Organisation for Standardization

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ISO is the world's largest developer and publisher of voluntary International Standards.²⁴ It is a network of national standards institutes from 162 countries. Some of these institutes are government-based, whereas others have their roots in the private sector.

Standards

ISO has developed tens of thousands of standards on a variety of subjects, including risk management, quality management systems (ISO 9001), environmental management systems (ISO 14 001), and numerous technical issues.

ISO standards are voluntary, however a number of ISO standards – mainly those concerned with health, safety or the environment – have been adopted in some countries as part of their regulatory framework, or are referred to in legislation for which they serve as the technical basis. ISO standards may become a market requirement, as has happened in the case of ISO 9000 quality management systems. All ISO standards are reviewed every five years to establish if a revision is required. Organisations (including corporations) abiding by a standard will seek certification for their organisation or for a product by the various national and international certification or registration bodies operating around the world.

ISO 26 000: an attempt to standardise social responsibility

In 2005, ISO launched the development of an International Standard providing guidelines for social responsibility, ISO 26 000.²⁵ It has been developed through various consultations led by a multi-stakeholder working group including industry, government, labour, consumer, NGO and SSRO (support, service, research and other related entities) representatives. It was adopted in November 2010. **In contrast with most ISO standards, ISO 26 000 does not aim at certification.**

The objective of ISO 26000 is to “assist organisations in contributing to sustainable development. It is intended to encourage them to go beyond legal compliance, recognizing that compliance with law is a fundamental duty of any organisation and an essential part of their social responsibility. It is intended to promote common

²⁴ International Organisation for Standardization, ISO, www.iso.org

²⁵ For a preview of ISO 26000:2010 see www.iso.org

understanding in the field of social responsibility, and to complement other instruments and initiatives for social responsibility, not to replace them”.²⁶

ISO 26 000 deals with a wide range of issues, and has identified seven “core subjects”: organisational governance; human rights; labour practices; the environment; fair operating practices; consumer issues; and, community involvement and development.

The human rights components of ISO 26 000

With regard to human rights, ISO 26 000 recognises that non-state organisations can affect individuals’ human rights, and hence **have a responsibility to respect human rights**, including in their **sphere of influence**. To respect human rights, organisations have a responsibility to exercise **due diligence** to identify, prevent and address actual or potential human rights impacts resulting from their activities or the activities of those with which they have relationships. Due diligence processes may also contribute to alert an organisation to a responsibility it has in influencing the behaviour of others, in particular when the organisation may be implicated in causing human rights violations.

- ISO 26 000 points out **human rights risk situations** (weak governance zone, etc.) where additional steps may be taken by organisations.
- Organisations should **avoid complicity** in human rights violations, be it direct, beneficial, or silent complicity.
- An organisation should establish **remedy mechanisms**.
- An organisation should pay attention to vulnerable groups and avoid any kind of **discrimination**.
- An organisation should respect **fundamental principles and rights at work**, as defined by the ILO, and engage in fair labour practices.

Content-wise, ISO 26 000 draws from existing initiatives, such as the Framework presented by the UN Special Representative on the issue of business and human rights. On the other hand, it goes further by including concepts and addressing issues such as the sphere of influence to determine companies’ complicity, the entire cycle life of products, sustainable purchasing and procurement practices, sustainable consumerism, responsible marketing, consumers’ right to privacy and access to information, respect for communities’ values and customs. A whole section is devoted to community involvement and development. The text nevertheless remains criticised for attempting to include various concepts – both judicial and non judicial – into the same document, thereby creating possible confusion.

²⁶ ISO 26000: 2010, Scope, *op. cited*

Complaints²⁷

ISO is a standard developing organisation and, as such, is not involved with the implementation of standards in the various countries. Complaints can only be made regarding standards that are subject to certification hence **no complaints are possible under ISO 26 000**.

Complaints can be submitted to ISO regarding the misuse of the ISO logo or false certification to ISO standards. Complaints can remain confidential if requested, and a response will be sent within 14 days. ISO does not “guarantee a resolution and cannot assume any liability, but it can help to facilitate dialogue between the parties involved and work towards a positive outcome”.

A complaint can be directly submitted to ISO only if the following steps have been fulfilled:

- 1) You must have filed a complaint with the company in question first.
- 2) If the outcome of this complaint is unsatisfactory, you must make an official complaint to the certification body which accepted the company in question.
- 3) If this is unsuccessful, you must complain to the national accreditation body in charge.

HOW TO MAKE A COMPLAINT?

The following information must be provided:

- Your contact details;
- Information about the parties that are the subject of the complaint (including contact details, if possible);
- Details about your complaint, including a chronology of events (including dates, parties, etc.); and
- Information about the steps that you have taken to address your complaint (see the steps to be taken before sending a complaint to iso above).

If the complaint is regarding a certification, information about the certificate in question (including the name and contact details of the certifier, the certificate number and the date of certification).

The complaint must be sent to Msscomplaints@iso.org

* * *

²⁷ ISO, Standards, Certification, Complaints, www.iso.org

To a certain extent, ISO 26 000 – and the lengthy process of its elaboration- reflects a wide range of issues which are being debated around the responsibility of businesses with regard to human rights and contributes to further acknowledgement that corporations cannot ignore human rights. To date, ISO 26 000 only provides guidance to organisations, and both its content and **potential usage remain too vague and uncertain** to assess its usefulness. No verification or complaint mechanisms are available.²⁸

Although it **is not meant to become a certification standard** nor to be used as a standard-setting document, nothing in the text prevents countries from adopting national standards based on ISO 26000 that could become certifiable. This has been done in Denmark, Austria has undertaken the process, and other countries such as Mexico are preparing for it. In the absence of a national norm incorporating ISO 26 000, nothing will prevent consulting firms (which actively participated in the drafting process) from proposing their services to businesses to evaluate, audit and establish ranking systems using the ISO 26 000 standards.

After a lengthy approval process, the text was adopted and published as an International Standard in late 2010. Its future use remains uncertain and will certainly be hampered by the text's unwieldiness and complexity. Developments in the next few years will most probably vary greatly from one country to another and should nevertheless be closely followed by civil society organisations in order to eventually require companies and governments to undertake steps which respect the spirit and content of ISO 26 000.

ADDITIONAL RESOURCES

- Information on ISO 26 000
www.iso.org
 - IISD (research organisation), webpage on ISO 26 000
www.iisd.org/standards/csr.asp
 - SOMO, Online comparison tool of the OECD Guidelines, ISO 26000 & the UN Global Compact, December 2013
www.somo.nl/dossiers-en/csr/corporate-responsibility-instruments
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²⁸ For a reflection on ISO 26000 two years on, see Ethical Corporation, *ISO 26000: Sustainability as standard?*, Jon Entine, 11 July 2012 www.ethicalcorp.com

CHAPTER III

Extractive industry initiatives

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Companies operating in the extractive sector (oil, mining, gas) have a considerable record of alleged violations of human rights, in particular the rights of local communities, including indigenous peoples. As a result, a number of companies have adopted their own CSR policies and/or joined CSR initiatives, such as the Extractive Industry Transparency Initiative (EITI) and the Kimberly Process.²⁹ Some companies in the extractive sector have established company-based grievance mechanisms that affected communities or company employees may turn to.³⁰ NGOs, communities, and individuals willing to explore such mechanisms should turn to the concerned company to obtain information on the procedures and possible outcomes and assess whether it is worth making use of these mechanisms. Although company-based mechanisms, if designed to ensure meaningful participation from stakeholders in particular communities, may represent interesting mechanisms to monitor and assess the respect for human rights, they are, by their very nature, inherently flawed due to their lack of independence.³¹ While these initiatives can potentially contribute to preventing human rights abuses, they cannot provide reparation for victims seeking remedies.

This guide addresses three collective initiatives in the extractive sector which may be of interest:

- The Voluntary Principles on Security and Human Rights
- The International Council on Mining and Metals
- The Executive Industry Transparency Initiative (EITI)

²⁹ The Kimberly Process is a joint government initiative with participation of industry and civil society to stop the flow of conflict diamonds. The trade in these illicit stones has fuelled decades of devastating conflicts in countries such as Angola, the Democratic Republic of Congo, and Sierra Leone. The Kimberly Process Certification Scheme (KPCS) imposes requirements on its members to enable them to certify shipments of rough diamonds as 'conflict-free'. This initiative is designed to ensure UN bans on diamond procurement from specific areas are respected. See www.kimberleyprocess.com

³⁰ This is the case of companies such as Anglo-American, BHP Billiton, and Newmont. For more information on the design of such mechanisms see: Oxfam Australia, *Community – company grievance resolution: A guide for the Australian mining industry*, 2010, <http://womin.org.za> and ICMM, *Human Rights in the Mining & Metals Sector, Handling and Resolving Local Level Concerns & Grievances*, 2009, www.icmm.com

³¹ Earth Rights International, with the cooperation of SOMO, is working on a model of community-driven operational grievance mechanism. For more information, see www.earthrights.org and www.earthrights.org

The Voluntary Principles on Security and Human Rights

In 2000, governments (initially the UK and US), NGOs, and companies established the Voluntary Principles on Security and Human Rights (“the Voluntary Principles” or VPs).³² The objective is to provide guidance for businesses in the extractive industry (mainly oil, gas and mining) on maintaining security and respect for human rights throughout their operations. The principles were born as a direct response to abuses perpetrated by private guard companies and security services in countries such as Colombia, Peru, Nigeria, Indonesia, Ghana and Democratic Republic of Congo.

🕒 What is the scope and content of the Principles?

The principles have been put in place to guide companies in upholding human rights and fundamental freedoms throughout their operations and to ensure the safety and security of all those involved.

Participants commit to conducting **risk assessments** and taking steps to ensure actions taken by governments, particularly the actions of **public security providers** are consistent with human rights. Where host governments are unable or unwilling to provide adequate security to protecting a company’s personnel or assets, **private security** should observe the policies of the contracting company regarding ethical conduct and human rights, the law and professional standards of the country in which they operate, emerging best practices and international humanitarian law.

Risk Assessment: <ul style="list-style-type: none"> - Identification of Security Risks - Potential for Violence - Human Rights Records - Rule of Law - Conflict Analysis - Equipment Transfers 	Companies & Public Security: <ul style="list-style-type: none"> - Security Arrangements - Deployment and Conduct - Consultation and Advice - Responses to Human Rights Abuses 	Companies & Private Security: <ul style="list-style-type: none"> - Law Enforcement - Coordination with State Forces - Weapons Carriage - Defensive Local Use of force
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³² Voluntary Principles on Security and Human Rights, www.voluntaryprinciples.org

② Who participates in this initiative?³³

- **Governments:** Australia, Ghana, Canada, the Netherlands, Norway, Colombia, Switzerland, The UK, and the US;
- **Non-Governmental Organisations:** The Fund for Peace, Human Rights Watch, International Alert, LITE-Africa, New Nigeria Foundation, Pact, Partners for Democratic Change International, Partnership Africa Canada, Pax, Search for Common Ground³⁴;
- **Observers:** Colombian Mining & Energy Committee on Security and Human Rights, DCAF, IFC, Institute for Human Rights and Business, International Committee of the Red Cross, International Council on Mining & Metals, International Petroleum Industry Environmental Conservation Association); and
- **Thirty companies:** Alphamin Bisie Mining SA, AngloGold Ashanti, Anglo American, Barrick Gold Corporation, BHP Billiton, BP, Chevron, ConocoPhillips, ExxonMobil, Freeport McMoRan Inc., Glencore, Goldcorp, Hess Corporation, Marathon Oil, Newcrest Mining Limited, Newmont Mining Corporation, Norsk Hydro, Occidental Petroleum Corporation, Pacific Exploration and Production Corp., PanAust, Premier Oil, Repsol, Rio Tinto, Wooside Energy, Seven Energy, Shell, Sherritt International, Statoil, Total, Tullow Oil.

In 2007, the Voluntary Principles adopted formal **Participation Criteria** intended to strengthen the principles by fostering greater accountability on part of all the VPs participants.

All participating governments, companies and NGOs, must meet the following criteria:³⁵

- Publicly promote the Voluntary Principles;
- Proactively implement or assist in the implementation of the Voluntary Principles;
- Attend plenary meetings and, as appropriate and commensurate with resource constraints, other sanctioned extraordinary and in-country meetings;
- Communicate publicly on efforts to implement or assist in the implementation of the Voluntary Principles at least annually;
- Prepare and submit to the Steering Committee, one month prior to the Annual Plenary Meeting, a **report on efforts to implement** or assist in the implementation of the Voluntary Principles according to criteria agreed upon by the participants;
- **Participate in dialogue** with other Voluntary Principles Participants; and
- Subject to legal, confidentiality, safety, and operational concerns, **provide timely responses** to reasonable requests for information from other Participants with

³³ Voluntary Principles on Security and Human Rights, *Who's involved?*, www.voluntaryprinciples.org/participants/

³⁴ In 2013, several NGOs, such as Amnesty International and Oxfam, decided to withdraw from the VPs due to concerns regarding the failure of the initiative to develop robust accountability systems for member companies. See for example: www.amnesty.org

³⁵ Voluntary Principles on Security and Human Rights, *Participation Criteria*, www.voluntaryprinciples.org/resources

the aim of facilitating comprehensive understanding of the issues related to implementation or assistance in implementation of the Voluntary Principles.

