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International Federation for Human Rights

CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS ABUSES

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



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Rights in Action

The guide prepared by the International Federation for Human Rights is unique. 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 Organization 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 quadriennial 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 Organization'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 US 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 US. This is by all means a spectacular development. But none of it 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.

In sum, this guide to victims 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 the 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



➤ A boy fixes goat skins to dry in front of a lake of untreated tannery waste in Bangladesh

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Director of Publication: Souhayr Belhassen

Editor: Antoine Bernard

Authors: Véronique Van Der Plancke, Valérie Van Goethem, Geneviève Paul, Elin Wrzoncki

Coordination: Geneviève Paul, Elin Wrzoncki

Graphic design: Bruce Pleiser

Photographs: Natalie Ayala, Parker Mah, Daniel Lanteigne, Ruben Dao

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INTRODUCTION

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 Western 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. Over 250 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 or serious environmental damage, directly linked to the economic activities of multinational corporations, are faced with major obstacles in seeking justice.

At the time of writing, an oil platform operated by BP was still leaking, after more than a month and millions of litres of oil spilling in the Gulf of Mexico, making its way to the Atlantic coast and already seen as one of the biggest environmental catastrophe of the century. In Latin America, union leaders are being shot for publicly claiming their rights, in Mexico, Colombia, Guatemala and in El Salvador. 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.

Twenty 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, a historic class-action lawsuit against the oil company Chevron is still pending 17 years after the initiation of legal proceedings and thousands of victims are still awaiting compensation for the damages suffered from water contamination. 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 the UN Special Representative on business and human rights, John Ruggie, remains a blatant reality. Corruption, lack of judicial independence, the unwillingness or inability of host States to ensure foreign companies operating in their territory respect environmental and social standards are only a few examples of these 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 multinationals 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. Various other strategies have been used in the past to seek justice. Civil society organisations have for instance set up innovative campaigns on various issues such as baby-milk marketing in developing countries, sweatshops

in the textile industry profiting multinationals or illicit diamond trafficking fueling 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 developing 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 held 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. Obstacles faced by victims when dealing with transnational litigation- numerous and important- are emphasized. While this section does not presume to provide an exhaustive overview of all existing legal possibilities, it highlights 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 it tends to be less the case with emerging countries); the volume of legal proceedings against multinationals headquartered 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 **directly** address the responsibility of companies. With a particular focus on the OECD Guidelines for Multinational Enterprises and the National Contact Points countries have set up to ensure respect of the guidelines, the section looks at the process, advantages and disadvantages of this procedure with a view to fuelling current intergovernmental discussions on the revision of the guidelines. 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 affected people by projects financed as a result of 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 projects they finance. All 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 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 second 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. An emerging trend, shareholder activism may represent a viable way to raise awareness of shareholders on violations that may be occurring with their financial support. Even more importantly, the increasing attention paid by investors (in particular institutional investors) on environmental, social and governance criteria can be a powerful lever.

Last but not least, the fifth section explores **voluntary initiatives** set up through multipartite, 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 conflict situations. Interestingly, such commitments may also be used as tools 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 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 contravening to 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 **company**, and the role it played, and 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.

③ 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, such as:

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 their 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, at what stage is the project?
- 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?

🕒 Step five – Identifying the risks for victims

- What are the risks that victims or their representatives face reprisals?

If desirable 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 other 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).

* * *

The 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 victims to claim their rights and to encourage the actors involved to share and exchange strategies on the outcomes of using these mechanisms with one overarching objective: to ensure victims of human rights violations can obtain justice, to which they are entitled, regardless of who committed the violation.

SECTION I

INTERGOVERNMENTAL
MECHANISMS

* * *



➤ Waorani woman and her child. The Yasuni National Park, ancestral Waorani territory, has been recognised by UNESCO as a biosphere reserve. Part of the territory is exploited by foreign extractive companies.

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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, 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.

Protocols were added to some of these instruments. These protocols are designed either to develop the protection of certain specific rights (such as system for prisons' visit in the case of the CAT Additional Protocol) or to create mechanisms enabling

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

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 Convention on the Rights of Persons with Disabilities of 13 December 2006.
- Optional Protocol to ICESCR of 10 December 2008, not yet entered into force.

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. FIDH supports the idea that states also hold **extraterritorial obligations**. 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 co-operation to help other realise these human rights. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights³ (ICESCR) contain similar 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.

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.

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**⁴, regardless of whether the private person can be prosecuted for the acts perpetrated.

There is at present **no convention dealing directly with the responsibility of non-state actors**, through which they could be called to account for their acts in violating human rights before United Nations mechanisms. However business is indirectly mentioned in human rights instruments as “organs of society”. The Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, drafted 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’s Special Representative on human rights and business (‘Special Representative’), was established to clarify the concepts and responsibilities of states and business enterprises. Mr. John Ruggie is currently the Special Representative⁵ (See below).

The Special Representative has submitted several reports. The latest was issued in April 2010. In his 2008 report, entitled “Protect, Respect, Remedy: a framework for Business and Human Rights”, John Ruggie proposes a framework based on 3 pillars: The obligation of the state to protect, the corporate responsibility to respect and access to remedies for victims of human rights violations. These general principles, although not enshrined in a legal instrument, are increasingly becoming more widely accepted.⁶

The obligation of the state 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

⁴ CCPR, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, General Comment No. 31, 26 May 2004, CCPR/C/21/Rev.1/Add.13, §8.

⁵ To access all the Special Representative’s publications and reactions to his work, see: Business & Human rights, “UN Secretary-General’s Special Representative on business & human rights”, www.business-humanrights.org/SpecialRepPortal/Home

⁶ For a critical analysis of the Special Representative’s framework, see for example: FIDH, “Human Rights and Business: Upholding Human Rights and Ensuring Coherence - Submission to the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises”, October 2009, www.fidh.org/

obligation, including the enactment of legislation. States are also expected to hold non-state actors accountable if they commit human rights violations. **The main point of debate relates to states' extraterritorial obligations.** In other words, the **obligation of states** where mother 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.

Corporate responsibility to respect

Although the idea that international legal obligations can be directly imposed on companies is still controversial, John Ruggie insists that at a minimum, **corporations should respect human rights.** In order to do so, Ruggie believes companies should exercise “due diligence”⁷. This responsibility to respect human rights is derived not only from legal obligations but also from the necessity for corporations to obtain, from the local community and other stakeholders, a social licence to operate. Many civil society organisations, including FIDH, believe business responsibilities should be further clarified and enshrined into an enforceable international legal framework.

Access to remedy

The Special Representative has acknowledged the need for victims of corporate-related human rights abuses to have far greater access to remedies at the national and international level. However NGOs remain concerned with the Special Representative's interpretation of the right to an effective remedy. In particular, this concern relates to its applicability in cases of abuses committed by non-state actors.⁸ NGOs maintain that under international law victims do have the right to an effective remedy, including the right to reparation, if they suffer human rights violations – be they committed by states or non-state actors.⁹

⁷ For an explanation of the “due diligence” concept, see Section II on Judicial Mechanisms.

⁸ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and human rights: Towards operationalizing the “protect, respect and remedy” framework*, 22 April 2009, A/HRC/11/13, § 88. In this report, the Special Representative affirms that: “While the State obligation applies to corporate abuse of all applicable human rights, it is unclear how far the individual right to remedy extends to non-State abuses”.

⁹ See notably ESCR-Net, Corporate Accountability Working Group, “Submission to the consultation on operationalizing the framework for business and human rights organized by the Office of the High Commissioner for Human Rights”, www2.ohchr.org/english/issues/globalization/business/docs/BHRSubmissions.pdf

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 the Member States' adherence to their international commitments:

1. **General comments**
2. **State reports**
3. **Inter-state complaints**
4. **Individual complaints**
5. **Inquiries or visits**
6. **Referral to the United Nations General Assembly**¹⁰

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.

Predominantly general comments are 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."¹¹

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,

¹⁰ For 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.

¹¹ CCPR, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, *op.cit.*

local communities, intergovernmental and non-governmental organizations, civil society organizations, 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.”¹²

CESCR – 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**. [...] [I]t 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.”¹³

CESCR – The Right to Work, General Comment No. 18

“The obligation to respect the right to work includes the responsibility of States Parties to prohibit forced or compulsory labour by **non-state actors**.

Private enterprises – national and multinational – while not bound by the Covenant, have a particular role to play in job creation, hiring policies and non-discriminatory access to work. They should conduct their activities on the basis of legislation, administrative measures, codes of conduct and other appropriate measures promoting respect for the right to work, agreed between the government and civil society. Such measures should recognize the labour standards elaborated by the ILO and aim at increasing the awareness and responsibility of enterprises in the realization of the right to work.”¹⁴

CESCR – The right to adequate food, General Comment No. 12

“The **private business sector – national and transnational** – should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society. [...] As part of their obligations to protect people’s resource base for food, States Parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food.”¹⁵

¹² 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.

¹³ 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.

¹⁴ CESCR, *The right to work*, General Comment No. 18, 24 November 2005, E/C.12/GC/18 (2006), §§ 25 and 52.

¹⁵ CESCR, *The right to adequate food*, General Comment No. 12, 12 May 1999, E/C.12/1999/5, §§ 20 and 27.

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 concerned¹⁶.

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.

🕒 Process and outcome

*Process*¹⁷

- 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 the 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 the government representatives can answer directly 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

¹⁶ CCPR, *Consolidated guidelines for State reports*, 26 February 2001, CCPR/C/66/GUI/Rev.2, § G.1.

¹⁷ 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. 21 and following.

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 the civil society.

The 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 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.¹⁸ 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 criticism that Committees can have on states which attach importance to their human rights reputation,

¹⁸ OHCHR, "The United Nations. Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies", *op.cit.*, p. 24.

- 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 years¹⁹).
- 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-up²⁰.

The Committees in action in corporate-related human rights abuses

CESCR – Concluding observations on the report submitted by Honduras

"15. The Committee is concerned about the lack of legislative and administrative measures by the State Party to control the negative effects of transnational companies' activities on the employment and working conditions of Honduran workers and to ensure compliance with national labour legislation. Examples of such negative impacts are the low level of wages and the substandard working conditions in the *maquilas* (assembly plants), in particular those employing primarily women workers."²¹

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 that the State Party 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)²² 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

¹⁹ 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.

²⁰ 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.

²¹ CESCR, *Concluding observations: Honduras*, 21 May 2001, U.N. Doc. E/C.12/1/Add.57.

²² CESCR, *Ecuador, Concluding observations*, 7 June 2004, E/C.12/1/Add 100, § 55.

Agreement) in order to ensure access to generic medicine and more broadly the enjoyment of the right to health for everyone in Ecuador.”²³

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 such as 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.

25. The Committee is alarmed at the extent of the environmental problems in the State Party and that **industrial leakage of harmful waste products** is such a severe problem in some regions that they could be correctly declared as environmental disaster areas.[...]

30. The Committee recommends that action be taken to protect the **indigenous peoples** from exploitation by **oil and gas companies**, and more generally that action be taken to ensure their access to traditional and other sources of food.”²⁴

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.”²⁵

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.

²³ CRC, *Ecuador, Concluding observations*, 13 September 2005, CRC/C/15/Add 262, § 21.

²⁴ CESCR, *Concluding observations: Russian Federation*, 20 May 1997, U.N. Doc. E/C.12/1/Add.13.

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

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

4. Individual complaints

④ Who can receive a complaint?

At present, **five of the nine Committees**²⁶ 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 CESCR, settling the difficult debate on the question of the “justiciability” of economic, social and cultural rights. 32 states have signed the Optional Protocol.²⁷ The mechanism will come into force after 10 ratifications.

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.”²⁸

²⁶ CCPR, CERD, CEDAW, CAT, CRPD. This will also apply to the CESCR, the CMW, and the Committee on Enforced Disappearances when in force. See table at the end of this part.

²⁷ UN, “UN Treaty Collection”, <http://treaties.un.org>

²⁸ For a further analysis, see M. Sepulveda and C. Curtis, “Are Extra-Territorial Obligations Reviewable Under the Optional Protocol to the ICESCR?”, *Nordisk Tidsskrift for Menneskerettigheter, Universitetsforlaget*, 2009, Vol 27, Nr.1, 54-63.

🔗 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.²⁹
- The state that is alleged to have violated the rights in question has accepted the competence of the Committee to accept individual complaints.³⁰

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.³¹ However, except in special cases, when a complaint is brought on behalf of a third party **written consent** must be obtained beforehand.³²

🔗 Under what conditions?

With some variations, all the Committees operate in accordance with the following principles:³³

- 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

²⁹ For a glossary of the terms applicable to treaty formalities, see: UN, “Treaty reference guide”, <http://untreaty.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/>

³⁰ 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.

³¹ For example in the event of a threatened extradition to a country where the person runs the risk of being tortured.

³² 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”.

³³ To get some idea of the differences between procedures, see table in appendix.