Any Participant's status will automatically become **inactive if it fails to submit an annual report** and/or categorically refuses to engage with another Participant.³⁶ However, it is noteworthy that there is no system for evaluating how closely the Principles are followed by individual companies or governments, as only general reports are published.

② Who can raise concerns about participants?

Only participants can raise concerns regarding whether any other Participant has met the Participation Criteria and, where appropriate, concerns regarding **sustained lack of efforts to implement the Voluntary Principles**.

② Process and Outcome

Participants will seek to resolve any concerns through direct dialogue with another Participant. If direct dialogue fails to resolve the issue, a Participant may submit its concerns to the Steering Committee.

- If determined by consensus of the Steering Committee that these concerns are based on reliable information, and that the Voluntary Principles process will be strengthened by further consultations, the matter will be referred to the Secretariat within 60 days of its submission to the Steering Committee.
- The Secretariat will facilitate formal consultations between the interested Participants, subject to the requirement of confidentiality set forth in this document.
- In no more than six months, the Participants involved in these consultations may present the matter to the annual or special Plenary for its consideration.
- That Plenary shall decide what, if any, further action is appropriate, such as:
 - recommendations
 - expulsion
- A party to a complaint can request that the Steering Committee conduct a status review of implementation and consider any issues arising from the implementation of a recommendation.
- Categorical failure to implement the Plenary's recommendations within a reasonable period as defined by that Plenary will result in inactive status.
- Decisions to expel a Participant must be taken by consensus, excluding the Participant who is raising the concerns and the Participant about whom the concerns are raised. In the event concerns are raised about more than one Participant, the decisions with respect to each Participant will be reached separately.

³⁶ Voluntary Principles on Security and Human Rights, *Governance Rules of the Voluntary Principles Initiative*, www.voluntaryprinciples.org/resources

► NOTE

Although there is little information available on the use of the mechanism, it has been used several times in the past. For instance, a mediation process was conducted under the auspices of the Voluntary Principles on Security and Human Rights after a complaint made by Oxfam America. See *Marco Arena, Mirtha Vasquez and others v. Peru* in Section I, Part III, Chapter III.

* * *

Considering that NGOs participate in the process, victims could approach these NGOs where there are concerns of “sustained lack of effort” on the part of a participating company. This is an additional tool to raise awareness on a situation of human rights abuse.

Overall, the Voluntary Principles remain criticised for their voluntary nature, lack of enforcement mechanism, and the lack of transparency of the process.³⁷ Yet, they remind states of their legal obligations and, although they may be voluntary for companies, their employees are expected to respect the principles once a company has adopted them into its internal guidelines.³⁸ While their language is easily understandable, it remains unclear what is expected from companies and states to put them into practice. There remain important challenges to ensure that the VPs can contribute to improving situations for victims in particularly complex settings.

³⁷ See for example Earth Rights International, *Assessing and Improving the Voluntary Principles on Security & Human Rights, Lessons from the Nigerian Experience*, May 2013, www.earthrights.org

³⁸ Salil Tripathi, *Have the Voluntary Principles Realised their Full Potential?*, Institute for Human Rights and Business, 17 March 2010.

International Council on Mining and Metals (ICMM)

The International Council on Mining and Metals³⁹ was established in 2001 to address the core sustainable development challenges faced by the mining and metals industry. It brings together 35 national, regional and global mining associations and 23 mining and metal companies including: Anglo-American, AngloGold Ashanti, Areva, Barrick, BHPbilliton, GoldCorp, Glencore Minerals Mitsubishi Materials, Newmont and Rio Tinto.⁴⁰

② What rights are protected?

Membership of ICMM requires a commitment to implement the ICMM Sustainable Development Framework, which was developed following a two-year consultation process with various stakeholders.⁴¹ It is mandatory for ICMM corporate members to:

- Implement the 10 principles for sustainable development⁴² throughout the business, one of which is to “uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by their activities”. They must also integrate six supporting position statements into corporate policy.⁴³
- Report annually in accordance with the Global Reporting Initiative (GRI) G4 Guidelines.⁴⁴
- Provide independent third-party assurance that ICMM commitments are met, in line with the ICMM Assurance Procedure, which was agreed upon in May 2008.⁴⁵ Most members assure their sustainability reports and any ICMM-specific assurance requirements in an integrated manner. This procedure clearly provides for greater credibility of the reporting.

ICMM conducts an annual assessment of the progress that each member company is making against these performance commitments. The resulting annual member performance assessment is published in ICMM’s Annual Review.⁴⁶

ICMM has also published different guides for its members, including on responsible sourcing, indigenous peoples and mining.

³⁹ ICMM, www.icmm.com

⁴⁰ See the full list of member companies at ICMM, Member Companies, www.icmm.com

⁴¹ Mining, Minerals, and Sustainable Development project, <http://www.iied.org/>

⁴² The 10 Principles are benchmarked against leading international standards, including the Rio Declaration, the Global Reporting Initiative, the Global Compact, OECD Guidelines on Multinational Enterprises, World Bank Operational Guidelines, OECD Convention on Combating Bribery, ILO Conventions 98, 169, 176, and the Voluntary Principles on Security and Human Rights. ICMM, Sustainable Development Framework, 10 Principles, www.icmm.com

⁴³ ICMM, Sustainable Development Framework, *Position Statement*, www.icmm.com

⁴⁴ ICMM, Sustainable Development Framework, *Public Reporting*, www.icmm.com

⁴⁵ ICMM, Sustainable Development Framework, *Assurance Procedure*, www.icmm.com/document/439

⁴⁶ ICMM, Sustainable Development Framework, *Member Performance*, www.icmm.com

② Who can file a complaint?

Any person who believes that a company is in breach of their ICMM membership commitments at the operational level and wishes to make a complaint may do so.⁴⁷

② Under what conditions?

ICMM has developed a complaint hearing procedure to hear “complaints that a company member is in breach of a membership standard or requirement or any other allegation that a member company has engaged in inappropriate behaviour.” The membership standards or requirements are “ICMM’s public reporting and assurance requirements, plus formally adopted position statements that bind company members to specified procedures or actions” (see links below). “‘Inappropriate behaviour’ is any activity by a member company that could, in the Council’s considered opinion, adversely affect ICMM’s standing and credibility, taking into account ICMM’s mandate as a leadership organisation committed to fostering good practices in sustainable development.”⁴⁸

If a company consistently fails to meet the requirements of membership, the ICMM Council of CEOs would review the membership status of the company concerned. The Council has the power to suspend or expel a member company as appropriate with the support of a 75% majority of Council members.

② Process and Outcome⁴⁹

All complaints must be in writing.

Upon receiving a complaint, ICMM acknowledges the complaint and forwards it to the company concerned. The company is responsible for resolving the complaint, but ICMM is kept informed throughout the process by copies of relevant correspondence. If the case is resolved through interaction between the company and the complainant, the company notifies ICMM of the resolution, and ICMM writes to the complainant for confirmation.

If the case cannot be resolved through interaction between the company and the complainant, ICMM is responsible for dealing with the complaint only if the “Council decides that an investigation of the complaint is appropriate and in ICMM’s interests. There is no automatic obligation to investigate all complaints received.” Upon receiving the complaint, the President contacts the complainant and the company concerned to request additional details. ICMM only considers

⁴⁷ ICMM, Sustainable Development Framework, *op. cited*

⁴⁸ ICMM, *ICCM complaint(s) hearing procedure*, International Council on Mining and Metals, www.icmm.com/our-work/sustainable-development-framework

⁴⁹ ICMM, *ICCM complaint(s) hearing procedure*, www.icmm.com/document/199

complaints when there is sufficient information “to establish, prima facie, that a breach of an ICMM standard could have occurred.”

At this stage, the President⁵⁰ prepares a report which is transmitted to the affected company member for comment.

- The President considers any response from the member and prepares a report for the Council’s Administration Committee. A copy of this report is provided to the affected member.
- The Administration Committee considers the report and determines the appropriate response. Where the Committee believes that the issue should be resolved by a full explanation of the circumstances to the complainant, the President discusses the issue with the complainant and then provides a written response to the complainant and the affected member.
- Where the Administration Committee considers that a serious breach of standard may have occurred, a report is prepared by the President for the Council.
- The Council then considers the report and any representations by the affected member, determines the appropriate response, and the President informs the complainant and member of this in writing. If it is determined that a breach has occurred, “the Council will decide what sanction or condition (if any) would be appropriate in the circumstances.” In doing so, the “Council will take into account Section 12.1.2 of ICMM’s Bylaws which allow members to request a meeting of the Council to consider any proposed suspension or termination of a member.” In all cases, the Council is informed of the complaints and how they have been resolved.

There is no information online as to whether complaints have been filed by ICMM and about their outcome.

The Extractive Industry Transparency Initiative (EITI)

The Extractive Industry Transparency Initiative (EITI) is a coalition of governments, companies, civil society groups, investors and international organisations which supports improved governance in resource-rich countries through the verification and full publication of company payments and government revenues from oil, gas and mining. The initiative was launched by the UK in 2002. Although not a complaint mechanism as such, it is an interesting initiative that can be used by NGOs to call on States and companies for accountability.

Over 90 of the world’s largest oil, gas and mining companies participate in the EITI. In almost all implementing countries, the commitment to implement the EITI has been decreed in some way. There remain a limited number of OECD coun-

⁵⁰ The Council may appoint at its discretion an appropriately qualified independent person to act as an ombudsman to hear the complaint and report to Council.

tries implementing the EITI.⁵¹ The initiative also contributed to the development, such as in the US and the EU, of mandatory disclosure requirements for listed companies to disclose detailed data on major payments to the governments where they operate.

The EITI Standard,⁵² which is the authoritative source on how countries can implement the EITI, was formally launched at the EITI Global Conference in Sydney 23-24 May 2013. These standards replace the 2011 EITI Rules.⁵³ The Standard is the “global transparency standard for improving governance of natural resources”, that participating countries are required to comply with. In April 2015, the EITI Board launched a process of updating the EITI strategy, including clarifying the EITI Standard.⁵⁴

The 12 EITI Principles outlined in the EITI Standard aim to increase transparency of payments and revenues in the extractives sector.⁵⁵ The Standard highlights seven minimum requirements that must be implemented by countries that are EITI members (also called EITI Compliant countries).

All companies (regardless of whether they are EITI Supporting Companies) operating in a country implementing the EITI are required to disclose how much they pay to the government. To become an EITI Supporting Company, companies are not required to provide additional reporting or disclosure of payments. Non-extractive companies and institutional investors are expressing growing support to the EITI.

➤ Process and Outcome

Countries implementing the EITI Standard publish annual EITI Reports, in which they disclose information on tax payments, licences, contracts, production and other key elements around resource extraction. The reports are compiled by Independent Auditors, who are appointed by the multi-stakeholder groups in each EITI country, and who compare and compile the data from company and government reports.

Participating countries can be de-listed from the EITI if, after a 24 month warning, they still fail to meet the requirements for compliance with the EITI Standard. Civil

51 See participating countries at <https://eiti.org/countries>

52 *The EITI Standard*, EITI International Secretariat, January 2015, www.eiti.org

53 For an overview of the key changes, see [eiti.org https://eiti.org/blog/charting-next-steps-transparency-extractives](https://eiti.org/blog/charting-next-steps-transparency-extractives) On 12 February 2015, as countries were preparing for validation under the new EITI Standard, the Institute for Multi-Stakeholder Initiative Integrity (MSI Integrity) released a report on the governance of EITI. See: *Protecting the Cornerstone: Assessing the Governance of Extractive Industries Transparency Initiative Multi-Stakeholder Groups*, MSI Integrity, February 2015, www.msi-integrity.org

54 EITI, *The future shape of the EITI Standard – strategy update*, www.eiti.org

55 The Extractive Industry Transparency Initiative, *The Principles*, <https://eiti.org/eiti/principles>

society organisations closely monitor reports published by member countries and use States' participation in this initiative as a mean to call for greater accountability.⁵⁶

ADDITIONAL RESOURCES

- **ICMM 6 Position statements (providing further clarification / interpretation of ICMM's 10 Principles)**
www.icmm.com
 - **ICMM Position statement on Indigenous People and Mining, May 2013**
www.icmm.com
 - **ICMM updated Indigenous Peoples and mining good practice guide. November 2015**
<http://www.icmm.com>
 - **Oxfam Australia, Community –company grievance resolution: A guide for the Australian mining industry, 2010**
<http://womin.org.za>
 - **ICMM, Human Rights in the Mining & Metals Sector, Handling and Resolving Local Level Concerns & Grievances, 2009**
www.icmm.com
 - **Centre for Social Responsibility in Mining, University of Queensland**
www.csr.mq.edu.au
 - **Extractive Industries Transparency Initiative (EITI)**
<https://eiti.org/>
 - **Publish what you pay,**
www.publishwhatyoupay.org
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⁵⁶ On the eve of 2016 Global EITI conference, more than 100 civil society organisations strongly criticized EITI governance failures. see "Statement EITI Governance Failures Threaten Independent Civil Society", *PWYP*, 24 February 2016.