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

- The complainant must prove that he (or the person on whose behalf he is acting) is **personally and directly** affected by the acts, decisions or omissions of the state in question. General and abstract complaints are not admissible.
- In principle, the complaint should not be under consideration **in another international or regional mechanism**. There can however be some exceptions to this principle. For instance, it may be ruled that there is no duplication of procedure when a different individual is concerned, even if other parties to the domestic proceedings have referred the matter to other mechanisms of international settlement,³⁴ or if the legal arguments put forward are different.³⁵
- 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.
- **Domestic remedies must have been exhausted, unless detailed reasons are given why the general rule should not apply.**³⁶ This means that victims, or their representatives, must first refer their matter to the 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 national level to examine individual complaints in the first instance. In particular, Article 14 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**.

³⁴ CCPR, *Leirvag v. Norway*, Communication No. 1155/2003, 23 November 2004.

³⁵ CCPR, *Karakurt v. Austria*, Communication No. 965/2000, 4 April 2002.

³⁶ 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.

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 possible³⁷. 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.³⁸

HOW TO FILE COMPLAINT?

Although “model” complaint forms for communications are available online,³⁹ the petition does not have to be drawn up in any particular way – an ordinary letter is sufficient. 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, address, 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).
- 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.

³⁷ 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.

³⁸ CCPR, *Könye v. Hungary*, Communication No. 520/1992, 7 April 1994, § 6.4.

³⁹ A model complaint form for submitting a communication is proposed in OHCHR, “Complaints procedure”, *op.cit.*, p. 41 and following.

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

Petitions Team
Office of the United Nations High Commissioner for Human Rights
Palais des Nations
CH-1211 Geneva 10
SWITZERLAND
Fax: +44 22 917 90 22 (for urgent complaints)
E-mail: tb-petitions.hchr@unog.ch

🕒 Process and outcome

*Process*⁴⁰

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 cases⁴¹, 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 by 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).⁴²

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.⁴³

⁴⁰ This paragraph is based on excerpts from OHCHR, “Complaints Procedure”, *op.cit.*

⁴¹ For example the CAT, CERD and CEDAW. See table in appendix.

⁴² 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”.

⁴³ For example: CCPR, *Rules of Procedure of the Human Rights Committee*, 22 September 2005, CCPR/C/3/Rev.8, art. 92; CAT, *Rules of procedure of the Committee Against Torture*, 9 August 2002, CAT/C/3/Rev.4, art. 108; CERD, *Rules of procedure of the Committee on Elimination of Racial Discrimination*, 1 January 1989, CERD/C/35/Rev.3, art. 94; CEDAW, *Rules of procedure of the Committee on the Elimination of Discrimination Against Women*, A/56/38, art. 63.

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"**.⁴⁴

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 web site of the Office of the United Nations High Commissioner for Human Rights⁴⁵. 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 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 situation on the information provided by civil society organisations.

⁴⁴ CERD, *Early warning and urgent action procedure – Decision I (68) Unites States of America*, 11 April 2006, CERD/C/USA/DEC/1.

⁴⁵ OHCHR, "Human rights Bodies – Complaints procedures", www2.ohchr.org/english/bodies/petitions/index.htm

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.”⁴⁶

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.”

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.”

⁴⁶ CCPR, *Angela Poma Poma v. Peru*, Communication No. 1457/2006, 24 April 2009.

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.⁴⁷

Legal force of the Committees' decisions

Having **quasi-judicial status**, 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.⁴⁸ 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.

5. Inquiries or visits

The **CAT, CEDAW, the Committee on the Rights of Persons with Disabilities (CRPD) - the CESCRC and the Committee on Enforced Disappearances 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.⁴⁹

⁴⁷ CCPR, *Länsmän et al v. Finland*, Communication No. 511/1992, 8 November 1994, CCPR/C/52D/511/1992.

⁴⁸ 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, *Länsmän v. Finland*, *op.cit.*

⁴⁹ 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.

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.⁵⁰

⁵⁰ 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 intergovernmental 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**.⁵¹ 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 Charter of the United Nations, 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:⁵²

- 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.

🕒 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.⁵³ 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.

⁵¹ 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.

⁵² HRC, *Resolution 5/1. Institution-building of the United Nations Human Rights Council*, *op.cit.*, § 15.

⁵³ 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 NGOs can play in the Universal Periodic Review in the following points:⁵⁴

- 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’.
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⁵⁴ 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.

HRC – Summary of information transmitted by “other relevant stakeholders” in the context of Ghana’s UPR

“12. Reports from mining communities who are victims of human rights violations indicate a high degree of complicity of **multinational mining companies** in human rights violations, as FIAN reported. In many cases it is private security personnel of mining companies that take the lead. Security contractors of mining companies assisted by armed police and soldiers often conduct “operations” ostensibly to arrest illegal small scale mining operators (galamsey) in the concessions of large-scale mining companies. FIAN added that these “operations” tend to be **violent and bloody invasions** of communities resulting in gross human rights violations.”⁵⁵

Outcome

The UPR aims at dealing with all states equally, in an “objective, transparent, non-selective, constructive, non-confrontational and non-politicized”⁵⁶ 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.

⁵⁵ UNGA, *Summary prepared by the Office of the High Commissioner for Human Rights - Ghana*, 2nd UPR, 2 April 2008, A/HRC/WG.6/2/GHA/3.

⁵⁶ HRC, *Resolution 5/1. Institution-building of the United Nations Human Rights Council*, *op.cit.*, § 3(g).

- 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.⁵⁷

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.

🔍 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, 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.

🔍 Under what conditions?

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**.⁵⁸
- The communication must not be based exclusively on reports disseminated by **mass media**.

⁵⁷ *Ibid.*, §§ 85 and following.

⁵⁸ However, such a communication may be considered if it meets the other criteria for admissibility after deletion of the abusive language.

- The situation in question must **have not already been dealt with** by a Special Procedure, a treaty body, other United Nations or similar regional complaints procedure 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)

🔗 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.⁵⁹

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 possible extent, 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).

⁵⁹ HRC, *Resolution 5/1. Institution-building of the United Nations Human Rights Council*, *op.cit.*, § 106.

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 Council⁶⁰ **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.

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 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 to⁶¹:

- **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.

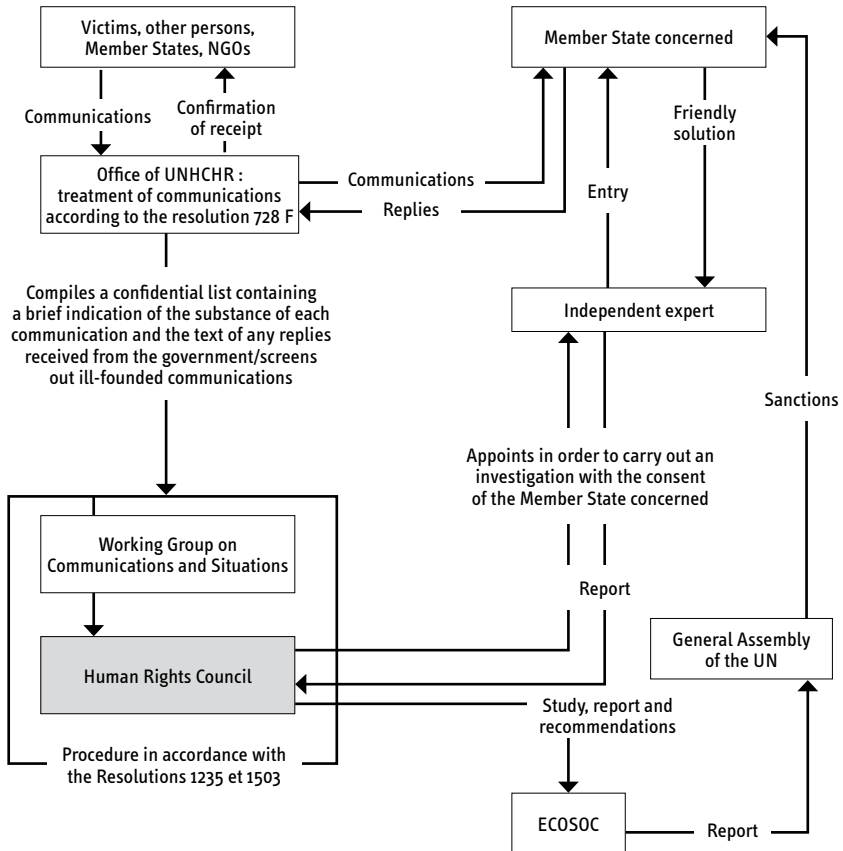
This last option could be particularly interesting for communications relating to allegations of a state’s complicity in human rights abuses committed by multinational companies in its jurisdiction.

⁶⁰ HRC, *Resolution 5/1. Institution-building of the United Nations Human Rights Council, op.cit.*, §§ 103-105.

⁶¹ *Ibid.*, § 109.

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.

The “revised 1503” procedure: summary scheme⁶²



⁶² 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 Rights⁶³. 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.

⁶³ 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.

SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES

A specific mandate has been created to look at the issue of human rights violations committed by or with the complicity of multinational companies.⁶⁴

The creation of this mandate was requested by the United Nations Human Rights Commission in its Resolution 2005/69 approved by the Economic and Social Council on **25 July 2005**.

The mandate of the Special Representative is to identify and clarify the responsibilities of business enterprises for human rights, especially related to state obligations and the scope and content of the responsibility of enterprises to respect human rights.

Professor John Ruggie became the first person to fill this post on 28 July 2005. His mandate was renewed for three years in June 2008 with an updated mandate to provide further clarification of the human rights obligations of business enterprises. In the second term of the Special Representative to the Human Rights Council, **unlike with other Special Procedures such as Special Rapporteurs, did not extend the mandate to include the examination of individual communications** alleging human rights violations due to activities undertaken by business enterprises. **John Ruggie interpret this aspect of his mandate strictly** and refuses to consider cases of alleged violations by businesses, including upon request to use his good offices to intervene in tensed situations.⁶⁵

His main missions are:

- To provide views and recommendations on ways to **strengthen the fulfilment of the duty of the state to protect all human rights from abuses by transnational corporations** and other business enterprises, including through international cooperation.
- To elaborate further on the **scope and content of the corporate responsibility to respect all human rights** and to provide concrete guidance to business and other stakeholders.
- 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 impacted by corporate activities.

⁶⁴ For further analysis on the special representative's mandate, see: ECSR, *Advocacy guide on business and human rights in the United Nations*, October 2009, www.escri-net.org/user_doc/ESCRNet_BHRGuideL_Updated_Oct2009_eng_FINAL.pdf

⁶⁵ See notably: "Mongolian NGOs protesting against govt.'s approval of mining project by Rio Tinto, Ivanhoe appeal to John Ruggie to "use his good offices to calm the tension" and a response by John Ruggie available on the website of the Business and Human Rights Resource Center.

Considering his role was created following the controversy which resulted from the endorsement, by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, of the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, John Ruggie's work has been commended for having brought the many varied actors around the consultation table. However, the Special Representative is still criticised by civil society in particular for having **not yet undertaken any country visits**.

The following are a list of the Special Representative's main reports so far:

- *Business and human rights: mapping international standards of responsibility and accountability for corporate acts*, 19 February 2007 (A/HRC/4/35)
- *Protect, respect, and remedy: a framework for business and human rights*, 7 April 2008 (A/HRC/8/5)
- *Business and human rights: Towards operationalizing the “protect, respect and remedy” framework*, 22 April 2009 (A/HRC/11/13) – Addendum to the report – *State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions*, 15 May 2009 (A/HRC/11/13/Add.1)
- *Business and Human Rights: Further steps toward the operationalization of the “Protect, respect, remedy” framework*, 9 April 2010 (A/HRC/14/27)

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.⁶⁶

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.

⁶⁶ 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.

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.

➔ **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.⁶⁷

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.

⁶⁷ OHCHR, "UN Special Procedures - Facts and Figures 2008", www2.ohchr.org

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**.

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.

🔍 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 from political motivation that is 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**.⁶⁸ It is left to the discretion of a mandate-holder to decide whether to act on a given situation.

🔍 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.

⁶⁸ OHCHR, *Manual of Operations of the Special Procedures of the Human Rights Council*, op.cit., §§ 38 and following.

- **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.

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
1211Genève 10 Switzerland
Fax: +4122 917 90 06
Email: urgent-action@ohchr.org (for complains and individual cases)
For any other information: spdinfo@ohchr.org

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 waste⁶⁹ 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 suf-

⁶⁹ 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”.

fering 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.”⁷⁰

➔ **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.

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.”⁷¹

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:

⁷⁰ OHCHR, “Special Rapporteur on toxic wastes urges measures to counter harmful effects of chemicals contained in household and foods”, Press release, 7 April 2006.

⁷¹ 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.

- 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.⁷²

STATISTICS⁷³

In 2008:

- 911 communications were sent to the governments of 118 countries.
- 66% were joint communications.
- 2,206 individuals were covered by these communications, of whom 20% were women.