CHAPTER IV

Labour Rights Initiatives in the Supply Chain

* * *

Multinational companies in the general retail sector as well as in the footwear, clothing and toys industry, sourcing from a complex supply chain are very exposed to violations of labour rights in supplier factories. Following international campaigns denouncing human rights abuses occurring in the supply chain of high profile multinational companies in the 1990's, in particular child labour, greater attention has been given to purchasers' responsibility vis-à-vis their supply chains. Numerous initiatives, business-led or multi-stakeholder, have been established with the objective of improving working conditions for factory workers, through adoption of standards, social auditing and implementation of corrective actions. Recently, major buyers have pooled efforts to harmonize standards across sectors, share information and contribute to the operationalization of labour and human rights standards within the production and sourcing processes.⁵⁷

Some of these initiatives have set up complaints procedures that workers and their representatives may use to denounce abuses taking place within a supplying factory, and seek a remedial action by one or several multinational companies sourcing at this factory. Individual companies may also have established workers' hotlines or other forms of grievance resolution procedures. It is not always easy to determine which company the factory where a violation occurs is producing for or what CSR initiative this company is engaged in. However, brands often appear on products processed by factories, which may enable to check what initiative this brand is participating in. Some initiatives publish the list of certified factories (such as Social Accountability International-SAI) while others say they are ready to provide the information if asked whether a factory is supplying one of its members (such as the Fair Labour Association-FLA).

The current section reviews some of these complaints mechanisms.

⁵⁷ See, for example, the Global Social Compliance Program (GSCP), a global collaboration platform promoting the harmonization of best practice towards sustainable supply chain management and bringing together key actors in the consumer goods industry. The GSCP is not a new standard or monitoring initiative. www.theconsumergoodsforum.com/gscp-home Other initiatives include the Business Social Compliance Initiative: <http://www.bsci-intl.org/>

ETI – Ethical Trading Initiative

The Ethical Trading Initiative⁵⁸ is a tripartite alliance between companies, trade unions and NGOs aiming to promote respect for workers' rights around the globe. There are about over 70 member companies⁵⁹, which must:

- Adopt the ETI Base Code⁶⁰, which draws from ILO Conventions and includes provisions on freely chosen employment, freedom of association and the right to collective bargaining, safe and hygienic working conditions, prohibition of child labour, payment of living wages, non-excessive working hours, non-discrimination, regular employment and prohibition of harsh and inhumane treatment.
- Sign up to ETI's Principles of Implementation⁶¹ to progressively implement the code.
- Submit annual reports to the ETI Board on measures taken to improve working conditions their supply chains: Company annual reports are reviewed by the ETI Board, the Secretariat provides detailed feedback to each company, identifying where progress has been made and where further action is required. **If member companies do not make sufficient progress, or fail to honour their membership obligations, the ETI tripartite Board may terminate their membership.**

Furthermore each year, the ETI Secretariat, together with representatives from its trade union and NGO membership, conducts random validation visits to a minimum of 20 percent of its reporting members. The purpose of these visits is to check that the company's management processes and systems for collecting data for its annual report are consistent and reliable.

Complaints Mechanism

The ETI states that it can serve as a forum to negotiate and to further the protection of the workers in situations where their rights have been violated. The ETI set up the ETI Code Violation Procedure in order to provide a formal avenue for raising and addressing breaches of the ETI Base Code **in the supply chains** of ETI Member companies.⁶² These guidelines, which draw on the UN Guiding Principles on Business and Human Rights were reviewed in November 2014.

⁵⁸ ETI, www.ethicaltrade.org

⁵⁹ See the full list of members: ETI, *Our Members*, www.ethicaltrade.org

⁶⁰ ETI, *The ETI Base Code*, www.ethicaltrade.org

⁶¹ ETI, *Principles of Implementation*, 2009, www.ethicaltrade.org

⁶² ETI, *Code Violation Procedure*, 10 November 2014, www.ethicaltrade.org

② Who can file a complaint?

ETI members; and an individual, NGO or a trade union that are not member of ETI, through contacting one of the member NGOs or trade unions that may be willing to take their complaint forward.⁶³

③ Process and outcome

This complaint procedure has four distinct stages.

- Stage 1: A complaint is filed and the company responds.⁶⁴ Where the parties agree, the complaint then progresses to stage 2;
- Stage 2: A remediation plan is developed and implemented. Where the parties are unable to agree on developing a plan, the complaint will progress to mediation under stage 3;
- Stage 3: Mediation seeks to place the parties in a position where they can agree on developing a remediation plan.
- Stage 4: Where mediation fails, either party can request an ETI recommendation on the complaint. Any of the parties can request that such a recommendation be reviewed by a tripartite sub-committee of the ETI Board.

In order to avoid the victimisation of workers, the complainant can withhold their names, and the ETI member must warn its supplier under allegation that there is a “no victimisation” policy in relation to workers who may be named in the complaint. All information received from each party will be provided to the other parties to the complaint, and in the case of a mediation procedure, parties can agree to keep the contents confidential. Progress on complaints heard under this process will be routinely reported to the ETI Board. At the conclusion of a complaint, the ETI will publish a statement agreed by the parties or a short summary of the complaint and the outcome. There is limited information on ETI’s website on complaints and outcomes regarding cases of violations of workers’ rights in members’ supply chains, but the secretariat can easily be contacted (see below).⁶⁵

⁶³ ETI can assist with making contact with the relevant members. See the full list of members at ETI, *Our Members*, www.ethicaltrade.org

⁶⁴ A sample complaint form can be found in the ETI, *Code Violation Procedure*, *op. cit.*

⁶⁵ See ETI, Resolving violations, www.ethicaltrade.org/in-action/resolving-violations

HOW TO FILE A COMPLAINT?

- If an ETI member (NGO or trade union) is aware of a violation of the Base Code by a supplier of an ETI corporate member, it may notify the relevant ETI member company in writing, putting the ETI secretariat in copy (eti@eti.org.uk)
 - For further information, contact the ETI secretariat by writing to eti@eti.org.uk and General Inquiries (emma.clark@eti.org.uk)
-

SAI - Social Accountability International

SAI⁶⁶ is a multi-stakeholder organisation that established SA8000 standard for decent work⁶⁷, a set of standards which companies and factories use to measure their social performance, which is subject to certification. SA8000 is grounded on the principles of core ILO conventions, the UN Convention on the Rights of the Child, and the Universal Declaration of Human Rights. SA8000 is used in over 3,000 factories, across 66 countries and 65 industrial sectors. SAI member companies⁶⁸ and the commitment requirements can be found online.⁶⁹

The Social Accountability Accreditation Service (SAAS) is responsible for monitoring the use of the SA8000 standards and for accrediting and monitoring certification bodies carrying out SA8000 audits.⁷⁰

Complaint mechanisms⁷¹

SAAS manages the complaints filed regarding the performance of a certified organisation (Type 4 complaint).

② Who can file a complaint?

Any interested party may file a complaint.

⁶⁶ SAI, www.sa-intl.org

⁶⁷ SAI, SA8000® Standard and Documents, www.sa-intl.org

⁶⁸ SAI, Corporate Programs, *Members*, www.sa-intl.org

⁶⁹ SAI, Corporate Programs, *Mission Statement*, www.sa-intl.org

⁷⁰ SAI, Social Accountability Accreditation Service (SAAS), www.sa-intl.org

⁷¹ Social Accountability Accreditation Services (SAAS), Complaints and Appeals Process, www.saasac-creditation.org/complaints

② Process and outcome

Before addressing a complaint to the SAAS, the complainant has to go through the internal complaints procedures of the facility concerned. If it is not addressed at this stage, the complaint should be filed with the Certifying Body. The complaints should be filed with SAAS after all other avenues for hearing complaints have been exhausted or the complainant feels that their concerns have not been investigated and addressed properly.

When a complaint is received, it is immediately forwarded to the Certification Body (CB), which must develop a plan of action and contact the complainant. If the complainant is not satisfied with the outcome of the investigation, it may file another type of complaint against the CB with SAAS.

A full list of the complaints and their outcome can be found at: www.saasaccreditation.org/node/62.

HOW TO FILE A COMPLAINT?

The complaint should include the following:

- Objective evidence of the violation;
- Documentation supporting the violation;
- Evidence that direct requests were made to the certified organisation and that the organisation had not acted on them (if applicable); and,
- Evidence that the company's internal grievance process was not carried out.

The complaint should be made in writing, it must not be anonymous but it can remain confidential, and a complaint form can be downloaded www.saasaccreditation.org/complaints.

The complaint should be sent to:

Executive Director, SAAS
15 West 44th street, Floor 6,
New York, NY 10036
Fax: +212-684-1515
Email: Lisa Bernstein, LBernstein@saasaccreditation.org

➔ In Action – Kenya human Rights Commission (KHRC) complaints against Del Monte Kenya Ltd.⁷²

In February 2005, SAI received a complaint from KHRC, citing clause 9 in the SA8000 Standard, concerning human rights violations, poor corporate relations between Del Monte and the neighbouring community, and the complacency of the company in addressing these issues. The complaint was forwarded to Coop Italia, a Del Monte customer and SA8000 certified company, and to SGS, the certification body. Due to organisational changes within the company, the certification had been suspended by SGS just before the complaint reached SAI. However, surveillance audits were conducted in March 2005 and in June 2005 and a recertification audit was conducted at the facility in January, 2006. During its audits, SGS identified initiatives that the company had undertaken to address community engagement, conducted interviews with Union representatives and individual workers. SGS did not find specific violations against the requirements of the SA8000 Standard, though some minor issues were identified and corrective actions recommended. During the recertification audit, a meeting was organized with a representative from KHRC. Overall, in his opinion, the company and its management were adopting a positive attitude towards the community. The company was officially re-certified in March 2006. This complaint was officially closed in August, 2007. The Certification Body has continued to be in contact with the initial complainant throughout the surveillance process at the facility.

At the time, the complaint led to important improvements. Del Monte started respecting the union agreement (CBAs). Unions and workers obtained more space to exercise their right to organize and workers previously retrenched before the complaint were compensated. Jobs were evaluated and workers paid accordingly (for jobs of equal value); housing conditions were proved and a plan of action was designed to ensure continuous improvement in the future. However, these turned out to be short term impacts that were unfortunately not sustained in the long term. There were ongoing allegations of violations (notably by workers) stating that the company is no longer respecting the CBA nor the job reevaluation plan that was agreed. Workers alleged being victims of threats and intimidation from management and unfair dismissal of union leaders (for retrenchment reasons according to the company).

This type of situation clearly reflects the limitation of such settlement mechanisms and the necessity for States hosts to take measures to establish regular and adequate systems of inspection which guarantee the respect of human rights by the companies.

⁷² Complaint #009: Certification Complaint Del Monte Kenya Ltd. – Management Systems; www.saasac-creditation.org/complaint009.htm

ADDITIONAL INFORMATION

– The list of certified facilities can be accessed at www.saasaccreditation.org/certfacilitieslist.htm

Fair Wear Foundation

The Fair Wear Foundation (FWF)⁷³ is an international verification initiative dedicated to enhancing garment workers' lives all over the world. FWF's 80 member companies represent over 120 brands, and are based in seven European countries.

④ Improving working conditions?

Members must comply with the 8 labour standards⁷⁴ outlined in the Code of Labour Practices:

- Employment is freely chosen
- Prohibition of discrimination in employment
- No exploitation of child labour
- Freedom of association and the right to collective bargaining
- Payment of a living wage
- No excessive working hours
- Safe and healthy working conditions
- Legally-binding employment relationship

The list of brands working with FWF can be accessed on FWF website.⁷⁵ Compliance with the Code of Labour Practices is checked by FWF⁷⁶ through factory audits and a complaints procedure, through management system audits at the affiliates and through extensive stakeholder consultation in production countries.

④ Who can file a complaint?

FWF's complaints procedure can be accessed by a factory worker, manager or by a representative from a local trade union or NGO. Complaints concern violations of the Code of Labour Practices. This system only applies when workers are not able to access local grievance mechanism, i.e. when other options, such as factory grievance systems or local labour courts, are not fair, effective, and/or accessible.

⁷³ FWF, <http://fairwear.org>

⁷⁴ FWF, *Labour Standards*, Fair Wear Foundation, <http://fairwear.org/labour-standards>

⁷⁵ FWF, *Brands*, www.fairwear.org/36/brands/

⁷⁶ FWF, *Verification*, www.fairwear.org and Fair Wear Foundation, *Complaints Procedure*, March 2014, www.fairwear.org

② Process and Outcome⁷⁷

In every country where it is active, FWF has a local complaints manager. Upon receipt of the complaint, FWF informs the affiliate(s) sourcing from the factory in question and investigates the complaint. The investigation can lead to recommendations and proposals for corrective action. It also includes a time frame and reporting. Once the investigation is complete, the affiliate is asked to formulate a response. When the entire procedure is closed and the verification process concluded, a final report is published. FWF provides information on its website on complaints under investigation; the name of the factory or the sourcing company is sometimes mentioned. When a member company, the plaintiff or the accused party disagrees with the outcome of the procedure, or disagrees with FWF's methods of verification; or when FWF is certain that a member company is not addressing the complaint seriously, appeals can be made to FWF's Executive Board. The Board will consider the advice of FWF's Committee of Experts and decide on a proper course of action.

The list of complaints can be found on FWF website's resource pages: www.fairwear.org/506/resources/

HOW TO FILE A COMPLAINT?

Complaints should be addressed to:

Fair Wear Foundation (FWF)

P.O. Box 69253

1060 CH Amsterdam the Netherlands

Tel +31 (0)20 408 4255 - Fax +31 (0)20 408 4254 / info@fairwear.nl

FWF complaint mechanism in action

➔ **Metrago (2006)**⁷⁸

In April 2006, a complaint was filed concerning the Metrago factory in Turkey where FWF affiliate O'Neill was sourcing at the time. The complaint involved unlawful dismissal of union members and harassment of others, constituting an infringement on the right to freedom of association and collective bargaining and was found to be justified. In October, an investigation was conducted by an independent person appointed by the Dutch employers association MODINT, which is also one of FWFs funding organisations, and five FWF and ETI member brands, working with Metrago.

⁷⁷ Fair Wear Foundation, *Complaints Procedure*, March 2014, www.fairwear.org

⁷⁸ FWF, *Final Report on the complaint against Metrago 2006-2007*, www.fairwear.org

In December, MODINT received the report which found the claims from the union to be justified and, a letter was sent to Metraco, with recommendations including protecting workers' rights, re-employing the unfairly workers dismissed and entering into dialogue with the trade union with the assistance of an observer. All requirements were not accepted by Metraco, thus FWF came to the final conclusion that Metraco had been acting in clear violation of the International Labour Standards on Freedom of Association and the Right to Collective Bargaining and not showing the will to correct this serious non-compliance by refusing to come to an agreement with the trade union on the issue of the workers that had been dismissed because of their trade union membership.

JSI/O'Neill informed FWF – in a “confidential manner” – in October that they would stop ordering from Metraco, mainly due to business reasons but also because of their reluctance to correct their non-compliance.

FWF assessed the member companies' attempts to remediate the situation, and concluded that they had seriously tried to get the issues solved and could not be qualified as a “cut & run” policy.

➔ **Takko Fashion (2014)**⁷⁹

On 17 May, 2014, a complaint was filed by 12 workers concerning a supplier of Takko Fashion located in Bangladesh.

The workers from finishing section claimed that the factory did not pay minimum wages, that it had reduced operators' monthly wages, and that they were forced to unpaid overtime and were not provided with payslips. In addition, the workers said that they would be under a lot of pressure from the management or even got fired if they objected to unpaid overtime. On 19 May, 2014, FWF decided that the case was admissible and that it was relevant to FWF's Code of Labour Practices in relation to payment of living wage and occupational health and safety, and regard to harassment.

The local audit team conducted an audit in September 2014. The audit was able to verify part of the complaint on wage payments. Additionally, it was found that verbal abuse with sexually explicit profanity was common in the factory.

The audit report was shared with Takko Fashion, which was meant to follow up and make sure the factory paid minimum wages to all workers and maintain record on overtime. A training programme on preventing and reducing harassment at work was set up, with the aim of setting up an internal grievance handling systems to improve working conditions. At least 20 requests for support, including on unfair termination, verbal abuse, maternity benefit, were solved by the factory's internal process up to November 2014.

⁷⁹ FWF, Complaint, Takko Fashion, Bangladesh, 25 September 2014, www.fairwear.org

The remediation process includes verification conducted by FWF with regards to the issue of harassment, and plans to verify minimum wage payment to cleaners.

Complaints against factories in Bangladesh supplying Takko Fashion continue.

Fair Labor Association (FLA)

The Fair Labor Association (FLA)⁸⁰ is a multi-stakeholder initiative involving companies, non-governmental organisations (NGOs) and colleges and universities in a collaborative effort to improve workplace conditions worldwide established in 1999.

A Workplace Code of Conduct has been developed which is based on the International Labour Organisation standards.⁸¹ On 14 June, the Fair Labor Association published the enhanced FLA Workplace Code of Conduct and Compliance Benchmarks, which includes higher standards for protection of workers' rights. The Code covers areas such as: forced labour, child labour, harassment in the workplace, non-discrimination and the respect of employment conditions such as working hours, health and safety, freedom of association and collective bargaining, compensation of overtime and environment.⁸²

The list of participating companies can be accessed on FLA website.⁸³ Famous companies affiliated with FLA include Adidas Group, Apple, H&M, Nestlé, Nike, PVH and Sygenta.

Upon joining the FLA, companies commit to accepting unannounced independent external monitoring (IEM) audits of their factories, contractors and suppliers. If factories violate the Code, FLA requires the correction of the through remediation plans **which are made public**. These plans are also published. Additionally verification audits are undertaken to check on the progress made in factories.

② Who can file a complaint?⁸⁴

Any person, group or organisation can report instances of persistent or serious non-compliance with the FLA Workplace Code of Conduct in a production facility used by an FLA-affiliated company, supplier, or university licensee. On its website, **FLA mentions it can be contacted to check if a factory produces for an FLA**

⁸⁰ Fair Labor Association, www.fairlabor.org

⁸¹ FLA, *Code of Conduct*, www.fairlabor.org/our-work/labor-standards

⁸² FLA, *Workplace Code of Conduct and Compliance Benchmarks*, Revised 5 October 2011, www.fairlabor.org

⁸³ FLA, *Affiliates*, www.fairlabor.org/affiliates

⁸⁴ FLA, *Third Party Complaints*, www.fairlabor.org/thirdparty_complaints.html

affiliated company. The complaint process is meant to be a tool of last resort when other channels (internal grievance mechanism, local labour dispute mechanisms...) have failed to protect workers' rights.

② Process and Outcome

- Step 1: FLA reviews complaint and decides on its admissibility.
- Step 2: FLA notifies and seeks explanations from the company.
The company using the factory has 45 days to conduct an internal assessment of the alleged non-compliance and if found to be valid, develop a remediation plan.
- Step 3: FLA conducts an investigation If warranted, the FLA conducts further investigation into the situation in the factory with the help of an external, impartial assessor or ombudsman.
- Step 4: A remediation plan is developed based on the report from the external assessor.

➔ KIK - Factory fire in Pakistan (2012)

In September 2012, 280 workers died and hundreds more were injured in a devastating factory fire in Ali Enterprises textile factory in Karachi, Pakistan. The inadequate storage of flammable textile facilitated the spread of a fire caused by an electrical short circuit, and the absence of emergency exits left many workers trapped in the burning building.

The factory's biggest client was KiK, a German discount retailer, which had bought 70% of the garment produced by the factory in 2011.⁸⁵ In the immediate aftermath of the fire, KiK paid USD 1 million compensation, to be distributed by a commission among the survivors and relatives of the deceased. However, Kik refused to pay compensation for the loss of income to families affected by the fire. Representatives of these families tried negotiating with KiK for 2 years in order to receive compensation, but the negotiations ended in December 2014 with KiK firmly refusing to pay. Consequently, on 13 March 2015, four of the victims of the fire filed a claim against KiK at the Regional Court in Dortmund, Germany, seeking a 30,000 Euros compensation per victim.

In Pakistan, the owners of the factory are currently subject to a criminal investigation in relation to the 2012 fire. Lawyers representing some of the victims have also initiated legal proceedings against Pakistani regulatory and prosecutorial authorities for negligence in the investigation. On 9 May 2015, the ECCHR submitted an amicus brief to the High Court in Karachi calling to broaden the scope of the criminal investigation so as to cover the responsibility of KiK and RINA – the Italian company who issued the factory an SA 8000 certificate as a guarantee of safety and other workplace standards – for “contribut[ing] to

⁸⁵ ECCHR, *Case Report: Pakistan, Cheap Clothes, Perilous Conditions*, 15 May 2014.

the fire through their failure to take action on safety standards.”⁸⁶ Depending on how the case before the court in Pakistan proceeds, victims and their counsels “will consider taking legal action in Europe.”⁸⁷

HOW TO FILE A COMPLAINT?

- A Third Party complaint Form is available in several languages at:
www.fairlabor.org/third-party-complaint-process
- Complaint can also be submitted online at:
www.fairlabor.org/third-party-complaint-form
- A complaint should contain as much detail and specific information as possible. The identity of the plaintiff may be kept confidential upon request.
- You can send your complaint by post, e-mail or fax to:
Jorge Perez-Lopez
Director of Monitoring
Fair Labor Association
1505 22nd
Street, NW
Washington, DC 20037 USA
jperez-lopez@fairlabor.org
Tel. +1-202-898-1000
Fax. +1-202-898-9050
- A list and summary of recent complaints can be found at:
www.fairlabor.org

Worker Rights Consortium (WRC)

The Worker Rights Consortium⁸⁸ is an independent labour rights monitoring organisation which conducts investigations in factories specialised in sewing apparel and other products, which are then sold in the United States and Canada. WRC focuses especially on apparel and other goods bearing university logos.

Over 182 universities, colleges, and high schools are affiliated with WRC.⁸⁹ They have adopted a manufacturing code of conduct which contains basic protection for workers in each of the following areas: wages, working hours and overtime compensation,

⁸⁶ ECCHR, “Paying the price for clothing factory disasters in south Asia”, available at: www.ecchr.eu

⁸⁷ *Ibid.*

⁸⁸ WRC, www.workersrights.org

⁸⁹ WRC, *Affiliates*, www.workersrights.org/about/as.asp

freedom of association, workplace safety and health, women's rights, child labour and forced labor, harassment and abuse in the workplace, and non-discrimination and compliance with local law. This code provides for its implementation in relevant contracts with licensees. Affiliates have to make sure that licensees provide WRC with information on the names and locations of all factories involved in the production of their logo goods. WRC makes a factory database available on its website.⁹⁰ WRC conducts factory inspections. These inspections may be initiated in response to complaints.

Complaints mechanism⁹¹

② Who can file a complaint?

Complaints can be filed by any party regarding alleged violations of the code of conduct.

HOW TO FILE A COMPLAINT?⁹²

- The complaint should contain specific allegations, and include the name and country of the factory, a detailed description of worker rights violations, and the complainant's telephone number.
- Complaints may be verbal or written, and may be submitted by telephone, fax, email, post, or any other means of communication. The complaint can be sent to WRC or any of its local contacts at:

Worker rights Consortium
5 Thomas circle NW, Fifth Floor
Washington, DC20005
United States of America

Complaints should be emailed to Lynnette.Dunston@workersrights.org or faxed to (202) 387-3292.

② Process and Outcome

The Executive Director assesses each complaint submitted to WRC and decides, in consultation with the Board, whether an investigation should proceed. A collaborative investigative team may be set up which includes at least one representative from the workers or the community, and a representative of WRC. The collaborative investigative team formulates recommendations on remedial actions.

The WRC works with US apparel companies that are procuring goods from the factory in question to encourage the implementation of these recommendations. When a company is unwilling to press its supplier factory to undertake the appropriate remedial steps, WRC will report this to affiliated schools and the public.

⁹⁰ WRC, *Factory Disclosure Database*, www.workersrights.org/search

⁹¹ WRC, *Investigative Protocols*, www.uwosh.edu

⁹² WRC, *Worker Complaint*, www.workersrights.org/contact/complaints.asp

Colleges and universities that have a relationship with the company in question may then choose to communicate with their licensee and/or take other action as deemed appropriate by each individual institution.

The WRC publishes factory reports on its website: www.workersrights.org/

FLA & WRC Third Party Complaint mechanism in Action

➔ Estofel (2005-2009)⁹³

In November 2007, Estofel Apparel Factory in Guatemala closed without legally mandated severance and other termination compensation for its workers. Shortly after the closure of Estofel's factories, COVERCO (Commission for the Verification of Corporate Codes of Conduct), a Guatemalan labour rights organisation, alerted the FLA about the situation. COVERCO also contacted FLA-affiliated company, Phillips-Van Heusen (PVH), that had sourced directly from the factory until a few months before the closure. In turn, PVH pressed Estofel to provide full severance payments. PVH also pressed for the payment of full severance to Estofel workers with Singaporean company Ghim Li, a business partner of Estofel.

In February 2008, WRC collected testimonies from the complainant workers, reviewed relevant documents, and communicated with factory management. Estofel was initially slow to cooperate in a meaningful way, but WRC was ultimately able to meet with factory management in April 2008, along with a representative of Vestex, a Guatemalan trade association that has played an important role in the case. Upon request from WRC, the company subsequently provided a range of documents.

On the basis of the evidence gathered, WRC found that upon closing the factory's two manufacturing units in October and November of 2007, Estofel had paid workers less than 50% of the severance and other termination benefits due to them by law. The non-payment of termination compensation affected nearly 1,000 workers.

In March 2008, University of Washington (UW) officials communicated to WRC and FLA concerns about violations of workers' rights and failure to pay severance at Estofel, based on information gathered by UW students during field work conducted in Guatemala in February 2008.⁹⁴ UW administration helped convene an ad hoc group consisting of representatives of WRC, FLA, University of Washington, GFSI Inc., Hanes brands (licensor of the Champion brand to GFSI), Phillips-Van Heusen, Ghim Li, and the Collegiate Licensing Company (licensing agent for the University of Washington). The group began meeting regularly via telephone in May 2008, and continued to do so until payments to the workers in question were made in late 2008 and early 2009.