By 31 December 2008:

- 63 countries had issued an invitation to the mandate-holders.
 - Other states have addressed a “standing invitation” to the mandate-holders, thereby indicating that they are permanently prepared to welcome them.
-

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.⁷⁴

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

⁷² See OHCHR, “Country visits”, www2.ohchr.org

⁷³ See OHCHR, “Special procedures of the Human Rights Council”, www2.ohchr.org

⁷⁴ OHCHR, *Manual of Operations of the Special Procedures of the Human Rights Council*, *op.cit.*, §§ 81 and following.

- **Ratifications of human rights instruments**
<http://treaties.un.org>
- **Office of the High Commissioner for Human Rights**
www.ohchr.org/EN/Pages/WelcomePage.aspx
- **Human Rights Committee**
www2.ohchr.org/english/bodies/hrc
- **Committee on Economic, Social and Cultural Rights**
www2.ohchr.org/english/bodies/cescr/index.htm
- **Human Rights Council**
www2.ohchr.org/english/bodies/hrcouncil/index.htm
- **Universal Periodic Review**
www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx
- **Review of the “1503” procedure**
www2.ohchr.org/english/bodies/chr/complaints.htm
- **Special Procedures**
www2.ohchr.org/english/bodies/chr/special/index.htm
- **Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises**
www2.ohchr.org/english/issues/trans_corporations/index.htm
www.business-humanrights.org/SpecialRepPortal/Home

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
 - **IBLF, OHCHR, *Global Compact, IBLF, OHCHR, Human Rights Translated: A business Reference Guide*, Report presented by Monash University, 2008**
www.unglobalcompact.org
 - **ECSR-Net, *Advocacy guide on business and human rights in the United Nations*, October 2009**
www.escrnet.org/usr_doc/ESCRNet_BHRGuidel_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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➤ 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) not yet in force)	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))	
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 PF-ICESCR This procedure only applies to States that recognise this competence of the CESCR Committee	Art. 11-13 CERD Possibility of appointing an <i>ad hoc</i> Conciliation Commission This procedure applies to all CERD State parties.		
Individual complaints	Yes The State concerned must have ratified the 1st Optional ICCPR Protocol.	Yes (on entry into force) The State concerned must have ratified the CESCR Optional Protocol (not yet in force).	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 CESCR Protocol	Article 94 Rules of Procedure of CERD Committee	Article 63 Rules of Procedure of CEDAW Committee	
Inquiries and visits	No	Yes but not yet in force		Art. 8-10 Optional CEDAW 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. Likewise matters pertaining to individuals protected under specific international conventions (such as women or persons with disabilities) may 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, not yet in force)
	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*	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 (on entry into force) 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. Raquel Rolnik, Brazil (since 2008)	- Urgent appeals - Letters of allegation	Yes	Not specifically mentioned	E-mail: srhousing@ohchr.org urgent-action@ohchr.org Fax: +41 22 917 90 06 Postal mail: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland
Special Rapporteur on extrajudicial, summary or arbitrary executions	Mr. Philip Alston, Australia (since 2004)	- Urgent appeals - Letters of allegation	Yes	Not specifically mentioned	E-mail: eje@ohchr.org urgent-action@ohchr.org Fax: +41 22 917 90 06 Postal mail: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland
Independent expert on the question of human rights and extreme poverty	Ms. Maria Magdalena Sepulveda Carmona, Chile (since 2008)	Not specifically mentioned	Yes	Yes A/HRC/RES/8/11 , §6.	E-mail: ieextremepoverty@ohchr.org
Special Rapporteur on the right to food	Mr. Olivier de Schutter, Belgium (since 2008)	- Urgent appeals - Letters of allegation	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 mail: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health	Mr. Anand Grover, India (since 2008)	- Urgent appeals - Letters of allegation	Yes	Not specifically mentioned	E-mail: srhealth@ohchr.org urgent-action@ohchr.org Fax: +41 22 917 90 06 Postal mail: 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/HRC/10/7 (Report 2009) 79. [...] All public and private actors involved in housing need to acknowledge the right to adequate housing. [...] Effective regulation and close monitoring by the State of private sector activities, including financial and building companies, is required.”</p>	<p>www2.ohchr.org/english/issues/housing/index.htm</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>www2.ohchr.org/english/issues/executions/index.htm</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>www2.ohchr.org/english/issues/poverty/index.htm</p>
	<p>A/HRC/RES/7/14 (2008) 13. <i>Requests</i> all States and private actors, as well as international organizations 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>www2.ohchr.org/english/issues/food/index.htm</p>
	<p>A/63/263 (in report to GA 2008) Human rights guidelines to pharmaceutical companies in relation to access to medicines</p> <p>A/HRC/7/11 (report 2008) “40. The requirement of transparency applies to all those working in health-related sectors, including States, international organizations, public private partnerships, business enterprises and civil society organizations. [...]</p>	<p>www2.ohchr.org/english/issues/health/right/index.htm</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 situation on human rights defenders	Ms. Margaret Sekagya, Uganda (since 2008)	- Urgent appeals - Letters of allegation	Yes	Not specifically mentioned	E-mail: srhousing@ohchr.org urgent-action@ohchr.org Fax: +41 22 917 90 06 Postal mail: 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	Mr. James Anaya, United States of America (since 2008)	- Urgent appeals - Letters of allegation	Yes	Not specifically mentioned	E-mail: eje@ohchr.org urgent-action@ohchr.org Fax: +41 22 917 90 06 Postal mail: 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 self-determination	5 members	- Urgent appeals - Letters of allegation	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 jjetard@ohchr.org mercenaries@ohchr.org Fax: +41 22 917 90 06 Postal mail: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland
Special Rapporteur on the human rights of migrants	Mr. Jorge A. Bustamante, Mexico (since 2005)	- Urgent appeals - Letters of allegation	Yes	Yes E/CN.4/ RES/2005/47, §16	E-mail: urgent-action@ohchr.org migrant@ohchr.org Fax: +41 22 917 90 06 Postal mail: 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. Gulnara Shahinian, Armenia (since 2008)	- Urgent appeals - Letters of allegation	Yes	Not specifically mentioned	E-mail: urgent-action@ohchr.org srslavery@ohchr.org Fax: +41 22 917 90 06 Postal mail: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland

	DOCUMENTS ET LIENS FAISANT RÉFÉRENCE AUX ACTEURS NON-ÉTATIQUES (RAPPORTS, GUIDES, PRINCIPES ...)	WEBSITE
	<p>A/HRC/4/37 (Report 2007) “78. [...] defenders working in all of the fields [...], face violations of their rights by the State and/or face violence and threats from non-State actors because of their work. [...]</p>	<p>www2.ohchr.org/english/issues/defenders</p>
	<p>E/2009/43 & E/C.19/2009/14 (2009) The Permanent Forum recommends that transnational corporations and other business enterprises adopt [...] a human rights policy; assess the impact on human rights of company activities; integrate those values and findings into corporate culture; and track and report on performance.</p> <p>A/HRC/4/32 (Report 2007) 17. The Special Rapporteur has received any number of reports and complaints from indigenous communities whose resources have been appropriated and are being utilized by powerful economic consortia, with neither their prior consent nor their participation, and without the communities securing any of the benefit of that activity.</p>	<p>www2.ohchr.org/english/issues/indigenous/index.htm</p>
	<p>A/63/325 (Report 2008) see §4 on private companies that perform all types of security [...] in armed conflict areas and/or zones.</p> <p>84. [...] A new international legal instrument, possibly in the format of a new United Nations convention on private military and security companies, may be required.” [See paragraph 90: concerning the study and legal codification led by the Working group on the regulation of private military and security companies]</p>	<p>www2.ohchr.org/english/issues/mercenaries/index.htm</p>
	<p>A/HRC/4/24 (Report 2007) The Special Representative points out notably the rôle of non-State actors (private individuals) in immigration control.</p>	<p>www2.ohchr.org/english/issues/migration/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/9/20 (report 2008) See §36.</p>	<p>www2.ohchr.org/english/issues/slavery/rapporteur/index.htm</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 torture and other cruel, inhuman or degrading treatment or punishment	Mr. Manfred Nowak, Austria (since 2004, extended in 2008)	- Urgent appeals - Letters of allegation	Yes	Yes, E/CN.4/RES/2005/47, §16	E-mail: sr-torture@ohchr.org urgent-action@ohchr.org Postal mail: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland
Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights	Mr. Okechukwu Ibeanu, Nigeria (since 2004)	- Urgent appeals - Letters of allegation	Yes	Yes, A/HRC/RES/9/1, §5B	E-mail: urgent-action@ohchr.org srtoxicwaste@ohchr.org Fax: +41 22 917 90 06 Postal mail: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland
Special Rapporteur on trafficking in persons , especially women and children	Ms. Joy Ngozi Ezeilo, Nigeria (since 2008)	- Urgent appeals - Letters of allegation	Yes	Not specifically mentioned	E-mail: SRtrafficking@ohchr.org urgent-action@ohchr.org Fax: +41 22 917 90 06 Postal mail: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland
Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises	Mr. John Ruggie, United States of America (since 2005, extended in 2008)	Not specifically mentioned	No	A/HRC/8/L.8 The Special Representative's mandate is explained in detail previously. See box on the Special Representative	E-mail: lwendland@ohchr.org

	DOCUMENTS ET LIENS FAISANT RÉFÉRENCE AUX ACTEURS NON-ÉTATIQUES (RAPPORTS, GUIDES, PRINCIPES ...)	WEBSITE
	Preliminary findings on the Mission to Papua New Guinea (25 mai 2010).	www2.ohchr.org/english/issues/torture/rapporteur/index.htm
	<p>E/CN.4/2006/42 His mandate concerns notably: The States' obligation to adopt rules towards private actors working with dangerous and toxic wastes, and to hold them accountable for any action taken in breach of such regulations. 76. Victims's right to reparation, including in the jurisdictions of the corporation's home country.</p> <p>A/HRC/7/21 "34. Cases that have been brought to his attention of disputes between citizens and transnational corporations over the movement of toxic and dangerous products and wastes.</p> <p>A/HRC/12/26/Add.2 Addendum - Mission in Côte d'Ivoire (August 2008) on the dumping of toxic waste from the ship Probo Koala.</p>	www2.ohchr.org/english/issues/health/waste/index.htm
	<p>E/2002/68/Add.1 Recommended Principles on Human rights and human trafficking</p> <p>A/HRC/10/16 (Report 2009) Recommendations on public-private partnerships to combat human trafficking.</p>	www2.ohchr.org/english/issues/trafficking/index.htm
	<p>A/HRC/4/35 (2007) Analysis of international standards for social responsibility and corporate transparency.</p> <p>A/HRC/8/5 Report 2008 - Protect, Respect and Remedy: a Framework for Business and Human Rights</p> <p>A/HRC/11/13 Report 2009 - Business and human rights: Towards operationalizing the "protect, respect and remedy" framework</p> <p>A/HRC/14/27 Report 2010 - Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework</p>	<p>www2.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
Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation	Ms. Catarina de Albuquerque, Portugal (since 2008)	Not specifically mentioned	Yes	Not specifically mentioned	Email: iewater@ohchr.org Postal mail: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland
Special Rapporteur on violence against women , its causes and consequences	Ms. Rashida Manjoo, South Africa, (since 2009)	- Urgent appeals - Letters of allegation	Yes	Not specifically mentioned	E-mail: vaw@ohchr.org urgent-action@ohchr.org Fax: +41 22 917 90 06 Postal mail: OHCHR-UNOG 8-14 Avenue de la Paix 1211 Geneva 10 Switzerland
Special Representative of the Secretary-General for human rights in Cambodia	Mr. Surya Prasad Subedi, Nepal (since 2009)	Not specifically mentioned	Yes	Not specifically mentioned (country mandate)	
Special Rapporteur on the situation of human rights in the Sudan	Mr. Mohamed Chande Othman, Tanzania (since 2009)	Not specifically mentioned	Yes	Not specifically mentioned (country mandate)	E-mail: sudan@ohchr.org

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:

	DOCUMENTS ET LIENS FAISANT RÉFÉRENCE AUX ACTEURS NON-ÉTATIQUES (RAPPORTS, GUIDES, PRINCIPES ...)	WEBSITE
	<p>In 2010, the Independent Expert will prepare a report on private sector participation in the provision of water and sanitation services.</p> <p>A/HRC/12/24 (report 2009)</p> <p>“64. When sanitation services are operated by a private provider, the State must establish an effective regulatory framework. [...] 81.- States and non-State actors should adopt a gender-sensitive approach to all relevant policymaking given the special sanitation needs of women</p> <p>- States should establish effective, transparent and accessible monitoring and accountability mechanisms, with power to monitor and hold accountable all relevant public and private actors”</p>	<p>www2.ohchr.org/english/issues/water/lexpert/consultation.htm</p>
	<p>A/HRC/11/6 (report 2009)</p> <p>“90. Develop mechanisms to hold non-State actors, including corporations and international organizations accountable for human rights violations and for instituting gender-sensitive approaches to their activities and policies;”</p>	<p>www2.ohchr.org/french/issues/women/rapporteur/index.htm</p>
	<p>A/HRC/7/42 (report 2008)</p> <p>The Special Rapporteur focuses on the forestry industry and in particular on the problems of corruption that characterize it, including the role played by private actors.</p>	<p>www2.ohchr.org/english/countries/kh/mandate/index.htm</p>
	<p>A/62/354</p> <p>“55. The displacement of populations as a result of the activities of oil companies has also been reported.</p> <p>74. The livelihoods of people living in oil-rich areas have deteriorated as environmental damage caused by oil companies continues to have negative consequences. Property and land have been taken for roads to be built, changing the course of water, with harmful effects on grazing and farming. There are allegations of violations of labour laws by these companies and there are no effective mechanisms in place for redress.”</p>	<p>www2.ohchr.org/english/countries/sd/mandate/index.htm</p>

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.