⁹³ See Complaint regarding Estofel S.A, Guatemala 2008, www.accessfacility.org

⁹⁴ Emily Lee, "Making History in Honduras", The Daily of the University of Washington, <http://dailyuw.com/2010/2/23/making-history-honduras>

COVERCO started its field investigation on 27 June 2008, and produced a final report in August 2008. Based on information provided by the factory, COVERCO reported that Estofel had a total of 974 employees on 15 October 2007, around the time when the closure process started. COVERCO estimated that the 974 former Estofel workers were due total benefits of \$1,375,175, however the factory had already paid benefits amounting to \$478,997. After a negotiation period, Estofel ultimately agreed to a settlement that would exclude payment of indirect labor benefits. Estofel conditioned the payments as follows: (1) workers who received the additional payments must execute a desistimiento (withdrawal) terminating legal claims against the factory; (2) those workers who had filed lawsuits must drop them; and (3) 20 February 2009 was scheduled as the deadline for making the payments.

The WRC worked with Coverco and the FLA to design an outreach programme to contact the workers owed and inform them of the offer of payment. Because of the significant time that had elapsed since their dismissals, an extensive outreach effort was needed. Coverco's work in this regard included the placement of advertisements in Guatemalan newspapers, and collaboration with an ad hoc leadership committee of former Estofel workers.

Coverco was ultimately able to reach nearly 95% of the 974 workers identified in its August 2008 report.⁹⁵ An additional eleven out of thirteen workers subsequently identified as being due compensation were also reached. In total, between December 4, 2008, when payments began, and February 20, 2009, the closing date set by Estofel for the payment period, 871 workers out of 974 had received compensation, with the total amounting to \$526 000.

⁹⁵ FLA, "Coverco Final Audit Report", August 2008, www.fairlabor.org

CHAPTER V

Fair Trade Initiatives

* * *

As opposed to other initiatives presented in this chapter, fair trade initiatives mostly relate to small producers and are not necessarily focused on multinational companies. While the following section will provide a brief overview of the Fair Trade Labelling Organisation (FLO), numerous other types of labels exist, such as environmental labelling initiatives.

Fairtrade (FT) is a strategy for poverty alleviation and sustainable development. Its purpose is to create opportunities for producers and workers who have been economically disadvantaged or marginalised by the conventional trading system. Different fairtrade labels have been developed, however, the most evolved system is the one developed by Fairtrade Labelling Organisation (FLO).⁹⁶ All operators using Fairtrade certified products and/or handling the fairtrade price are inspected and certified by FLO-CERT.

Standards

Although standards differ depending on the scale of the production (small-scale producers, contract production, hired labour), they all set high requirements in terms of social development and labour conditions including with regard to non-discrimination, freedom of labour, freedom of association and collective bargaining, conditions of employment and occupational health and safety. FT standards also deal with environmental protection. Additionally, FT standards exist for each type of products labelled under fairtrade. Traders of fair trade products also abide by standards mainly with regard to prices paid to and contracts paid to producers.

FT standards are available at www.fairtrade.net.

Complaint's Procedure

② Under what conditions can a complaint be filed?

An allegations procedure has been set up to deal with allegations about a certified party (producer or trader) non-compliance with FT standards.

⁹⁶ FLO, www.fairtrade.net

② Who can file a complaint?

Any party may file an allegation, including but not limited to, a Fairtrade operator, an NGO, a labor union or any individual.

The allegation must be submitted in writing to: QualityManagement@flo-cert.net

The allegation must contain: name and/or identification of operator, description of facts.

② Process and Outcome⁹⁷

The party filing the allegation is informed throughout the process. The quality management first evaluates the validity of the allegation to determine whether to initiate an investigation. If the allegation is considered valid, based on the kind and severity of the allegation, appropriate investigation measures are determined. This may include analysis of the written evidence provided by the allegation party, interviews with parties involved, evaluation of the allegation by a third party (e.g. technical expert opinion, legal statement), analysis of the allegation as part of the next regular audit at the concerned operator, an unannounced or additional audit to verify the allegation on site.

- If the concerned operator is found to be in compliance with the Fairtrade Standards, the allegation will be summarily dismissed.
- If the concerned operator is found to be in non-compliance with the Fairtrade Standards, FLO- CERT will issue a non-conformity. The non-conformity may lead to one of the following actions:
 - a. The operator may be requested to suggest corrective measures to address the non-conformity. This might be followed-up in documents or a follow up audit.
 - b. If the non-conformity is linked to a major compliance criterion, the certificate of the operator may be suspended while the operator can suggest corrective measures to address the non-conformity. This might be followed up on documents or a follow up audit.
- The operator may be decertified due to a major breach of the Fairtrade Standards.

⁹⁷ FLO-CERT, Complaints, Appeals and Allegations, www.flocert.net

PART II

International Framework Agreements (IFAs)

An International framework agreement (IFA) or a global framework agreement (GFA) is “an instrument negotiated between a multinational enterprise and a Global Union Federation (GUF) in order to establish an ongoing relationship between the parties and ensures that the company respects the same standards in all countries where it operates” (ILO definition).

The difference between a CSR commitment such as a code of conduct and a Global Framework Agreement is that the latter is a signed agreement with the people employed by the company. According to unions, such an agreement gives the company’s claims in the field of CSR credibility as it provides for joint implementing and monitoring procedures, whereas codes of conduct are the responsibility of companies only.

The vast majority of the about 70 currently existing agreements have been signed since 2000. Most of these IFAs were signed in TNCs whose headquarters are in Europe.⁹⁸

② What is the scope and content of Global Framework Agreements?

Despite sector and company specificities, the IFAs share some common ground⁹⁹:

- Reference to ILO Core Labour Standards, such as the freedom of association, the right to collective bargaining, the abolition of forced labour, non-discrimination, and the elimination of child labour.
- Reference to ILO Declaration on Fundamental Principles and Rights at Work.
- Recognition of the union and its affiliates in operations worldwide.

Additional features include:

- Reference to the Universal Declaration of Human Rights
- Anti-corruption
- Environmental commitments

⁹⁸ See notably: www.imfmetal.org

⁹⁹ For a review of the content of IFAs, please see: European Foundation for the Improvement of Living and Working Conditions, European and international framework agreements: Practical experiences and strategic approaches, Luxembourg: Office for Official Publications of the European Communities, 2009 and Reynald Bourque, “International Framework Agreements and the Future of Collective Bargaining in Multinational Companies” in Just Labour: A Canadian Journal of Work and Society – Volume 12 – Spring 2008.

- Linkage to CSR policy (i.e. Global Compact Principles)
- Obligations with regard to restructuring including information sharing and consultation
- Decent wages and working hours
- Health and safety standards
- Training and skills development.

The scope of these agreements varies. According to a study conducted by the European Foundation for the Improvement of Living and Working Conditions in 2009, almost 70% of the existing IFAs mention suppliers and subcontractors, and half of the agreements merely oblige companies to inform and encourage their suppliers to adhere to the IFA. 14% of the IFAs actually contain measures to ensure compliance by suppliers, and 9% are to be applied to the whole supply chain, with the transnational company assuming full responsibility. Only a few companies acknowledge in the IFA a comprehensive responsibility for the whole production chain, including subcontractors. Among these are the IFAs with CSA-Czech Airlines, Inditex, Royal BAM and Triumph International.¹⁰⁰ Some IFAs establish that their commitment varies according to the degree of power they have within their different subsidiaries. Some IFAs extend their scope to subcontractors and present commitments to respect the labour rights (in particular regarding health and safety in the workplace) of workers of the subcontractors. One example often cited is the IFA concluded with EADS.¹⁰¹

In case of non-respect, some IFAs, such as the one negotiated by Rhodia, contain precise sanctions for suppliers and subcontractors, including the termination of the contract in the case of violations of clauses that are considered to be the most important ones, for example the provisions on health and safety or on human rights.¹⁰²

🔗 Implementation of Global framework Agreements

Implementation and monitoring systems of the commitments taken by the company also vary; the most recent IFAs are more precise on the implementation aspect. According to some, the added value of IFAs is “not only to reaffirm these rights when referring to national labour law standards, but also to organise procedures on implementation and monitoring that aim at making them effective”.¹⁰³ Most IFAs institute a committee of employees and company representatives in charge of the implementation of the agreement.

¹⁰⁰ Isabelle Daugareilh, *La dimension internationale de la responsabilité sociale des entreprises européennes: Observations sur une normativité à vocation transnationale*, in M.A. Moreau, F. Caffagi, F. Francioni, *La dimension pluridisciplinaire de la responsabilité sociale d'entreprise*, éd. PUAM, Aix-Marseille, 2007

¹⁰¹ *Ibid*

¹⁰² André Sobczak, *Legal Dimensions of International Framework Agreements in the Field of Corporate Social Responsibility*, in *Relations industrielles / Industrial Relations*, vol. 62, n° 3, 2007, p. 466-491, www.erudit.org

¹⁰³ Sobczak, *op. cit.*, 2007.

Other concrete implementing measures may include:

- Annual reporting on the implementation.
- Provision for the creation of a special body in charge of supervising the implementation of the agreement and interpretation of the agreement in case of dispute.¹⁰⁴
- Grievance resolution procedures at the local and international level. Some agreements establish a formal complaint mechanism by which an employee (EADS, Rhodia) or any other stakeholder (Daimler Chrysler) may denounce a breach of the agreement.
- Audit on compliance within the company.
- Few IFAs provide for the possibility to invite NGO representatives to the annual meeting.

➔ **An analysis of the Daimler Chrysler dispute resolution procedure**¹⁰⁵

This IFA's dispute resolution record provides compelling evidence that IFAs can produce positive results that can help promote global industrial relations, particularly where there are strong national unions and international networks and a process by which to bring the issue to the attention of the company in a timely manner. A longer term approach that seeks to improve labor relations amongst suppliers, rather than respond to crises, is now necessary. Delays in solving disputes, coupled with the re-emergence of problems considered as solved, will challenge the legitimacy of the dispute resolution process –the most prominent element of the Daimler IFA.

An example of an International framework Agreement

➔ **PSA Peugeot Citroën Global framework Agreement on social responsibility**¹⁰⁶

PSA Peugeot Citroën, a worldwide automotive corporation headquartered in France, signed an IFA with the International Metalworkers' Federation (IMF) and the European Metalworkers' Federation (EMF) in March 2006. The agreement is interesting as it covers both the company itself and its supply chain, is firm on labour and human rights, and provides for a monitoring procedure.

The Preamble refers to previous commitment of the corporation including the Principles of the Global Compact, 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.

¹⁰⁴ See IFA with EDF, article 22: www.icem.org

¹⁰⁵ Extract taken from: Stevis Dimitris, *International Framework Agreements and Global Social Dialogue: Lessons from the Daimler case*, Employment Sector Working Paper no. 46, 2009.

¹⁰⁶ *PSA Peugeot Citroën Global Framework Agreement on Social Responsibility*, 2006, available at www.newunionism.net

Chapter 1: Scope of agreement

The Agreement applies directly to the entire consolidated automotive division; certain provisions also apply to suppliers, subcontractors, industrial partners and distribution networks.

Chapter 2: PSA Peugeot Citroën's commitment to fundamental human rights

PSA Peugeot Citroën agrees to promote compliance with human rights in all countries in which the corporation is present, including in geographical areas where human rights are not yet sufficiently protected. PSA Peugeot Citroën agrees to work towards preventing situations of complicity or acts of collusion concerning fundamental human rights violations. PSA Peugeot Citroën reiterates its commitment to union rights (ILO Convention no. 87, no. 135, 98), condemns forced labour (ILO Conventions nos. 29 and 105), commits to abolishing child labor and sets the minimum age for access to employment in the company at 18 (with an exception at 16 for countries and region whose economies and education systems have not achieved sufficient levels of development), and to eliminate discrimination (ILO Convention no. 111). PSA Peugeot Citroën is committed to working against all forms of corruption.

Chapter 4: social requirements shared with suppliers, subcontractors, industrial partners and distribution networks

While PSA Peugeot Citroën cannot take legal responsibility for its suppliers, subcontractors, industrial partners and distribution networks, the corporation will transmit this agreement to the companies concerned and request that they adhere to the international agreements of the ILO mentioned previously. PSA Peugeot Citroën requires that its suppliers make similar commitments with regard to their respective suppliers and subcontractors. When requesting quotes from suppliers, PSA Peugeot Citroën agrees to ensure that compliance with human rights is a determining factor in the selection of suppliers for the panel. Any failure to comply with human rights requirements will result in a warning from PSA Peugeot Citroën and a plan of corrective measures must be drawn up. Non-compliance with these requirements will result in sanctions including withdrawal from the supplier panel.

Chapter 5: Taking into account the impact of the company's business on the areas in which it operates

PSA Peugeot Citroën is committed to promoting the training and employment of the local working population in order to contribute to economic and social development wherever the corporation does business.

Chapter 6: Deployment of basic labour commitments

PSA Peugeot Citroën agrees to widely inform corporation employees about the content of this agreement.

Chapter 7: Monitoring of the agreement and the creation of a Global Council

This chapter provides for the establishment of local social observatories in each of the major countries made up of human resources divisions and labour unions in charge of monitoring the application of the Global Framework Agreement on an annual basis. At the corporate level, a report on the deployment of the agreement in the countries concerned will be presented each year to the PSA Peugeot Citroën Extended European Council on Social Responsibility.

Interesting global framework agreements have also been signed with major companies such as H&M, Codere, Volvo, etc. A list of agreements signed is accessible here: www.global-unions.org

➔ IndustriALL Global Union and H&M sign global framework agreement

In March 2015, IndustriALL Global Union together with the Swedish trade union IF Metall signed a global framework agreement with H&M, protecting the interests of 1.6 million garment workers.

“The agreement includes setting up **national monitoring committees**, initially planned for countries such as Cambodia, Bangladesh, Myanmar and Turkey to safeguard the implementation of the agreement from the factory floor upwards, and to facilitate a dialogue between the parties on the labour market¹⁰⁷.”

* * *

The legal status of IFAs and the ways they can be used in legal proceedings are not clear. The GUFs involved in the negotiation of IFAs see them more as “gentlemen’s agreements,” that is, voluntary agreements that put the onus of application on the signatory parties only. From this point of view, these agreements belong to “soft law”. The most effective sanction in the case of violation by the signatory company of the rights or principles stated in these agreements remains the tarnished corporate image resulting from denunciation campaigns.¹⁰⁸ However, the International Organisation of Employers in particular questions how a court would regard this type of agreement and how it might affect any other national agreements signed

¹⁰⁷ IndustriALL Global Union and H&M sign global framework agreement, 3 March 2015, www.industriall-union.org

¹⁰⁸ Bourque, *op. cit.*, 2008.

by the company.¹⁰⁹ The recognition by courts of the legality of such an agreement might indeed lead to imposing direct obligations under the international labour standards on companies. It should however be noted that some of these agreements specifically include a “peace clause” which prevents the union from appealing to lodging a complaint before any judicial authority before the exhaustion of all internal mechanisms in place to ensure a friendly settlement of the dispute.

The lack of clear legal status of these agreements may become a problem for companies in the future. “Such a risk is less linked to a potential conflict between the signatory parties insofar as the IFAs themselves may define special dispute settlement mechanisms without involving the courts, than to a potential conflict with a third party, be it an NGO or an individual citizen”.¹¹⁰

Framework agreements are mainly a means of transnational social dialogue within the company itself and may contribute to the resolution of disputes between workers and employers in particular with regard to respect for labour rights and human rights. Some agreements set forth the possibility for other stakeholders to denounce a breach before the internal grievance mechanism, but this is rare. In any case, NGOs or victims’ representatives aware of human rights violations involving a company that has signed an IFA should contact the global union federation or its local affiliate in order to bring the matter to the attention of the internal committee in charge of implementing the agreement.

ADDITIONAL RESOURCES

- **A full list of IFAs can be accessed here:**
www.global-unions.org/-framework-agreements
- **IndustriALL, Global Framework Agreements**
www.industrialunion.org
- **UNI Global Union, Global Framework Agreements**
www.uniglobalunion.org
- **Orse (Study Centre for Corporate Social Responsibility)**, which includes resources such as guidelines on engagement practices with trade-unions (conditions of negotiation, signature and implementation of an IFA, listing the involved actors and the best practices).
www.orse.org
- **Dimitris Stevis**, International Framework Agreements and Global Social Dialogue: Parameters and Prospects, Employment Sector Employment Working Paper no. 47, ILO, 2010.

¹⁰⁹ International Organisation of Employers, International Framework Agreements, An Employer’s Guide, Update version, August 2007.

¹¹⁰ A ndré Sobczak, *Legal Dimensions of International Framework Agreements in the Field of Corporate Social Responsibility*, in *Relations Industrielles / Industrial Relations*, vol. 62, n° 3, 2007, p. 466-491.

PART III

Using the voluntary commitments of companies as a basis for legal action

Consumer protection legislation can be used against business enterprises for denouncing “unfair commercial practices”, which include misleading and aggressive practices on the part of the enterprise, in particular in advertising and marketing. Public commitments – albeit voluntary – by enterprises in matters of social responsibility that are not fulfilled can to a certain extent be considered to be unfair commercial practices, as the enterprise hopes to gain commercial benefits vis-à-vis consumers by deceiving them.

Legal actions against multinational corporations based on misleading advertising are generally brought not by victims in the host country, but by NGOs, in particular consumer organisations based in the country of origin of the company. They can, however, have a positive impact on the activities of the multinational corporation abroad. It would produce a very negative image if companies that had made public commitments were to back down for fear of court action for unfair commercial practices. For companies that are conscious of the power of groups of consumers, the risk of being sued for such marketing and advertising practices is a real and tangible one. Such legal instruments should therefore prove very useful in helping NGOs to make companies do what they promised to do, especially as the law on commercial practices is quite explicit, whereas the legal framework in which victims can lodge a complaint regarding human rights violations committed abroad is far from satisfactory, as is shown in section II.

What is misleading advertising?

The European Directive 2005/29/CE of May 11, 2005 concerning unfair business-to-consumer commercial practices gives a definition of misleading commercial practice:¹¹¹

According to the Directive, misleading advertising is any advertising which, in any way, including in its presentation, is capable of:

- deceiving the persons to whom it is addressed;
- distorting their economic behaviour; or
- as a consequence, harming the interests of competitors.¹¹²

Article 6.1. A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or [...] deceives or is likely to deceive the average consumer [...] and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise.

2. A commercial practice shall also be regarded as misleading if [...] it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

[...]

- b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:
 - i) the commitment is not aspirational but is firm and is capable of being verified, and
 - ii) the trader indicates in a commercial practice that he is bound by the code.

This Directive has been transposed in the Member States of the European Union.

A few national examples...

France

Article L.121-1 of the Consumer Code stipulates: “Advertising comprising, in whatever form, allegations, indications or presentations that are false or likely to deceive and that bear on one or several of the following factors, is prohibited: existence, nature, composition, substantial qualities, content of active agents, species, origin, quantity, mode and date of manufacture, properties, price and conditions of sale of goods or services advertised, conditions of use, results that can be expected

¹¹¹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>

¹¹² European Commission, Misleading advertising, <http://ec.europa.eu>

from their utilisation, reasons and methods of sale or of provision of services, scope of the advertiser's commitments, identity, qualities or skills of the manufacturer, retailers, promoters or providers of services".

This article applies to both traders and individuals, regardless of the advertising media concerned. Before the re-writing of the definition of misleading commercial practices, the offence of misleading advertising was established without having to prove intent to deceive the consumer. However, according to a ruling by the criminal chamber of the *Cour de Cassation* on December 15, 2009,¹¹³ it would appear that intent is now required for the offence of deceptive advertising to be established. For advertising to be reprehensible it must be untruthful (containing untruthful allegations regarding the characteristics listed in Article L 121-1) and deceptive (of such a nature as to mislead the consumer).

➔ **Monsanto v. Eaux et Rivières de Bretagne and UFC-Que choisir? (2009)**¹¹⁴

On October 6, 2009 the Cour de cassation confirmed the conviction of Monsanto for untruthful advertising of its herbicide Round Up, sold as being "biodegradable" and leaving the "soil clean". Following the complaint lodged in particular by the associations Eaux et Rivières de Bretagne and UFC-Que choisir, in January 2007 the Lyon criminal court sentenced Monsanto to a 15,000€ fine and the publication of the judgement in the newspaper *Le Monde* and in a gardening magazine, for untruthful advertising. In October 2008 the Lyon Court of appeal confirmed the ruling of the lower court, invoking "a presentation (on the packaging of the product) that eludes the potential danger by using reassuring language and that misleads the consumer".¹¹⁵ On October 6, 2009 the Cour de cassation dismissed Monsanto's appeal, thereby making definitive the sentencing to a fine of 15,000€ for "untruthful advertising".

➔ **French NGOs file a complaint against global retailer Auchan**

In April 2014, three NGOS (Collectif Ethique sur l'étiquette, Peuples Solidaires and Sherpa) filed a complaint in Lille, France against the supermarket Auchan alleging the company used misleading advertisements regarding the conditions in which its clothing was produced. The plaintiffs highlight that the company has made public statements regarding its commitment to social and environment standards in its supply chain. Auchan has denied the claims.

The NGOS allege that Auchan lied to its customers about working conditions at its suppliers abroad after labels from its "In Extenso" clothing range were found in the rubble of the Rana Plaza factory in Bangladesh that collapsed in April 2013, killing thousands of workers and injuring hundreds. The supermarket has denied placing orders at the Rana

¹¹³ Cass.Crim., December 15, 2009, n° 09-89.059

¹¹⁴ For more information, see Blandine Rolland "Environmental information: convictions for untruthful advertising", *Journal des accidents et des catastrophes*, Actualité juridique, JAC 95, n°104, May 2010

¹¹⁵ Free translation

Plaza factory and said it was the victim of “concealed subcontracting”. Since then, it says it has taken steps, including signing the “Fire and Safety Agreement” aiming at improving safety measures in Bangladesh’s garment factories.

In May 2014, the prosecutor’s office in Lille launched a preliminary investigation. In January 2015, the case was dismissed on the grounds of lack of sufficient evidence from the investigation report to prove the “misleading” character.

In June 2015, the 3 NGOs filed a new complaint as civil parties, bringing new elements based on findings of a mission to Bangladesh in December 2014. A judge has been appointed to the instruction after the complaint was filed and the case is pending.¹¹⁶

United States

Advertising is regulated by the Federal Trade Commission, a government agency charged with prohibiting “unfair or deceptive commercial acts or practices”.

The aim is prevention rather than punishment. A typical sanction is to order an advertiser to stop acting illegally, or to publish additional information in order to avoid the risk of deception. Corrective advertising may also be imposed. Fines or prison sentences are not contemplated, except in the rare cases in which an advertiser refuses to obey an injunction to put an end to his acts. Current legislation defines false advertising as a “means of advertisement other than labelling, which is misleading in a material respect; and in determining whether an advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal material facts in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.”

➔ **Federal Trade Commission v. Wellness Support Network Inc. (2010)**¹¹⁷

In October 2010, FTC challenged claims for the defendants’ Diabetic Pack and Insulin Resistance Pack. The defendants touted the Diabetic Pack as a treatment for diabetes and advertised primarily online relying on consumer testimonials.

¹¹⁶ Case extract from Business and Human Rights Resource Centre, Auchan lawsuit (re garment factories in Bangladesh), <http://business-humanrights.org>

¹¹⁷ Federal Trade Commission, www.ftc.gov

The FTC asked a federal judge to permanently bar the company from making deceptive claims and to require the defendants to provide refunds to consumers. The U.S. Court entered the final judgement and order on February 19, 2014.

A federal court ruled in favour of the FTC and has ordered the company to pay nearly \$2.2 million. The FTC will reimburse the fund to the consumers. Furthermore, the court has prohibited the company –Wellness Support Network Inc.- from claiming without rigorous scientific proof that their supplements would treat and prevent diabetes.

➔ **Eradicating slavery in seafood Industry supply chain – Nestlé case before U.S. jurisdictions (Melanie Barber, et al. v. Nestle USA Inc., et al.)**

Following reports from the media and NGOs that certain products such as shrimp and pet food are linked to inhumane working conditions,¹¹⁸ Nestle SA launched an investigation in December 2014 into the working conditions in its seafood supply chain. This investigation confirmed the findings of The Associated Press that slave-made products enter the US as part of Nestlé's supply chain.¹¹⁹

In August 2015, a group of pet-food consumers filed a class-action lawsuit in the federal tribunal of California against Nestlé claiming "Nestlé is obligated to inform consumers that some proportion of its cat food products may include seafood which was sourced from forced labour."¹²⁰ The plaintiffs alleged that in failing to disclose that some of the ingredients in its cat food were produced as a result of forced labour, Nestlé violated California's Unfair Competition Law, the California Consumers Legal Remedies Act, and the False Advertising Law. According to court documents, the Thai Union Frozen Products PCL – a thai network of small fishing ships –, provides its catches to Nestlé. "Both parties [PCL and Nestlé] acknowledge that some proportion of the small fishing ships use forced labour".¹²¹

In January 2016 this demand filed by consumers against Nestlé was rejected. Judges considered that California's Transparency in Supply Chain Act only imposes an obligation on companies to provide information (through their web-page or otherwise) on the efforts the company has undertaken to eradicate slavery and human trafficking from their supply chain. An appeal has been filed against this decision.

¹¹⁸ Affectio Mutandi, "Des esclaves pour produire nos crevettes: Tout le modèle des low-cost à revoir", 18 June 2014, available at: <http://affectiomutandi.com>

¹¹⁹ Associated Press, "Nestlé confirms labor abuse among its Thai Suppliers", 23 November 2015, available at: www.ap.org

¹²⁰ *Melanie Barber, et al. v. Nestle USA Inc., et al.*, Case No. 8:15-cv-01364, in the U.S., C.D. Cal., Southern Division.

¹²¹ Legal Newslne, "Plaintiff loses challenge to Calif. law in forced labor case over Fancy Feast, appeal to Ninth Circuit", 27 January 2016, available at: <http://legalnewslne.com>

Germany

The German law on unfair competition (UWG)¹²² also covers misleading advertising, on the grounds that it gives the announcer an undue competitive advantage.