SECTION I
INTERGOVERNMENTAL MECHANISMS

PART II
ILO Mechanisms

The International Labour Organization (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' organizations 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 mechanisms 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 detailing the measures they have taken to implement the provisions of the ratified Conventions. Employers' and workers' organizations are able to comment on the reports before they are given to the Committee of Experts, which publishes its observations in an annual report. These observations can subsequently be used as a lobbying tool to pressure governments. A selected number of cases (approximately 25) are discussed at the International Labour Conference. The representatives of the governments concerned are then requested to provide information on the measures they intend to adopt to comply with their international obligations.

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.

🕒 What rights are protected?

ILO Conventions

There are 188 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' organizations. 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.

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 organizations 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' organizations under the domination of employers or employers' organizations - Right to collective bargaining
Elimination of forced labour and compulsory labour	Forced Labour Convention, 1930 (n°29)	- 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
	Abolition of Forced Labour Convention, 1957 (n°105)	- 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)	- 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)	- 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 and health, 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.⁷⁵

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”.⁷⁶

No article 26 complaints (see section on Article 26 below) have been filed with the ILO under Conventions Nos. 107 or 169.⁷⁷ However, the Convention has been the subject of several representations.⁷⁸

Using ILO conventions in national courts

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,

⁷⁵ ILO, “Subjects covered by International Labour Standards”, www.ilo.org/global/What_we_do/InternationalLabourStandards/Subjects/lang--en/index.htm

⁷⁶ ILO, “Indigenous and tribal peoples”, www.ilo.org/global/What_we_do/InternationalLabourStandards/Subjects/Indigenousandtribalpeoples/lang--en/index.htm

⁷⁷ ILO, “ILO Website on Indigenous and tribal peoples: standards and supervision”, www.ilo.org/public/english/indigenous/standard/super.htm

⁷⁸ The complaint and representation procedures are described in the next sections of this guide.

political organization and internal forms of exerting authority.⁷⁹ 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.⁸⁰

The MNE Declaration

In addition to the conventions, the ILO also has asked 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' organizations **basic guidance in the domain of employment, training, working conditions and life and industrial relations**. It refers to many ILO conventions and recommendations.⁸¹ The Declaration sets out principles that governments, employers' and workers' organizations and multinational enterprises are recommended to observe on a **voluntary basis**.⁸²

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 can not be used simultaneously with other mechanisms. Many potential applications overlap with other complaints mechanisms and hence **this recourse has become virtually obsolete**.⁸³ Furthermore its main purpose is to clarify situations in which the policy of a country is concerned. This means that it is not very useful as a direct recourse strategy for victims of violations of human rights abuses by TNCs. As a result the MNE interpretation procedure will not be further discussed in this guide.

⁷⁹ 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.

⁸⁰ *Federación Independiente del Pueblo Shuar del Ecuador (FIPSE) c. Arco Oriente s/ Amparo*, Tribunal Constitucional del Ecuador, 2000, available at ESCR-Net, "Caselaw", www.escr-net.org/caselaw/caselaw_show.htm?doc_id=406016

⁸¹ See 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.

⁸² ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 4th edition, 2006, art. 7.

⁸³ E. Sims, Manager, ILO Helpdesk, ILO, Telephone Interview with FIDH, 23 September 2009.

CHAPTER I

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

* * *

The ILO's Committee on Freedom of Association 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 2,700 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 organization of workers or employers. Therefore, individuals who are unable to find an organization willing to submit a complaint on their behalf will be unable to resort to this mechanism

🕒 Who can file a complaint?

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

- A national organization 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 organization is an employers' or workers' organization 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 organization, or because the person or persons making the complaint has taken refuge abroad.

The fact that a trade union has not deposited its by-laws, or that an organization has not been officially recognized is not sufficient to reject their complaints, in accordance with the principle of freedom of association.⁸⁴

If no precise information is available regarding the complainant organization, the ILO may request that the organization to “furnish 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 organization”.⁸⁵

⁸⁴ *Ibid.*, § 37 and § 38.

⁸⁵ *Ibid.*, § 39.

Hence a complaint can be submitted by:

- An international organization of employers or workers having consultative status with the ILO.
- Another international organization of employers or workers, where the allegations relate to matters directly affecting their affiliated organizations.
- 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”.⁸⁶ The Committee can then decide what action, if any, to take regarding the complaint.

🕒 Under what conditions?

1. Ratification status⁸⁷

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 remedies⁸⁸

You are **not required** to exhaust domestic remedies before filing a freedom of association complaint. However, if national remedies or appeals procedures are

⁸⁶ *Ibid.*, § 40.

⁸⁷ ILO, *Procedures of the Fact-Finding and Conciliation Commission and the Committee on Freedom of Association for the examination of complaints alleging violations of freedom of association*, § 34, [http://training.ilo.org/training.ils/foa/2002/a92894_es/library/digestdecisions_en/23176.htm](http://training.ilo.org/training/ils/foa/2002/a92894_es/library/digestdecisions_en/23176.htm)

⁸⁸ *Ibid.*, § 33.

available to you and they are not made use of, 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. 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.⁸⁹

4. Time limits for complaints⁹⁰

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”.⁹¹ 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,⁹² complaints can also be filed with the United Nations, which will forward by the Economic and Social Council to the ILO.⁹³ 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;

⁸⁹ B. Vacotto, Senior Specialist in International Labour Standards and Legal Issues, Bureau for Workers’ Activities, ILO, Telephone Interview with FIDH, 17 September 2009.

⁹⁰ ILO, *Procedures of the Fact-Finding and Conciliation Commission and the Committee on Freedom of Association for the examination of complaints alleging violations of freedom of association*, § 67, http://training.itcilo.it/ils/foa/2002/a92894_es/library/digestdecisions_en/23176.htm

⁹¹ *Ibid.*

⁹² There are 9 countries who are members of the UN but not of the ILO: Andorra, Bhutan, Democratic People’s Republic of Korea, Liechtenstein, s, Federated States of Micronesia, Monaco, Nauru, Palau, and Tonga. ILO, “Alphabetical list of ILO member countries”, www.ilo.org/public/english/standards/reIm/country.htm. UN, “United Nations Member States”, www.un.org/members/list.shtml

⁹³ 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.⁹⁴

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.⁹⁵

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 website⁹⁶. 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. They are most likely to do this when they have encountered difficulties in communicating with the government concerned or when the allegations and the government's reply are completely contradictory. This method, 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 the existing problems.⁹⁷

⁹⁴ Note that the government's consent is only required where the country has not ratified the conventions on freedom of association.

⁹⁵ B. Vacotto, *op. cit.*

⁹⁶ ILO, "Comity on Freedom of Association", <http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?Lang=FR&hdroff=1&CFID=46432149&CFTOKEN=64973597>

⁹⁷ ILO, *Procedures of the Fact-Finding and Conciliation Commission and the Committee on Freedom of Association for the examination of complaints alleging violations of freedom of association, op.cit.*, § 65.

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.⁹⁸

2. Fact-Finding and Conciliation Commission on Freedom of Association⁹⁹

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 2006, it had examined six complaints since its inception in 1950. 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 Freedom of Association Committee 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 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 terminated 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.

⁹⁸ *Ibid.*, § 66.

⁹⁹ ILO, "Introduction to the Digest of Decisions and Principles of the Freedom of Association Committee", 2006.

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

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' organizations in Heilongjiang, Liaoning and Sichuan Provinces",¹⁰⁰ 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 is requested that law enforcement workers be trained to reduce the threat of excessive violence when exercising crowd control during demonstrations.¹⁰¹

→ Complaints against the Government of the United States presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM)¹⁰²

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 rights.

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.

¹⁰⁰ 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).

¹⁰¹ *Ibid.*

¹⁰² ILO, *Complaints against the Government of the United States presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM): Report United States (Case No. 2227)*, 18 October 2002, Report N°332 (LXXXVI, 2003, Series B, No. 3)

ILO Convention No. 87 protects the right of workers ‘without distinction whatsoever’ to establish and join organizations 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).¹⁰³

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 migrants 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 2,700 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.

¹⁰³ *Ibid.*

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' organization 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".¹⁰⁴ Overall 106 representations have been submitted to date.

➤ Who can file a complaint?

An employers' or workers' organization may make a representation. The representation must allege that a Member State has failed to adhere to a convention which it has ratified.¹⁰⁵

➤ Process and outcome

First, an organization makes a representation before the ILO Governing Body. If the representation is receivable under Article 24, the Governing Body communicates the representation to the government concerned and invites it "to make such statement on the subject as it may think fit".¹⁰⁶

Under Article 25, "if no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it".¹⁰⁷

The Governing Body establishes an ad hoc three-member tripartite Committee to "examine the representation and the government's response". The Committee will then submit a report to the Governing Body stating the legal and practical aspects of the case, examining the information submitted and concluding with recommendations.¹⁰⁸

¹⁰⁴ ILO, "Representations", www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/Representations/lang-en/index.htm

¹⁰⁵ *Ibid.*

¹⁰⁶ ILO, *Constitution of the ILO*, art. 24, adopted in 1919, amended in 1972, entered into force on 1 November 1974.

¹⁰⁷ *Ibid.*, art. 25.

¹⁰⁸ ILO, *Representations*, *op. cit.*

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.¹⁰⁹

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”.¹¹⁰

➔ 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”.

The Governing Body established a tripartite Committee to investigate the representation and the Committee made findings concerning the three cases raised in the representation:

- 1- 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”.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

- 2- 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.
- 3- The government violated the convention when it granted environmental licenses to Occidental without first conducting prior consultation with the affected communities.¹¹¹

* * *

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 a 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.¹¹²

¹¹¹ 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)*, ILO, 1999.

¹¹² B. Vacotto, *op. cit.*

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”.¹¹³ “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”.¹¹⁴

So far around 30 complaints have been filed and 12 complaints lodged have led to the establishment of Commissions.¹¹⁵ 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.

🔗 Who can file a complaint¹¹⁶?

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 employers¹¹⁷
- The Governing Body of the ILO

¹¹³ ILO, “Complaints”, www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/Complaints/lang-en/index.htm

¹¹⁴ ILO, “Complaints”, *op. cit.*

¹¹⁵ B. Vacotto, *op. cit.*

¹¹⁶ ILO, “Complaints”, *op. cit.*

¹¹⁷ 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 workpeople 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.

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.¹¹⁸

🕒 Process and outcome¹¹⁹

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.¹²⁰

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.¹²¹ Article 33 has been used only once – in 2002, against Myanmar/Burma.¹²²

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.¹²³

¹¹⁸ B. Vacotto, *op. cit.*

¹¹⁹ ILO, *Constitution, op. cit.*, art. 26-34.

¹²⁰ ILO, *Constitution, op. cit.*, art. 29, 31.

¹²¹ *Ibid.*, art. 33.

¹²² ILO, “Complaints”, *op. cit.*

¹²³ B. Vacotto, *op. cit.*

Commissions of Inquiry in action

➔ Case of forced labour in Myanmar/Burma¹²⁴

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 organizations 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".¹²⁵ 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".¹²⁶

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

¹²⁴ 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/sapfi/Informationresources/ILOPublications/lang--en/docName--WCMS_088490/index.htm 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 Organization to examine the observance by Myanmar of the Forced Labour Convention (no. 29), 1930", ILO, 2 July 1998.: Part I: Establishment of the Commission.

¹²⁵ *Ibid.*, Part IV: Examination of the case by the Commission.

¹²⁶ *Ibid.*

convention, that they cease the use of forced labour in practice, and that they enforce penalties against those who exact forced labour.¹²⁷

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 Organization’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”.¹²⁸

In February 2007, the ILO concluded a supplementary understanding¹²⁹ 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”.¹³⁰

* * *

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 organizations 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

¹²⁷ *Ibid.*, Part V, Conclusions and recommendations.