Article 3 of the UWG specifies;

“Any person who, in the course of trade and for the purposes of competition, makes misleading statements concerning business circumstances, in particular the nature, the origin, the manner of manufacture or the pricing of individual goods or commercial services or of the offer as a whole, price lists, the manner or the source of acquisition of goods, the possession of awards, the occasion or purpose of the sale or the size of the available stock, may be enjoined from making such statements.” Article 4-1 deals further with consumer protection: “Any person who, with the intention of giving the impression of a particularly advantageous offer, makes statements which he knows to be false and liable to mislead in public announcements or communications intended for a large number of persons, concerning business circumstances, in particular the nature, the origin, the manner of manufacture or the pricing of goods or commercial services, the manner or source of acquisition of goods, the possession of awards, the occasion or purpose of the sale or the size of the available stock, shall be liable to imprisonment of up to two years or a fine.”

Like other European countries (the United Kingdom in particular), German legislation allows groups of consumers to bring actions against advertising strategies that have deliberately misled consumers in order to incite them to buy. Also, although this does not appear in the legislation, in matters of misleading advertising the associations have another instrument at their disposal, the *Abmahnverfahren*. By this means, they can bring an action against traders. However, before doing so, they must ask the trader to cease the unfair practice. The trader can accede to the request and sign a declaration (*Unterwerfungserklärung*) by which he is obliged to cease the unfair practice and to pay a fine in case of violation.

→ Hamburg Customer Protection Agency v. Lidl (2010)¹²³

The European Center for Constitutional and Human Rights (ECCHR), jointly with the Clean Clothes Campaign (CCC), supported the Customer Protection Agency in Hamburg by filing a complaint against Lidl on April 6, 2010. In the application, Lidl is accused of deceiving its customers concerning compliance with social and labour standards in its suppliers' factories. In its brochures Lidl stated “At Lidl, we contract our non-food orders only with selected suppliers and producers that are willing to undertake and can demonstrate their social responsibility. We categorically oppose every form of child labour, as well as human and labor rights violations in our production facilities. We effectively ensure these standards.”

¹²² Act Against Unfair Competition of 7 June 1909 (amended on 22 June 1998) www.wipo.int

¹²³ For more information: ECCHR, “Lidl Retracts Advertisements, www.ecchr.de

Lidl is therefore accused of deceiving its customers and is gaining an unfair competitive advantage. This is the first time a German company is sued for poor working conditions. Only ten days after the filing of the complaint, the company admitted the truth of the allegations against it in respect of human rights abuses in Bangladesh, and had to revise its advertising strategy. On 14 April 2010, Lidl agreed to withdraw the public claims and advertisements that its goods were being produced under fair and decent working conditions. A consent decree was filed with court to memorialise this agreement. Furthermore, Lidl is no longer permitted to refer to its membership in the Business Social Compliance Initiative (BSCI) in its advertising materials.

HOW TO FILE A COMPLAINT FOR MISLEADING ADVERTISING?

- Contact a consumer association or a consumer information centre in the country in which the multinational is based, or in which it engages in advertising or marketing campaigns that are considered to be deceptive.

The list of consumer associations in Europe can be consulted at:

http://ec.europa.eu/consumers/empowerment/cons_networks_en.htm#national

Consumer associations in 115 countries have formed Consumers International.

Map of member organisations at:

www.consumidoresint.cl/globalmap.asp

www.consumersinternational.org

The European consumer Center has branches in the European countries for informing consumers of their rights and available recourses:

http://ec.europa.eu/consumers/ecc/contact_en.htm

- File a complaint. In most countries bodies have been set up for dealing with disputes between consumers and customers by hearing complaints with a view to reaching an out-of-court agreement. It can be an ombudsman, a consumer commission or a sectoral commission. Consumers can also file a complaint with a court for individual or collective harm. Class actions or joint actions through consumer associations are often well suited for such situations.

* * *

The advantage of legal actions against misleading advertising that are based on consumer protection legislation against unfair commercial practices, is that in many countries such legislation is well defined, making it possible to uncover doubtful human rights and environmental practices on the part of companies. Unfortunately, however, they do not enable victims of human rights abuses to obtain justice: the

courts do not punish the acts of the companies that lead to human rights violations, only their advertising and marketing practices connected with their commitment to act responsibly. All the same, such initiatives can have a positive impact on corporate behaviour, as companies are concerned about their image in the countries where their main consumers live. In such matters an alliance between human rights organisations and consumer associations is essential.

Furthermore, certain legal developments tend to confirm that for business enterprises, taking into account environmental, social and governance criteria (ESG) does not merely concern their own voluntary initiatives, but is well and truly part of their responsibility. More and more enterprises recognise this, either by joining a variety of corporate social and environmental responsibility initiatives, or by adopting a code of conduct. In some cases companies even run the risk of criminal liability if they fail to take into account certain principles, in particular in connexion with sustainable development.¹²⁴ And indeed voluntary commitments on the part of companies in terms of corporate environmental and social responsibility are often cited by plaintiffs in court cases in which enterprises are accused of human rights violations, as elements of proof to show the context in which their activity can be qualified as being contrary to generally accepted standards of behaviour. In France, notably, the Dassault case (in which a trade union questioned the legal status of the internal code) gave rise to considerable legal debate regarding the degree of obligation resulting from a “code of conduct” adhered to by the company and that it had undertaken to comply with. The case was decided on December 8, 2009 by a ruling of the Cour de cassation,¹²⁵ and effectively demonstrated that such undertakings could provide grounds for invoking corporate liability, either if the company disregarded the obligations entered into, or if, under cover of a so-called code of “ethics”, it violated the fundamental rights and liberties of its employees. Numerous and rapid developments are taking place in the area of corporate social responsibility. In the coming years it will be important to monitor the situation closely since it represents an additional instrument that can be used for greater corporate accountability.

Moreover, the controls instituted by parent companies over subsidiaries on commercial partners in relation to the respect of codes of conduct contribute to demonstrating the capacity of the parent company to influence other legal entities. In the Shell Nigeria case before Dutch Courts, Shell’s environmental policy and compliance verification system was one element used to determine the influence of the multinational over its Nigerian subsidiaries (see section II, part I, chapter III).

¹²⁴ In this respect, see the article by Juliette Mongin and Emmanuel Daoud, *Is criminal law still alien to the concept of ‘sustainable development’? This is by no means certain!*, published in *Pratiques et Professions*, www.vigo-avocats.com

¹²⁵ Cass. Soc. 8 December 2009, n°08-17.091

CONCLUSION

As illustrated throughout the different sections of this guide, the range of mechanisms that are available to victims of corporate-related abuses is diverse. From invoking States' responsibilities before the international human rights protection system and corporations' liability before domestic courts, to initiating mediation processes with ombudsmen or OECD National Contact Points instances, recourse mechanisms may take various forms and result in different types of outcomes. However, the real question remains: can they effectively bring justice to victims? Do they fulfil victims' right to an effective remedy? Do they offer adequate sanction to change corporate behaviour and help deter future violations?

This guide, although highlighting potential avenues, also reminds us that to date, none of the existing mechanisms can truly live up to the meaning of an effective remedy.

Enshrined in international human rights law, the right to an effective remedy entails both a procedural and substantive dimension. Put simply, victims should not only have access to justice, but they are also entitled to reparation measures. These may take different forms such as restitution, rehabilitation, compensation, satisfaction and/or guarantees of non-repetition.

The obstacles faced by victims and their legal representatives in holding companies liable and seeking to invoke extraterritorial obligations of States, as illustrated in the section dealing with civil and criminal liability, remain numerous, complex and should not be underestimated. Some pieces of legislation such as in Canada, the US and Europe do indeed provide for opportunities to initiate legal proceedings to obtain civil or criminal sanctions for damages caused by or with the complicity of companies. Yet they should not be seen as a panacea.

Simply obtaining the judge's acceptance to even consider a case can represent years of litigation with lawyers having to deal with reluctant judges and where the probabilities of dismissal are high (mainly due obstacles such as the *forum non conveniens* doctrine). Other legal hurdles such as proving the involvement of the parent company in the behaviour of its subsidiary ("piercing the corporate veil") require access to information that lawyers often do not have and which is further impeded by legal strategies used by corporations to avoid liability. Economic obstacles caused by the inequality of arms between the parties remain one – if not the most- important obstacle. On the one hand, corporations will most often not hesitate to invest millions of dollars in legal counsel and use every possible strategy to discredit experts, witnesses and even judges, even more so if the case bears the

potential to create a precedent. On the other hand, affected individuals and peoples, in vast majority, can be marginalized, vulnerable, poor people with very limited financial means. Legal representatives willing to take on their case with all the risks it entails (including risk to their physical security and risk of bankruptcy) are hard to find. The fact that, under certain jurisdictions, victims may have to bear the costs of a lawsuit if they lose the case certainly presents an insurmountable obstacle. In the end, lawsuits against corporations often end up in out-of-court settlements, whose conformity with human rights standards is questionable and which in turn impede the development of a much needed jurisprudence.

Access to non-judicial and voluntary mechanisms, is undoubtedly easier than to judicial mechanisms. Yet, not only are they often characterised by lengthy procedures, but they also tend to present inherent flaws that prevent them from offering adequate reparation.

Quasi-judicial intergovernmental mechanisms established by the International Labour Organisation, the United Nations or the regional bodies are both legitimate and competent in addressing a range of complex human rights issues. They can, in some instances, represent the only mechanism that victims seeking justice can turn to. Yet, the means with which these bodies operate remain absurdly low. Their lack of human and financial resources is coupled with the lack of power to ensure their decisions and recommendations are enforced. To date, they remain ill-equipped to directly address the responsibility of non-state actors. It is hoped that the current intergovernmental process towards the establishment of an international binding instrument on human rights, multinational corporations and other business enterprises will contribute to clarify and further codify existing obligations and ensure redress for corporate-related human rights abuses.

For their part, mediation mechanisms are currently attracting a lot of attention. The OECD Guidelines now include language on human rights (including in the supply chain) and there is a strong push from civil society calling to reform the National Contact Points to ensure greater independence and efficiency. However, even if rendered more efficient, they would still lack enforcement powers, in addition to being questions as legitimate bodies to deal with cases of human rights violations. Mediation mechanisms should be improved by drawing from victims' perspective and human rights principles. As for National Human Rights Institutions, we are witnessing an increased interest on their part to consider corporate-related cases as part of their mandate. Such developments could serve to reinforce and build on the work of the UN Treaty Bodies and Special Procedures and to further clarify the respective responsibilities of States and companies. Yet, NHRIs face the same obstacles as intergovernmental mechanisms and most of them are still not vested with the mandate to receive individual communications on these issues.

Financial institutions' mechanisms such as the World Bank Inspection Panel and regional development banks complaint mechanisms can eventually represent interesting avenues for victims affected by mega-projects funded by these institutions. In these cases, access to complaint mechanisms turn out to be hampered not by heavy procedural requirements, but rather because they remain largely unknown by groups that qualify as claimants. In addition, they have faced wide criticism for their apparent lack of good faith (notably characterized by the lack of resources and relevant expertise) and their inability or unwillingness to consider indirect and long-term damages caused by the projects they support. Access to information, awareness-raising and the monitoring of corrective action plans remain areas where critical improvement is required. Nevertheless, and as a result of public pressure, most of them are going through reform processes. Affected groups should seize these opportunities to demand greater accountability from these institutions. As far as private banks are concerned, means of influence for civil society remain weak and limited to the bank that have agreed to the Equator Principles..

Finally, mechanisms voluntarily set up by States and companies present potential to contribute to the prevention of future violations by looking to change corporate behaviour and address human rights issues companies face in particular concerning purchasing practices and procurement policies. However, they remain limited in scope and, if not coupled with legal incentives and structural reforms at the State level, they may only lead to short-term insufficient or inadequate results.

Last but not least, the scenario set out in this guide relates to human rights violations caused directly or indirectly by the operations of multinational corporations mostly based in the OECD countries and operating in third countries. Yet, economic actors from emerging countries are playing an increasingly important role in the global economy, be they State-owned enterprises or multinational corporations heavily involved in developing countries in sensitive industrial sectors including mining and infrastructure development. This represents an additional challenge to those seeking justice, particularly where both home and host governments collude with the company. This raises serious concerns as to how adapted (or rather ill-adapted) current recourse mechanisms are, and reinforces the need for adequate universal mechanisms guaranteeing that all economic actors may be held accountable.

The current process taking place within the United Nations regarding the adoption of a binding instrument on human rights, multinational corporations and other business enterprises intends to address some of these challenges. The adoption of such instrument would build on the achievements of the former UN Secretary-General Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, notably the UN Guiding Principles on Business and Human Rights (UNGPs). The UNGPs should be effectively implemented and be accompanied by the reinforcement of existing standards and enforcement mechanisms. The June 2014 Human Rights Council resolution establishing an intergovernmental working group mandated to elaborate a binding instrument on

human rights and businesses echoed a global call from hundreds of civil society organisations and social movements around the world. These organisations, many of which remain active through the Treaty Alliance, will have a crucial role to play to continue pushing for the elaboration of a robust instrument providing adequate protection and reparation to victims of corporate abuse, as well as to monitor its effective implementation.