¹²⁸ 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

¹²⁹ Supplementary Understanding between the Government of the Union of Myanmar and the International Labour Office (2007), www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-yangon/documents/legaldocument/wcms_106131.pdf

¹³⁰ ILO, “Office of the ILO Liaison Officer: Yangon”, www.ilo.org/public/english/region/asro/yangon/

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.¹³¹ 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?¹³²

- 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
- All applications should be addressed to the Director General
- **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
- **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
- **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
-

¹³¹ B. Vacotto, *op. cit.*

¹³² *Ibid.*

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/ilolex/english/newratframeE.htm
- **Table of ratifications of the fundamental conventions**
www.ilo.org/ilolex/english/docs/declworld.htm
- **ILO MULTI Multinational Enterprises and Social Policy website**
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, Employers' organisations and the ILO supervisory machinery (2006)**
www.ilo.org/public/libdoc/ilo/2006/106B09_39_engl.pdf
- **International Trade Union Confederation (ITUC), "ILO complaints",**
www.ituc-csi.org/-ilo-complaints-.html

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/natlex_browse.home
-

➤ 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' organization (2) workers' organization	(1) a national organization directly interested in the matter (2) an international organization of employers or workers having consultative status with the ILO (3) an other international organization of employers or workers, where the allegations relate to matters directly affecting their affiliated organizations	(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	106 representation have been submitted	Over 2,700 cases of which 6 cases passed onto the Fact-Finding and Conciliation Commission	12 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), with 47 Member States, brings together representatives from all countries of Europe. Founded on 5 May 1949 by 10 countries, the aim of the Council of Europe is to develop common and democratic principles based on the European Convention on Human Rights, and other related texts on the protection of individuals.

The Council of Europe is composed of six main bodies. One of these is a judicial body – the European Court of Human Rights. Unlike many legal systems at regional and international levels the European Court is an international court with the authority to hear cases and issue binding judgements, involving cases of alleged individual and inter-State violations of the European Convention on Human Rights. 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 1997.¹³³ 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 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

¹³³ For more information on the mandate and activities of the Commissioner for Human Rights, see: CoE, “Commissioner for Human Rights”, www.coe.int/t/commissioner

on the protection of human rights and the prevention of human rights violations. When the Commissioner considers it appropriate, he/she adopts recommendations regarding a specific human rights issue in a single Member State (or several). 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.

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).¹³⁴ Created in 1959, the ECHR became permanent on 1 November 1998, following the entry into force of Protocol No. 11 to the Convention, which replaced the former enforcement mechanism - the European Commission of Human Rights (created in 1954).¹³⁵ On 1 June 2010 the Additional Protocol No. 14 "amending the control system of the Convention" entered into force¹³⁶. The Russian Federation was the last State Party to ratify it. The deposit of the instrument of ratification was made on 18 February 2010. With this Protocol States Parties intend to reduce the workload on the Court by modifying the process before the ECHR.

The ECHR exercises its jurisdiction over the territory of the 47 Member States of the Council of Europe that have ratified the Convention.¹³⁷

🔍 What rights are protected?¹³⁸

The ECHR hears cases arising under the European Convention on Human Rights and its Protocols (if these are ratified by the Member States in question). These rights 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

¹³⁴ CoE, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted on 4 November 1950, entered into force on 3 September 1953.

¹³⁵ *Ibid.*

¹³⁶ 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.

¹³⁷ ECHR, "European Court of Human Rights: Questions and Answers", www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Frequently+asked+questions

¹³⁸ *Ibid.*

European Convention and those protected by the European Social Charter.^{139/140}

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 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:¹⁴¹

- 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?¹⁴²

The ECHR may only hear complaints **against States Parties which have allegedly violated the European Convention on Human Rights**. The act or omission complained of must have been committed by one or more public authorities in the state(s) concerned (for example, a court of law or an administrative authority).

¹³⁹ ECHR, *Airey v. Ireland*, App. No. 6289/73, (1979) Serie A32, 2 *EHRR* 305.

¹⁴⁰ 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.

¹⁴¹ CoE, “Simplified Chart of signatures and ratifications”, 25 January 2010, <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG>

¹⁴² *Ibid.*

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 or private actors, 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 admitted **indirectly** the “drittwirkung theory”, through a failure from the State to take appropriate measures in order to secure respect for rights and freedoms protected under the European Convention “even in the sphere of the relations of individuals between themselves”.¹⁴³ It deals with the responsibility of the State and not with the responsibility of a private actor. As such, the **ECHR can rule that a Member State(s) is in violation of the Convention if it fails to protect people under their jurisdiction from the violations of a third private party**. This is called the horizontal effect of the Convention.

Extraterritorial application

With regard to violations involving transnational corporations originating from Council of Europe Member States that occur in third states, it is relevant to reflect 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. Literally **there is no defined extraterritorial application of the European Convention. It depends mainly on the interpretation of the concept of jurisdiction made by the Court**. For areas which are legally outside their jurisdiction, the European Court considers that the responsibility of Contracting Parties (or Member States) could be engaged because of acts of their authorities, such as judges, which produce effects outside their own territory.¹⁴⁴ As explained in the cases related below, the Convention may also apply where a State Party exercises “**effective overall control over an area**” – whether lawfully or unlawfully – through its own agents operating beyond its territory.

¹⁴³ ECHR, *X and Y v. Netherlands*, App. No. 8978/80, (1985) Serie A91, 7 EHRR 152, § 23.

¹⁴⁴ ECHR, *Drozd and Janousek v. France and Spain*, App. No. 12747/87, (1992) Serie A240, 14 EHRR 745, §91.

→ **Cyprus v. Turkey**¹⁴⁵

After the Turkish military intervention of 1974, the Greek Cypriot administration (representing the Republic of Cyprus) lodged two complaints against Turkey on the grounds of deprivation of its property rights. To determine the admissibility of the applications, the Commission had to decide whether the obligations of Turkey under the Convention could be invoked regarding violations that allegedly occurred outside its territory. The Commission ruled that **State Parties are bound to secure the rights and freedoms enshrined in the Convention to all persons under its effective overall control and responsibility, regardless of the authority being exercised within its territory or abroad.**

→ **Loizidou v. Turkey**¹⁴⁶

In July 1989, Mrs. Loizidou lodged a complaint against Turkey alleging she was prevented from accessing, using and selling her property in Northern Cyprus. Although the acts complained of did not occur on Turkish soil, the Court concluded that “the responsibility of a Contracting Party may [...] arise when as a consequence of military action – whether lawful or unlawful – it exercises **effective control of an area outside its national territory.** The **obligation to secure**, in such an area, **the rights and freedoms set out in the Convention** derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration”.¹⁴⁷

→ **Ilascu and Others v. Moldova and Russia**¹⁴⁸

The Grand Chamber was called upon to determine whether Moldova and/or Russia exercised “jurisdiction” over the separatist “Moldavian Republic of Transdniestria”, where Russian troops had remained following Moldova’s declaration of independence in 1991. Although the Convention was not applicable in respect of the Russian Federation at that time, the Court considered that the events had to be regarded as including not only the acts in which agents of the Russian Federation had participated but also the transfer of the applicants into the hands of the separatist regime, in full knowledge of the illegality and unconstitutionality of that regime. After ratification of the Convention, the Russian army had maintained an **important military presence** on Moldovan territory providing **significant financial support**, so that the “Moldavian Republic of Transdniestria” had remained “**under the effective authority, or at the very least the decisive influence, of the Russian Federation**”.¹⁴⁹ There was “a **continuous link of responsibility** for the applicants’ fate”.¹⁵⁰ The applicants therefore fell **within the jurisdiction of the Russian Federation**, whose responsibility was engaged.

¹⁴⁵ ECHR, *Cyprus v. Turkey*, App. Nos. 6780/74 & 6950/75, (1975) 4 EHRR 482.

¹⁴⁶ ECHR, *Loizidou v. Turkey*, App. No. 15318/89, (1996) 20 EHRR 99, (1997) 23 EHRR 513, §52.

¹⁴⁷ *Ibid.*

¹⁴⁸ ECHR, *Ilascu and others v. Moldova and Russia*, App. No. 48787/99, (2004) 40 EHRR 1030.

¹⁴⁹ *Ibid.*, § 392.

¹⁵⁰ *Ibid.*, § 393.

➔ **Al Saadoon and Mufdhi v. the UK**¹⁵¹

This case concerned two Iraqi detainees in British military custody who sought to block their transfer over to the Iraqi government. The detainees claimed that the transfer would violate the duty of the UK to respect the prohibition on torture and the right to a fair trial under the European Convention. In this case the ECHR re-affirmed its traditional position: “when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside its national territory, there may be an obligation under Article 1 to secure the Convention rights and freedoms within that area”.¹⁵² As an ‘occupying power’ in Iraq, the Court ruled that “given the total and exclusive *de facto*, and subsequently also *de jure*, **control exercised by the United Kingdom authorities** over the premises in question, the **individuals detained** there, including the applicants, **were within the United Kingdom’s jurisdiction**”.¹⁵³

However, the extraterritorial application of the European Convention on Human Rights remains *exceptional* as outlined by the *Bankovic* case.

➔ **Bankovic and others v. Belgium and 16 other Contracting States**¹⁵⁴

In October 1999, an application was lodged against 17 NATO States for the bombing of a Serbian Radio and Television Station (RTS) in Belgrade during the Kosovo conflict in 1999. The case raised issues concerning the right to life (art.2 of the Convention), freedom of expression (art.10 of the Convention) and the right to an effective remedy (art.13 of the Convention). The first question was to decide whether the applicants, six Yugoslav nationals, fell within the jurisdiction of the respondent states (17 Member States of NATO which are also Contracting States to the European Convention on Human Rights). The ECHR’s position stemmed from the notion that the **jurisdictional competence of a state is primarily territorial**, then noted that “the recognition of the exercise of **extra-territorial jurisdiction by a Contracting State is exceptional**”.¹⁵⁵ It went on to state that “the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.” It found that “the Convention is a multi-lateral treaty operating [...] in an essentially regional context and notably in the **legal space of the Contracting States**.”¹⁵⁶

The Court considered that the interpretation of the positive obligation of the states under article 1 made by the claimants “was tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, was thereby brought within the jurisdiction of that

¹⁵¹ ECHR, *Al Saadoon and Mufdhi v. the UK*, App. No. 61498/08, 30 June 2009.

¹⁵² *Ibid.*, §85.

¹⁵³ *Ibid.*, §88.

¹⁵⁴ ECHR, *Bankovic and Others v. Belgium and 16 other Contracting States*, App. No. 52207/99, (2001) 7 EHHR 775.

¹⁵⁵ *Ibid.*, §47.

¹⁵⁶ *Ibid.*, §56.

State for the purpose of Article 1”.¹⁵⁷ Since the ECHR was not convinced that there was any jurisdictional link between the victims of the alleged violation and the respondent states, it declared the complaint inadmissible. The Federal Republic of Yugoslavia was not a party to the Convention, thus **jurisdiction could not be established**.

Many authors have pointed out the contradictions of this judgement.¹⁵⁸ The ECHR’s explanation in this case is indeed ambiguous. The Court continues to recognise the exercise of extraterritorial jurisdiction when a Contracting State, through the effective control of a territory and its inhabitants, exercises the public powers “exercised normally” by the government of that territory, but in *Bankovic* they decided to set some limits.¹⁵⁹ One can understand why the Court, who already receives abundant applications, did not also want to get involved in cases concerning politically sensitive conflicts. The *Behrami Saramati* case is another example of how the Court is prone to restrict the interpretation of the Convention when the issue is linked other sensitive activities such as UN activities.

➔ **Behrami & Behrami v. France; Saramati v. France, Germany & Norway**¹⁶⁰

Both cases deal with a distinct feature of the UN’s oversight role in Kosovo. The applicants brought the cases against State Members of KFOR (NATO-led Kosovo Force) and UNMIK (UN Mission in Kosovo) on the grounds of extra-judicial detention, denial of access to the court by the respondent states, and failure in the supervision of de-mining. According to the Resolution 1244 of the UN Security Council (UNSC), KFOR was mandated to exercise complete military control in Kosovo, UNMIK was to provide an interim international administration and its first Regulation confirmed that the authority vested in it by the UNSC comprised all legislative and executive power and the authority to administer the judiciary. “UNMIK was a **subsidiary organ of the UN created under Chapter VII** and KFOR was **exercising powers lawfully delegated under Chapter VII of the Charter by the UNSC**. As such, their actions were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective”.¹⁶¹ The Court declared the applications inadmissible, considering its **inability to subject the UN to its judgement**.

¹⁵⁷ ECHR, “*Bankovic and Others v. Belgium and 16 other Contracting States* declared inadmissible”, Press release issued by the Registrar, 970, 19 December 2001.

¹⁵⁸ R. Lawson, “Life after *Bankovic*: on the extraterritorial application of the European Convention on Human Rights”, in *Extraterritorial application of human rights treaties*, F. Coomans and M. T. Kamminga (eds), Hart Publishing, Oxford, 2004, p.120; G. Cohen-Jonathan, “La territorialisation de la juridiction de la Cour européenne des droits de l’homme”, *Revue trimestrielle des droits de l’homme*, 52 RTDH (2002), pp. 1070-1074.

¹⁵⁹ ECHR, *Bankovic and Others v. Belgium and 16 other Contracting States*, App. No. 52207/99, (2001) 7 EHHR 775, §71.

¹⁶⁰ ECHR, *Behrami & Behrami v. France; Saramati v. France, Germany & Norway*, App. Nos. 71412/01 & 78166/01, (2007) 45 EHRR SE10.

¹⁶¹ *Ibid.*, §67.

Under certain circumstances, the European Court accepts the possibility of state responsibility for extraterritorial conduct. But uncertainty remains on how far this can go. Even though the “overall effective control” test seems to apply unequally, it appears that if there is a **direct and immediate link** between extraterritorial conduct of state and the alleged violation of an individual’s rights, then the individual must be assumed to fall within the jurisdiction of the Contracting State.

As the spirit of the Convention enshrined in section 3 of the *travaux préparatoires* would be “to widen as far as possible the categories of persons who shall benefit from the guarantees contained in the Convention”, rulings about the reach of extra-territorial jurisdiction might be developed further in future cases.¹⁶²

🕒 Who can file a complaint?

Any private individual, whether a body corporate or a natural person, a group of individuals, an NGO (if the NGO itself is the victim) or a Contracting State may file an application to the ECHR alleging a violation of the rights enshrined in the Convention.

Submissions by individual persons, groups of individuals or NGOs are referred to as “individual applications”, in contrary to those filed by Contracting States. **The complainant does not need to be a national of one of the states bound by the Convention.**

Amicus curiae

NGOs cannot apply to the Court for deprivations of an individual’s rights. At present, the participation of a non-governmental organization in the proceedings before the Court may only take the form of *amicus curiae*, expressing its views on a subject matter of a pending case without being a party in the process. However they may complain if their rights as entities have been breached (for instance complaining of dissolution or refusal of registration).

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.¹⁶³

¹⁶² ECHR, *Medvedev and Others v. France*, App. No. 3394/03, (2010). The ECHR confirms that the responsibility of a State Party to the European Convention on Human Rights could arise in an area outside its national territory when as a consequence of military action it exercised effective control of that area.

¹⁶³ CoE, *Protocol No. 14, op. cit.*, art.13; CoE, *European Convention on Human Rights, op.cit.*, art. 36 § 3.

🔗 Under what conditions?

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 even accepted appeals from **“potential victims”** in cases where a national measure in a domestic legal system may violate rights protected under the Convention.
- 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 would not be accepted by the ECHR. 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 complaints¹⁶⁴ and must offer reasonable prospects of success in order to be considered both effective and available.¹⁶⁵ In determining whether any particular remedy meets the criteria of availability and effectiveness, regard must be made 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.¹⁶⁶ Applications before bodies of the executive branch, such as ombudsmen, are not considered as effective remedies. The Court also considered that “where an individual has an arguable claim that there has been a violation of Article 3 [prohibition of torture] (or of Article 2 [right to life]), the notion of an effective

¹⁶⁴ ECHR, *Cardot v. France*, App No. 11069/84 (1991), 13 EHRR 853, § 34.

¹⁶⁵ ECHR, *Akdivar v. Turquie*, App. No. 21893/93 (1996), Reports 1996-IV, § 68. Voir aussi: 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 ».

¹⁶⁶ ECHR, *Van Oosterwijck v. Belgique*, App No. 7654/76, Serie A No. 40, §§ 36 à 40; ECHR, *Akdivar v. Turquie, op.cit.*; §§ 68-69 .

remedy entails, on the part of the State, a thorough and effective investigation capable of leading to the identification and punishment of those responsible”.¹⁶⁷

- e) **The complainant should specify before their domestic courts those articles of the Convention that they allege have been violated.** According to many judgements, as long as the issue was raised implicitly, or in substance, the exhaustion rule is satisfied. It is not necessary to mention explicitly the rights of the Convention. However, raising Convention-based arguments in proceedings is the best way to avoid any risk of inadmissibility because it helps prove to the Court that the applicant raised the same complaint before national courts.
- f) **The complaint must be filed within six months of the final decision of the domestic court being delivered.** The Court cannot set aside the application of the six-month rule.

Protocol No. 14 adds two criteria of inadmissibility regarding individual complaints:

- g) if the application is “incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
- h) [if] the applicant has not suffered a **significant disadvantage**, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.”¹⁶⁸

At the moment the consequences of these two requirements remain uncertain for the victims. Future cases will indicate how they should be interpreted.

HOW TO FILE A COMPLAINT?

- The official languages of the ECHR are **English and French**. However, it is possible to file an application in one 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 must then **only** use English or French.
- Do not come to the Court personally to state your complaint orally. The proceedings are conducted in writing. Public hearings are exceptional.
- As soon as you have a copy of the application form, you should fill it out carefully and legibly and return it as quickly as possible. It must contain:
 - A brief summary of the facts and your complaints;
 - An indication of the Convention rights that you allege may have been violated;

¹⁶⁷ ECHR, *Selmouni v. France*, App No. 25803/94 (1999), 29 EHRR 403, § 79.

¹⁶⁸ *CoE, Protocol n° 14, op. cit.*, art. 12.

- The remedies you have already used;
 - Copies of other decisions concerning your case made by all the public authorities of your country (national courts judgements and administrative decisions), and
 - Your signature as the applicant of the case, or your representative's signature.
- If will be represented by a lawyer, or other representative, at the beginning of the proceedings you must complete the application form that provides your authority for them to act on your behalf.
 - If you send a letter clearly explaining your complaint to the Court an application form will be returned to you. If you fill in the application form directly, it must be sent to the ECHR. In either case postal correspondence must be sent to the following address:

The Registry
European Court of Human Rights
Council of Europe
F-67075 STRASBOURG CEDEX

- If you send your application by e-mail or fax, you must confirm it by post.

For additional information, please refer to “The Application Pack” available in several languages at: www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+Court/Application+pack

Process and outcome

*Process*¹⁶⁹

An application can be examined by:

- A 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. “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)
- A 3-judges Committee: this Committee may also - by a 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. The Committee can also declare an application admissible and render a judgement on the merits even if the matter in the case (“underlying question in the case”) is already a “subject of well-established case-law of the Court”. The decisions and judgements are final. If no decision nor judgement is taken by the Committee, the application is referred to a Chamber, which then determines both the admissibility and the merits (art. 28 and 29 of the European Convention).

¹⁶⁹ ECHR, “Basic information on procedures”, www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/Procedure+before+the+Court

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

Once the Chamber has received the application, it may ask the parties to submit further evidence and written observations, including any claims for financial compensation (so-called “just satisfaction”) by the applicant. 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. If no hearing has taken place during the admissibility stage, the Chamber may decide to hold a hearing on 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 if it raises a serious question of interpretation, application or a serious issue of general importance. The Grand Chamber decides by a majority vote and its judgements are final.

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.**

Interim measures

Rule 39 of the Rules of Court empowers the Chamber, if necessary, to indicate 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**.¹⁷⁰ 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 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

¹⁷⁰ 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.

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 costs (such as those incurred by the respondent state).

The ECHR in action in corporate-related human rights abuses

In the cases related below, the European Court condemned Contracting Parties for their failure in regulating 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.¹⁷¹

→ Lopez Ostra v. Spain¹⁷²

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

¹⁷¹ 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).

¹⁷² ECHR, *Lopez Ostra v. Spain*, App. No. 16798/90, (1995) 20 EHRR 277.

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".¹⁷³

➔ **Fadeyeva v. Russia**¹⁷⁴

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**".¹⁷⁵ 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.¹⁷⁶

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".¹⁷⁷

➔ **Using the European Court of Human Rights to challenge 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 4 Burmese citizens against Total for alleged complicity in the violation of human rights in Burma, under a 1993 Belgian

¹⁷³ *Ibid.*, § 51-58.

¹⁷⁴ ECHR, *Fadeyeva v. Russia*, App. No. 55723/00, 9 June 2005.

¹⁷⁵ *Ibid.*, §89.

¹⁷⁶ *Ibid.*, §134.

¹⁷⁷ 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).

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.

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 European Court has not ruled yet on the admissibility and the merits of the case.

* * *

The primary difficulty with filing a complaint regarding corporate human rights abuses 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 control. Applications regarding the failure of a European state to control the actions of a corporation abroad are likely to fail because the Court is would most probably be reluctant to find the actions of the corporation abroad to have been within the jurisdiction of the State.

Furthermore, the Court is also currently struggling with a very heavy workload. At the end of 2009, there were 119 300 cases pending before the Court, and the Court receives far more cases each year than it can process.¹⁷⁸ It can take between 4 and 6 years for a case to be examined. This is a major impediment to the effectiveness of this legal recourse mechanism.

¹⁷⁸ ECHR, “Annual Report 2009”, Provisional edition, www.echr.coe.int; ECHR, “Pending applications allocated to a judicial formation”, 31 December 2009, www.echr.coe.int

B. European Social Charter

The European Social Charter (ESC) is a Council of Europe treaty adopted in 1961.¹⁷⁹ A revised Charter was adopted in 1996 and it 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 22 February 2010, 29 Council of Europe Members States were bound by the revised European Social Charter.

The European Committee of Social Rights (ECSR) is composed of fifteen independent and impartial members, elected by the Council of Europe Committee of Ministers for a period of six years. These members are eligible to stand for a second consecutive term.¹⁸⁰ The Committee determines whether or not national situations (according to their law and practice) in the States Parties are in conformity with the Charter (Article 24 of the Charter, as amended by the 1991 Turin Protocol), through a monitoring procedure based on national reports and a collective complaint procedure. According to the ECSR:

– States Parties must submit a report every year detailing their implementation of the Charter in law and in practice concerning some of the accepted provisions of the Charter.¹⁸¹ Each State is bound by the provisions it previously accepted. Among them, 6 must be taken out of the “hard-core” provisions of ESC.¹⁸² “The Committee examines the reports and decides whether or not the situations in the countries concerned are in conformity with the Charter. Its decisions, known as ‘conclusions’, are published every year. If a state takes no action on a Committee decision to the effect that it does not comply with the Charter, the Committee

¹⁷⁹ CoE, *European Social Charter*, adopted on 18 October 1961, revised on 3 May 1996, entered into force on 1 July 1999, <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>

¹⁸⁰ According to the 1991 Turin Protocol, the members of the ECSR shall be elected by the Parliamentary Assembly. Nevertheless, as an amendment protocol, it has not yet been ratified by all States Parties. So, in the practice, the Committee of Ministers still elects members of the ECSR.

¹⁸¹ CoE, “Forms for the presentation of reports”, www.coe.int/t/dghl/monitoring/socialcharter/ReportForms/FormIndex_en.asp. Originally, there was a separate reporting on accepted provisions belonging to the “hard core” of the Charter and half of the other accepted provisions of Part II of the Charter, or so-called “non hard core provisions”. In 2007, the Council of Europe Committee of Ministers adopted a new system for the presentation of reports in 2007. According to this system, states are now required to submit an annual report before 31 October of each year, covering in turn four different thematic groups: Employment, training and equal opportunities; Health, social security and social protection; Labour rights; Children, families, migrants.

¹⁸² The 9 articles of the “hard core” provisions of the Charter are: Articles 1 (right to work), 5 (freedom of association), 6 (collective bargaining), 7 (right of children and young persons to protection), 12 (right to social security), 13 (right to social and medical assistance), 16 (right of the family to social, legal and economic protection), 19 (right of migrant workers and their families to protection) and 20 (right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex).

of Ministers addresses a recommendation to that state, asking it to change the situation in law and/or in practice”.¹⁸³

- The ECSR may receive complaints for violations of the Charter under the 1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, which came into force in 1998. So far only 14 states have agreed to adhere to this procedure.¹⁸⁴

The European Social Charter **applies only to the “metropolitan territory of each Party”**.¹⁸⁵ 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 partially expanded by the 2003 landmark decision of *FIDH v. France*.¹⁸⁶

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)
- 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)

¹⁸³ CoE, “The European Social Charter”, www.coe.int/t/dghl/monitoring/socialcharter/Presentation/AboutCharter_en.asp

¹⁸⁴ 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, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=158&CM=8&CL=ENG>

¹⁸⁵ CoE, *European social charter revised*, adopted on 3 May 1996, entered into force on 1 July 1999, Part VI, art. L.

¹⁸⁶ 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 France had violated the rights of children to social protection.

- 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)

🕒 Who can file a collective complaint?¹⁸⁷

Are eligible to file complaints to the Collective Complaints Protocol:

- European Trade Union Confederation (ETUC), Union of Industrial and Employers' Confederations of Europe (UNICE) and International Organisation of Employers (IOE);
- A number of International Non-Governmental Organisations (INGOs) which enjoy participative status with the Council of Europe, and are on a list drawn up for this purpose by the Governmental Committee;
- 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, competent in the matters covered by the Charter.

¹⁸⁷ CoE, "Organizations entitled to lodge complaints with the Committee", www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/OrgEntitled_en.asp

🔗 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

🔗 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”.¹⁸⁸ These recommendations are available on the Committee of Ministers website.¹⁸⁹

The Committee in action in corporate-related human rights abuses

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

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.¹⁹⁰

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.