Other recent interesting developments include the adoption in March 2016 of a non-binding instrument on business and human rights by the Council of Europe, which contains decisive recommendations on access to justice for victims of corporate human rights abuse. In this case as well, one of the critical challenges remains the adequate implementation of the Recommendation by the Council of Europe's 47 member States.

In our view, addressing the well-recognised challenges linked to corporate accountability calls for the necessity to go beyond the existing mechanisms.

There continues to be an urgent need to acknowledge the current state of affairs and the huge barriers victims still face in accessing and obtaining justice for violations and damages suffered; recognising the inherent tensions between the search for profit and the respect for human rights; and finally, admitting that governance gaps are and will most probably remain a reality in most cases.

Faced with such a situation and in the absence of effective legal remedies, victims and NGOs have had to find ways to claim their rights, such as by setting up their own Peoples' Tribunals. By being judge and jury of the multinational corporations, victims are sending a strong and symbolic message: the lack of justice when it comes to protecting individuals against corporate-related violations and the urgency for the international community to act.

Various proposals have been made to suggest the creation of an international court with adjudicative powers over crimes committed by companies. Others have suggested the modification of the Rome Statute of the International Criminal Court with a view to incorporating in the Court's jurisdiction crimes committed by legal persons. Others insist on the need to – at a very minimum- apply the actual provisions of the Rome Statute to individuals suspected of crimes of complicity committed on behalf of a company. Various NGOs raised the need for a UN body (such as the UN Working Group on business and human rights for example) tasked with ensuring the implementation of the UNGPs as well as to receive and examine communications from victims of alleged violations. This mechanism appears essential to contribute to both closing the accountability gap and establishing principles on a case-by-case basis. In addition, the mechanism would contribute to interpreting standards and developing jurisprudence which would allow both States and corporations to better understand the scope of their respective legal responsibilities.

These are not idealistic aspirations: they are legitimate demands grounded in reality. They represent credible claims that could be seen as complementary to reforms that are either underway, contemplated or proposed regarding the use of direct extraterritorial jurisdiction. They also relate to legal and political domestic measures with extraterritorial dimensions in different areas such as anti-corruption, securities law and environmental law. They represent proposals that are in line with the challenges posed by economic globalization and the harm victims suffer. The guide should be seen as a tool to fuel discussions around these proposals. It is meant to be a foundation upon which victims can rely to claim their rights and ask for greater justice.

The overall portrait this guide draws of available recourse mechanisms does not necessarily depicts a hopeful picture for victims. Yet it is a call for action. As rightly evoked by Olivier De Schutter, it is an invitation to make use of these mechanisms in order to render them more effective and to obtain results for those affected. It is also a call for environmental NGOs, human rights defenders, social activists, trade unionists, public interest lawyers or attorneys working pro-bono to work hand in hand in the best interest of the victims in order to not only challenge the current paradigm, but to bring about change.

* * *

GLOSSARY

ACHPR.....	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ADB	Asian Development Bank
AfDB.....	African Development Bank
AGM	Annual General Meeting
AMU.....	Arab-Maghreb Union
ATCA.....	Alien Tort Claim Act
AU.....	African Union
BIAC.....	Business and Industry Advisory Committee
BIT	Bilateral Investment Treaty
CAO.....	Compliance Advisor Ombudsman
CAT.....	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
CCPR	Committee on Civil and Political Rights
CEDAW	Convention on the Elimination of Discrimination Against Women / Committee on the Elimination of Discrimination Against Women
CEN-SAD.....	Community of Sahel-Saharan States
CEO.....	Chief Executive Officer
CERD	Committee on the Elimination of all form of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFA	Committee on Freedom of Association
CIME.....	Committee on International Investment and Multinational Enterprises
CMW	Committee on Migrant Workers
COE.....	Council of Europe
COFACE	Compagnie Française d'Assurance pour le Commerce Extérieur
COMESA	Common Market of Eastern and Southern Africa
COP.....	Communication on Progress
CRC.....	Convention on the Rights of the Child / Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities / Committee on the Rights of Persons with Disabilities
CSR.....	Corporate Social responsibility
EAC.....	East African Community
EBRD	European bank for Reconstruction and Development
EC	European Community
ECA(s)	Export Credit Agency(-ies)
ECCAS	Economic Community of Central African States
ECGD	Export Credit Guarantee Department
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC.....	Economic and Social Council
ECOWAS	Economic Community of West African States

ACHPR.....African Commission on Human and Peoples' Rights
 ACRWC.....African Charter on the Rights and Welfare of the Child
 ADB.....Asian Development Bank
 AfDB.....African Development Bank
 AGM.....Annual General Meeting
 AMU.....Arab-Maghreb Union
 ATCA.....Alien Tort Claim Act
 AU.....African Union
 BIAC.....Business and Industry Advisory Committee
 BIT.....Bilateral Investment Treaty
 CAO.....Compliance Advisor Ombudsman
 CAT.....Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
 CCPR.....Committee on Civil and Political Rights
 CEDAW.....Convention on the Elimination of Discrimination Against Women /
 Committee on the Elimination of Discrimination Against Women
 CEN-SAD.....Community of Sahel-Saharan States
 CEO.....Chief Executive Officer
 CERD.....Committee on the Elimination of all form of Racial Discrimination
 CESCR.....Committee on Economic, Social and Cultural Rights
 CFA.....Committee on Freedom of Association
 CIME.....Committee on International Investment and Multinational Enterprises
 CMW.....Committee on Migrant Workers
 COE.....Council of Europe
 COFACE.....Compagnie Française d'Assurance pour le Commerce Extérieur
 COMESA.....Common Market of Eastern and Southern Africa
 COP.....Communication on Progress
 CRC.....Convention on the Rights of the Child / Committee on the Rights of the Child
 CRPD.....Convention on the Rights of Persons with Disabilities / Committee on the Rights
 of Persons with Disabilities
 CSR.....Corporate Social responsibility
 EAC.....East African Community
 EBRD.....European bank for Reconstruction and Development
 EC.....European Community
 ECA(s).....Export Credit Agency(-ies)
 ECCAS.....Economic Community of Central African States
 ECGD.....Export Credit Guarantee Department
 ECHR.....European Court of Human Rights
 ECJ.....European Court of Justice
 ECOSOC.....Economic and Social Council
 ECOWAS.....Economic Community of West African States
 ECSR.....European Committee on Social Rights
 EDC.....Export Development Canada
 EIB.....European Investment Bank
 EITI.....Extractive Industries Transparency Initiative
 EPFI.....Equator Principles Financial Institutions

ESC.....European Social Charter
 ESG.....Environmental Social and Governance issues
 ETIEthical Trading Initiative
 ETUCEuropean Union Trade Confederation
 FIDH.....International Federation for Human Rights
 FLA.....Fair Labour Association
 FLO.....Fair Trade Labeling Organisation
 FSIA.....Foreign Sovereignty immunities Act
 FTCA.....Federal Tort Claim Act
 FWFFair Wear Foundation
 GFA(s)Global Framework Agreement(s)
 GONGO(s)....Governmental Non Governmental Organisation(s)
 GRIGlobal Reporting Initiative
 GUFGlobal Union Federation
 HRCHuman Rights Council
 IACHRInteramerican Commission on Human Rights
 I/A Court H.R. .Interamerican Court of Human Rights
 IBRD.....International Bank for Reconstruction and Development
 IC.....Investment Committee
 ICCPR.....International Covenant on Civil and Political Rights
 ICERDInternational Convention on the Elimination of all form of Racial Discrimination
 ICESCR.....International Covenant on Social and Cultural Rights
 ICJ.....International Court of Justice
 ICMCInternational Council on Mining and Metals
 ICRMWInternational Convention on the Protection of the Rights of all Migrants
 Workers and their families
 ICSIDInternational Center for Settlement of Investment Disputes
 IDA.....International Development Association
 IDB.....Inter-American Development Bank
 IFA(s)International Framework Agreement(s)
 IFCInternational Finance Corporation
 IFI(s).International Financial institution(s)
 IGAG.....Intergovernmental Authority for Development
 ILOInternational Labour Organisation
 IMF.....International Monetary Fund
 INGO(s)International Non Governmental Organisation(s)
 IOEInternational Organisation of Employers
 ISOInternational Organisation for Standardization
 KNHRCKenyan National Human Rights Commission
 KPCS.....Kimberley Process Certification Scheme
 MIGAMultilateral Investment Guarantee Agency
 MNE(s)Multinational Enterprise(s)
 NCP(s)National Contact Point(s)
 NEPAD.....New Partnership for Africa's Development
 NGO(s).....Non Governmental Organisation(s)

NHRI(s).....National Human Rights Institution(s)
 OAS.....Organisation of American States
 OAUOrganisation of the African Unity
 OECDOrganisation for Economic Co-operation and Development
 OHCHROffice of the High Commissioner for Human Rights
 OPIC.....Overseas Private Investment Corporation
 PRIUnited Nations Principles for Responsible Investment
 PS.....Performance Standards
 REC.....Regional Economic Communities
 RICO.....Racketeer Influenced and Corrupt Organisations
 SADCSouthern Africa Development Community
 SAHRC.....South African Human Rights Commission
 SAISocial Accountability International
 SRISocially Responsible Investment
 TNC(s)Transnational Corporations
 TUACTrade Union Advisory Committee
 TVPATorture Victim Protection Act
 UDHR.....Universal Declaration of Human Rights
 UNUnited Nations
 UNESCOUnited Nations Organisation for Education Science and Culture
 UNGC / GCUnited Nations Global Compact
 UNICEUnion of Industrial and Employers' Confederations of Europe
 UNSC.....United Nations Security Council
 UPRUniversal Periodic Review
 VPs.....Voluntary Principles
 WBWorld Bank
 WRC.....Worker Rights Consortium

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Gardons les yeux ouverts

la FIDH

Nulla vel odio vel quam consectetur aliquam nec a massa. Sed gravida orci diam, ac volutpat ligula porta et. Donec viverra, justo a hendrerit blandit, lectus nulla cursus ex, vitae aliquam arcu tellus id libero. Ut posuere bibendum nisl sit amet commodo

Partenaire 1

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Partenaire 2

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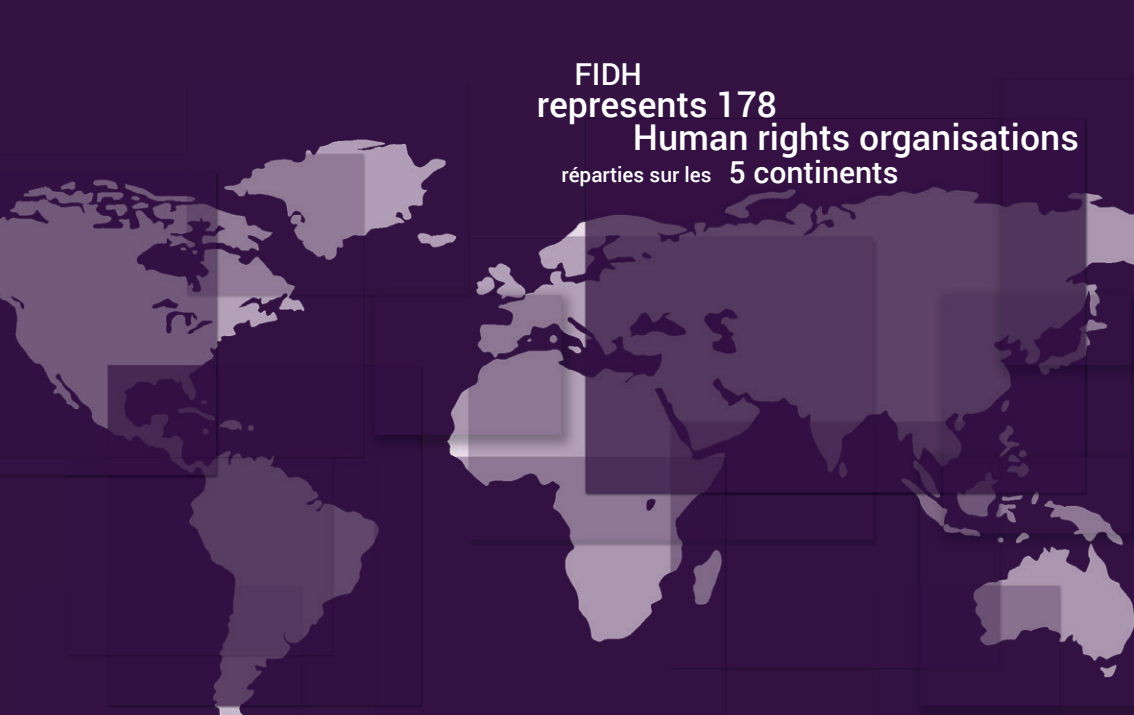
Partenaire 3

Bibendum nisl sit amet commodo. Sed gravida orci diam, ac volutpat ligula porta et. Donec viverra, justo a hendrerit blandit, lectus nulla cursus ex.

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ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

A universal movement

FIDH was established in 1922, and today unites 178 member organisations in more than 100 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

An independent organisation

Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.