Registered on the 4th of April, 2005, the complaint was declared admissible on October 10th, 2005. In its judgement of December 6th, 2006, the ECSR found a violation of article 11§1-3 (the right to protection of health), article 3§2 (the right to safe and healthy working conditions). In relation to this latter article, the ECSR stated that Greece failed to provide for the enforcement of safety and health regulations through adequate measures of supervision). In its finding 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 January 16, 2008, in which it stated in particular that:

¹⁸⁸ CoE, “Protocol to the European Social Charter Providing for a System of Collective Complaints – Summary of the treaty”, <http://conventions.coe.int/Treaty/en/Summaries/Html/158.htm>

¹⁸⁹ CoE, “Committee of Ministers Adopted Texts”, www.coe.int/t/cm/adoptedTexts_en.asp

¹⁹⁰ ECSR, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Collective Complaint No. 30/2005, Case Document No. 1, 26 April 2005, §1.

- 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.”¹⁹¹
- Greece “is in breach of its obligation to monitor the enforcement of regulations on health and safety at work properly”.¹⁹²
- The Greek government “has taken no subsequent steps to enforce the right embodied in Article 254”.¹⁹³

* * *

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:

- CoE, “The Application Pack”
www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+Court/Application+pack
- CoE, “Latest commentaries and manuals on ECHR”
www.echr.coe.int/library/COLENmanuals.html
- CoE, “Case-processing flowchart”
www.echr.coe.int/NR/rdonlyres/BA3F06A3-133C-4699-A25D-35E3C6A3D6F5/0/PROGRESS_OF_A_CASE.pdf

On the European Social Charter:

- CoE, European Committee of Social Rights- Rules, adopted on 29th March 2004, revised on 12th May 2005 and on 20th February 2009
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

¹⁹¹ 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.

¹⁹² *Ibid.*, (iii).

¹⁹³ *Ibid.*, (iv).



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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 Committee of Experts on the Rights and Welfare of the Child
- C. The African Court on Human and Peoples' Rights
- D. The Courts of Justice of the African Regional Economic Communities

* * *

The African Charter on Human and Peoples' Rights¹ entered into force on 21 October 1986, after its adoption in Nairobi (Kenya) in 1981 by the Assembly of Heads of the States and Governments of the Organization of African Unity (OAU, the African Union – AU, since 2001). It has opened a new era for the protection of human rights in Africa, and has been ratified by all State Members of the African Union.

The African Charter provided for the creation of the **African Commission on Human and Peoples' Rights** (art. 30 of the Charter), a mechanism which in turn led to the establishment of the **African Court on Human and Peoples' Rights**.

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**.² In case of violations of its provisions, and if local remedies have failed to guarantee them, it is possible to ask the African Commission and Court to consider the case.³
- The **Charter on the Rights and Welfare of the Child**.⁴ In case of violations of its provisions, and if local remedies have failed to guarantee them, it is possible to ask the African Committee of Experts on the Rights and Welfare of the Child⁵ and the African Court to consider the case.

¹ AU, *African Charter on Human and Peoples' Rights*, adopted on 27 June 1981, entered into force on 21 October 1986.

² AU, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, adopted 10-12 July 2003.

³ 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

⁴ AU, *The African Charter on the Rights and Welfare of the Child*, adopted in July 1990, entered into force in November 1999.

⁵ UA, "African Committee of Experts on the Rights and Welfare of the Child", www.africa-union.org/child

There are also different rapporteurs and working groups within the African system that can be seized by individuals.

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

A. The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (ACHPR) is a treaty body whose creation and mandate are defined by the African Charter (art. 30 of the Charter).⁶ The Commission which entered into force on 2nd November 1987, and has its seat in Banjul, The Gambia, has the **mandate to ensure the promotion and protection of human rights on the African continent** (art. 45 of the Charter). The Commission collects documents, undertakes missions of information, studies and research on African problems in the field of human and peoples' rights, organizes conferences, disseminates information and gives its views or makes recommendations to Member States. The Commission meets in session twice a year to adopt country specific resolutions on serious human rights violations and/or thematic resolutions,⁷ and to examine state reports and communications on human rights violations submitted to its attention.

🕒 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 rights⁸.

⁶ UA, *African Charter on Human and Peoples' Rights*, *op.cit.*, art. 30.

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

⁸ This could be particularly relevant when looking at violations involving transnational corporations.

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)
- 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, which is currently working on a set of guidelines aiming at detailing States' obligations under the Charter. The draft guidelines⁹ do 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

⁹ ACHPR, *Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and People's Rights*, July 2009.

development of their economies and cultures. They furthermore include rights such as the right to national and international peace and security and **the right to a clean and satisfactory environment**.

➔ **Centre for Minority Rights Development and MRG on behalf of Endorois Community v. the Republic of Kenya**¹⁰

This case deals with the eviction of the Endorois people from their traditional lands by the Kenyan government for tourism development purposes. It was brought by CEMERIDE and the Center for Minority Rights Development. On 4 February 2010, in a landmark case, the African Commission established that Endorois are a distinct indigenous people, taking position on the controversial meaning of “indigenous people” in Africa, where the very concept of indigeneity is questioned. The Commission then condemned Kenya for violating Endorois people’s right to land and right to development. Since the land was traditionally occupied and used by the Endorois, the Commission ruled that Kenya did not respect the right of the Endorois to consent to development, and did not adequately compensate them, taking into account both the loss they had suffered and the benefit they did not enjoy from the development project.

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

The African Commission also deals with alleged violations of the rights enshrined in the **Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa**.¹¹ 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)
- Right to sustainable development (art. 19)
- Right to inheritance (art. 21)

¹⁰ 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/download.php?id=749

¹¹ AU, *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa*, *op. cit.*

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?¹²

A communication can be lodged against a State Party for violations of a right guaranteed by the African Charter, or related instruments such as the Protocol to the African Charter on human and peoples’ rights, if these alleged violations were committed after the State party in question has ratified these instruments. The Commission has interpreted that the obligations of States under the Charter include the duty to “respect, protect, promote and fulfil these rights”. States’ duty to protect from harm by non-state actors is well established.¹³

However and alike other international instruments, States are the primary responsible to ensure the implementation of the rights protected in the Charter. It is currently debated whether the African Charter also provides for direct accountability of non-state actors. Although the African Charter, unlike other human rights instruments explicitly includes duties of individuals, its horizontal application (i.e. its application between persons – moral or physical – including businesses) remains controversial. Even more controversial is whether the duties specified in the Charter may be enforced against persons and whether complaints brought against a non-state actor might be admissible¹⁴.

¹² ACHPR, “Guidelines for submission of communications”, www.achpr.org/english/_info/guidelines_communications_en.html

¹³ 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.

¹⁴ *Ibid.*, pp 31-35.

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 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”¹⁵ 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.¹⁶

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.¹⁷

🕒 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).

¹⁵ 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.

¹⁶ *Ibid.*

¹⁷ SAIRAC, *op. cit.*

🔗 Under what conditions?

A petition may only be presented:

- If local remedies have been exhausted (art. 56(5)).
- If the matter has not already been settled by another international human rights body (art. 56(7)).
- 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

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.¹⁸ 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.

¹⁸ FIDH, *10 Keys to Understand and Use the African Court on Human and Peoples' Rights. A user's Guide for Victims of Human Rights Violations in Africa and Human Rights Defenders*, November 2004, p.54, www.fidh.org (updated in May 2010).

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

Link for additional information on how to submit a communication:

www.achpr.org/english/_info/guidelines_communications_en.html

See also: ACHPR, "Guidelines on the Submission of Communications", Information Sheet No. 2.

② Process and outcome¹⁹

Process

If a person or an organization, 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.²⁰ Communications sent

¹⁹ ACHPR, "Communications procedure", www.achpr.org/english/_info/communications_procedure_en.html

²⁰ ACHPR, "Rules of procedure", Rules 111, www.achpr.org/english/_info/rules_en.html

to the Commission should therefore indicate if the victim's life, personal integrity or health is in imminent danger.

Outcome

Strengths:

The communication procedure before the ACHPR:

- Is simple;
- 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 the States.

RAPPORTEURS & WORKING GROUPS WITHIN THE COMMISSION

At the moment, there are Special Rapporteurs on **prisons and conditions of detention; the rights of women; freedom of expression; human rights defenders; refugees, asylum seekers, migrants and internally displaced persons; summary, arbitrary and extra-judicial executions** and Working Groups on economic, social and cultural rights; indigenous populations/communities; the implementation of the Robben Island guidelines; death penalty and specific issues.

The Rapporteurs can undertake investigative and country visits, with the consent of the concerned state, which 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 treats individual communications. However, each Rapporteur can seek and receive information from States Parties to the African Charter, and from individuals and other bodies.²¹ They may then decide to take action, for example by sending a diplomatic letter to a Member State or by transmitting urgent appeals.²²

21 ACHPR, "Communications procedure", Information Sheet No.3, www.achpr.org/english/_info/communications_procedure_en.html

22 Although it may not be specifically indicated in their mandate, all Rapporteurs can transmit urgent appeals.

Finally, the Commission recently decided to create an expert Working Group on the state of legal obligations to examine the impacts of the extractive industry on the environment and human rights in Africa.²³

The Commission in action in corporate-related human rights abuses

➔ The case of Shell in Nigeria²⁴

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 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.

Therefore the communication 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 ruled in 2001, that the government of Nigeria had violated these articles.

The Commission recommended to cease attacks on the Ogoni people, to investigate and prosecute those responsible for the attacks, to provide compensation for victims, to prepare environmental and social impact assessments in the 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,²⁵ the UN Sub-Commission on prevention and discrimination of Minorities resolution 1994/8 and the Universal Declaration on the Eradication of Hunger and Malnutrition.

²³ ACHPR, *Resolution on the establishment of a working group on extractive industries, environment and human rights violations in Africa*, November 2009, ACHPR/Res148(XLVI)09.

²⁴ ACHPR, *Re: Communication 155/96*, 27 May 2002, ACHPR/COMM/A044/1, www.escri-net.org/usr_doc/serac.pdf

²⁵ 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 treaties. It must take all appropriate measures to protect individuals from violations of their rights and should be held accountable if it fails to do so, or if the taken measures are not sufficient. Through its international obligations, the government is expected to have established all necessary measures to protect its citizens from violations committed by transnational corporations. Furthermore it was easier to establish a direct government involvement in the case, as the government itself was the majority partner in the oil consortium and owned 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".²⁶

* * *

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.

Finally, the inability of the African Commission to enforce its decisions remains a serious weakness.

²⁶ International Crisis Group, *Nigeria: Ogoni Land after Shell*, Africa Briefing n54, 18 September 2008, www.crisisgroup.org/home/index.cfm?id=5675&l=1

B. The African Committee of Experts on the Rights and Welfare of the Child

The **African Charter on the Rights and Welfare of the Child**²⁷ (ACRWC or Children’s Charter) was adopted in 1990 by the Organization of African Unity, and entered into force in 1999. The Children’s Charter sets out rights and defines universal principles and norms for the status of children.

🕒 What rights are protected?

Among other rights, the Children’s Charter ensures:

- The right to life, survival and development (art. 5)
- Education, including vocational training and guidance (art. 11)
- Leisure, recreation and cultural activities (art. 12)
- The Right to Health and Health Services (art. 14)
- The Right to be protected from all Forms of Economic Exploitation (art. 15)
- The Right to be protected against Harmful Social and Cultural Practices (art. 21)

Many of the rights enshrined in the African Charter on the Rights and Welfare of the Child are guaranteed by the African Charter, and as such can be protected by the African Commission. But, the Charter provides for the Establishment of an African Committee of Experts on the Rights and Welfare of the Child (art. 32), and for its mandate (art. 42) which consists of:²⁸

- Promoting and protecting the rights enshrined in the Charter;
- Monitoring the implementation and ensuring protection of the rights enshrined in the Charter;
- Interpreting the provisions of the Charter at the request of a State Party, an institution of the AU or any other person or institution recognized by AU and,
- Performing such other tasks as may be entrusted to it by the Assembly of Heads of State and Government.

🕒 Who can file a communication and under what conditions?

The Committee receives reports from **countries which have ratified the Children’s Charter** (art. 43, 1) and communications **from “any person, group or non-governmental organization** recognized by the Organization of African Unity, or the United Nations” relating to any matter covered by this Charter. Every communication to the Committee shall contain the name and the address of the author and shall be treated in confidence (art. 44, 1-2). There is no condition in the Charter providing for the exhaustion of all available domestic legal remedies before submitting a communication to the Committee.

²⁷ AU, *The African Charter on the Rights and Welfare of the Child*, op.cit.

²⁸ AU, “African Committee of Experts on the Rights and Welfare of the Child”, op.cit.

🔗 Process and outcome

The Children’s Charter also provides a **mechanism of investigations** through which the Committee may “resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from the States Parties any information relevant to the implementation of the Charter, and may also resort to any appropriate method of investigating the measures the State Party has adopted to implement the Charter” (art. 45).

The Committee submits a report every two years detailing its activities and on any communication received to each Ordinary Session of the Assembly of Heads of State and Government (art. 45, 2). The report must be published by the Committee after its examination by the Heads of State and Government, while State Parties must make it widely available in their own countries (art. 45, 3-4).

In the case of violations of the provisions of the African Charter on the Rights and Welfare of the Child,²⁹ it is also possible to ask the African Court to step in.

C. The African Court on Human and Peoples’ Rights

The creation of the African Court on Human and Peoples’ Rights is an important step to complement the role of the African Commission with enforceable mechanisms that the African system of human rights protection was lacking so far. The Protocol to the African Charter on Human and Peoples’ Rights on the establishment of an African Court on Human and Peoples’ Rights³⁰ was adopted on 10 June 1998, and entered into force on 25 January 2004. At the 2004 AU Summit, it was decided that the new Court would merge with the African Court of Justice. As of today, this has yet to be done but nevertheless, the Court is still in operation without the merger. The Court is located in Arusha, Tanzania. The Court gave its first judgement on 15 December 2009.

🔗 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.**”³¹

²⁹ *Ibid.*

³⁰ AU, *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.

³¹ *Ibid.*, art. 3.

Ⓧ Against whom may a complaint be lodged?

The petition must be addressed to a State which is party to the Protocol.

Ⓧ Who can file a complaint?

In accordance with Article 5 of the Protocol, the Court is competent to receive applications from:

- The African Commission;³²
- A State Party to the Court’s Protocol which has lodged an application with the Commission, which was transmitted to the Court;
- A State Party to the Court’s Protocol against which an application was introduced before the Court;
- A State Party to the Court’s Protocol whose citizen is a victim of human rights violation;
- A State Party to the Court’s Protocol with an interest in a case (may be permitted by the Court to join the proceedings);
- **African intergovernmental organizations: this is one of the unique aspects of the African Court compared to other regional courts;**
- **Any individual and NGO with observer status before the Commission.**³³ However, the African Court may **not** receive petitions **directly** from them, **unless** the State Party concerned made a prior **declaration** granting such a right (art. 34.6) (See conditions of admissibility below)

Ⓧ Under what conditions?

- 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).

This declaration requirement is one of the main limits of the African system of protection of human rights. As of today, among the 25 States having ratified the Protocol of 1998, **only Burkina Faso and Mali** 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

³² Individuals and NGOs with Observer Status before the African Commission may present communications before the African Commission, which 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.

³³ ACHPR, *Resolution for the criteria for granting an enjoying observer status to non-governmental organizations working on the field of human rights with the African Commission on Human and Peoples’ Rights*, 5 May 1999.

this could represent a potential obstacle to access the Court. Obtaining the observer status can take up to a year or two.³⁴

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 organization or its legal representative;
 - 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

³⁴ 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 organizations working on the field of human rights with the African Commission on Human and Peoples’ Rights*, *op cit*.

- 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
-

⑤ 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.³⁵

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 (see *Box: How to file an application*).

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);
- Judgement³⁶ (art. 3, 5, 6, and 7 of the Protocol)

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.

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).

³⁵ ACHPR, *Interim Rules of Court*, Rule 27.

³⁶ Term used for legal decisions of Appeal Courts and Supreme Courts that are binding.

The judgements issued by the Court are **binding**, contrary to the communications of the Commission and of the Committee.

State Parties commit themselves to the implementation of judgements rendered within the delays fixed by the Court (art. 30 of the Protocol). However, 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 Council of Ministers, is an important way to put pressure on the condemned States.

Besides, the Council of Ministers 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, the implementation of these measures will depend on the will of the Council of Ministers to exercise a thorough monitoring of the decisions of the Court. This still remains to be seen.

The Court addresses the Conference of the Heads of State and Government in an annual report which must include the non-fulfilment 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 two 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.

D. 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 for 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 borne 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?³⁷

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)**

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

³⁷ 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, www.claiminghumanrights.org/ecowas.html?L=1

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.**

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 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 can presumably base an application on the SADC Treaty's requirement that State Parties should respect the fundamental principles of human rights.

HOW TO FILE A COMPLAINT?³⁸

- 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.
- 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

³⁸ Based on SADC, *Protocol of Tribunal and the Rules of Procedures Thereof*, art.33, www.sadc.int/tribunal/protocol.php

The Tribunal's jurisdiction in the field of human rights is therefore implicit, and this appears to be borne out by the first case heard by the Tribunal in October 2007:

➔ **Michael Campbell I v. Zimbabwe**³⁹

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 law⁴⁰, 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. An appeal will probably be lodged with the SADC Tribunal.

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.

³⁹ SADC, *Mike Campbell (Pvt) Ltd. v. Zimbabwe*, November 28, 2008, n° 2/2007 [2008] SADC (T) 2, SADC (T) n° 8/2008, www.saflit.org/sa/cases/SADCT/2008/2.pdf

⁴⁰ *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".

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**⁴¹

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”.⁴² 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.⁴³

41 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.

42 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, www.eacj.org/docs/judgements/JUDGMENT_REFERENCE_NO_1_OF_2007.pdf. 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.”

43 S. T. Ebobrah, *op.cit.*, p.83.

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.**

See appendice table on Jurisdiction, Referrals and Rulings of the REC Courts of Justice at the end of this chapter.

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.

* * *

It could be said that the RECs' jurisdiction in the area of human rights developed because the African Court on Human and Peoples' Rights was slow in becoming operational (so far the Court has had one complaint referred to it, which it declared inadmissible); and also because the need was felt to transcend national judiciaries that either were not independent, or had little knowledge of international human rights law applicable in domestic law. Existing regional economic and cultural ties, and the regional mobilisation around specific cases, may increase the likelihood of sanctions being applied if States refuse to comply with the rulings handed down.

On the other hand, such co-existence can lead to the fragmentation (and fragility) of the interpretation of international human rights standards; and could create confusion as to the best course of legal action to pursue, and to a funding problem for the courts.

Nevertheless, the RECs remain a channel that can be beneficial for the victims, although so far no REC has ruled on the responsibility of economic actors. The NGO SERAC (Social and Economic Rights Action Center) however has lodged a complaint against Nigeria before ECOWAS concerning the responsibility of oil companies and the Nigerian government. The case is pending: the victims allege violation of their right to a healthy environment and of their economic and social rights, and are claiming damages to the tune of 1 billion US dollars.

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 Committee of Experts on the Rights and Welfare of the Child
www.africa-union.org/child/home.htm
- 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_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
- F. Vlijoen, *International human rights law in Africa*, Oxford University Press, Oxford, 2007.
V.O.O. Nmehielle, *The African Human Rights System: its Laws, Practices and Institutions*, Martinus Nijhoff, The Hague, 2001

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.html?showall=1

– 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/index.html

– 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



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➤ Jurisdiction, Referrals and Rulings of the REC Courts of Justice

ECOWAS COURT OF JUSTICE		SADC TRIBUNAL
Seat	Abuja (Nigeria)	Windhoek (Namibia)
Member States	Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali (suspended), Niger, Nigeria, Senegal, Sierra Leone, and Togo	Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe
Jurisdiction	<ul style="list-style-type: none"> - Interpretation and application of the Treaty, and its Protocols and Conventions - Disputes between States or between a State and an ECOWAS body - Individual complaints against Member States (additional Protocol) 	<ul style="list-style-type: none"> - Interpretation and application of the Treaty, the Protocols, the subsidiary instruments and any other agreement between Member States (Art. 14 of Protocol) - Disputes between (Art. 15 of Protocol): <ul style="list-style-type: none"> - a Member State and the Community - a natural person or a legal entity and the Community - the Community and its personnel
Jurisdiction in the field of Human Rights	Jurisdiction based on the African Charter on Human and Peoples' Rights	Jurisdiction in the field of Human Rights is implicit, based on the principles established in Article 6 of the Treaty
Who can apply to the Court/Tribunal	<ul style="list-style-type: none"> - Member States or the Authority of Heads of State and Government - Individuals and corporate bodies in proceedings for the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies. (Art. 10 c) of additional Protocol - Individuals on application for relief for violation of their human rights (Art. 10 d) of additional Protocol 	<ul style="list-style-type: none"> - A Member State - A natural person or a legal entity against a Member State (Art. 15 of Protocol)
Requirements for an individual complaint	<ul style="list-style-type: none"> - Exhaustion of local remedies not required - The case must not have been considered by another international Court 	<ul style="list-style-type: none"> - Exhaustion of all local remedies except if unable to proceed under the domestic jurisdiction (Art. 15.2 of Protocol) - Consent of other parties not required (Art. 15.3 of Protocol)
Type of Procedure	Written and oral	Written and oral
Nature of the decision	- Judgements final, not open to appeal	<ul style="list-style-type: none"> - Conservatory or interim measures as necessary (Art. 28 of Protocol) - Judgements final, binding on the parties, open to appeal (Art. 16 and 32.3 of Treaty) - Procedure for review of a decision (Art. 26 of the Protocol)
Force of decisions	Binding	Binding
Execution of judgements	<ul style="list-style-type: none"> - Transmission of execution orders by the Court to Member States concerned (Art. 24 of additional Protocol) - In the case of non-execution of a judgement, the Authority of Heads of State and Government can impose sanctions (Art. 77 of Revised Treaty). 	<ul style="list-style-type: none"> - States and Institutions of the Community are responsible for the execution of the judgements (Art. 32.2 of Protocol) - Any failure to comply with a decision of the Tribunal may be referred to the Tribunal, which can report to the Summit for the latter to take appropriate action.

EAC COURT OF JUSTICE	COMESA COURT OF JUSTICE	AMU COURT OF JUSTICE
Arusha (Tanzania)	Khartoum (Sudan)	Nouakchott (Mauritania)
Burundi, Kenya, Rwanda, Uganda and Tanzania	Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe	Algeria, Libya, Mauritania, Morocco, Tunisia
<ul style="list-style-type: none"> - Interpretation and application of the Treaty (Art. 23 of Treaty) - Disputes between the Community and its employees - Any agreement involving a Member State or the Community and which gives jurisdiction to the Court in case of dispute (Art. 28-32 of Treaty) 	<ul style="list-style-type: none"> - Interpretation and application of the Treaty (Art. 19 of Treaty) 	<ul style="list-style-type: none"> - Interpretation and application of the Treaty and other documents adopted by AMU (Art. 13 of Treaty)
Jurisdiction in the field of Human Rights is implicit, based on the principles established in Article 6 of the Treaty	Jurisdiction in the field of Human Rights is implicit, based on the principles established in Article 6e of the Treaty, which refers to the African Charter	Jurisdiction in the field of Human Rights is implicit, based on the Treaty, the other AMU documents, the general principles of international law and international case law and doctrine
<ul style="list-style-type: none"> - A Member State - The EACJ Secretary general - Any natural person or legal entity residing on the territory of Member States 	<ul style="list-style-type: none"> - A Member State - The Secretary general - Any natural person or a legal entity 	<ul style="list-style-type: none"> - Presidential Council - Member State involved in the dispute
<ul style="list-style-type: none"> - Exhaustion of all local remedies 	<ul style="list-style-type: none"> - Exhaustion of all local remedies (Art.26) 	
Written and oral	Written and oral	
<ul style="list-style-type: none"> - Judgements final, not open to appeal - Procedure for review of a decision (Art. 35 of Treaty) 	<ul style="list-style-type: none"> - Interim orders or directions deemed necessary or desirable (Art. 35 of Treaty) - Judgments delivered in public session and not open to appeal, except in case of revision (Art. 31 of Treaty) 	<ul style="list-style-type: none"> - Judgements enforceable and final
Binding	Binding	Binding
<ul style="list-style-type: none"> - In the case of non-execution of a judgement, the Council can take sanctions (Art. 143), including suspension from taking part in the activities of the Community (Art. 146), and even expulsion (Art. 147). 		

CHAPITRE III

The Inter-American System of Human Rights

* * *

The Organization 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.⁴⁴

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”.⁴⁵

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”.

⁴⁴ Honduras was suspended on July 5, 2009, because of the overthrow of the democratic government of President Manuel Zelaya. The membership of Cuba was suspended for many years and was only re-activated in 2009 but it is still to be seen if Cuba will take seriously the work of the OAS, thus only 33 countries participate actively when this guide was published.

⁴⁵ 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.

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 Charter⁴⁶ and the American Convention on Human Rights⁴⁷. **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 particular⁴⁸:

- 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 (art. 58). Such reports can address violations committed by businesses;⁴⁹
- 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 (art. 40);
- 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 (art.15); 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

⁴⁶ OAS, Charter of the Organisation of American States, adopted on 1948, lastly revised on 25 September 1997, www.oas.org/juridico/english/charter.html

⁴⁷ IACHR, American Convention on Human Rights, adopted on 22 November 1969, entered into force on 1978, www.cidh.org/Basicos/English/Basic3.American%20Convention.htm

⁴⁸ IACHR, Rules of Procedure of the Inter-American Commission on Human Rights, adopted at the 137th regular period of sessions, 28 October to 13 November 2009, www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm

⁴⁹ 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.

to the General Assembly of the OAS. The Commission can also prepare additional reports as it deems appropriate in order to perform its functions, and publish them as it sees fit (art. 56 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.⁵⁰ 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 (art. 3 to 25):

- Right to judicial personality (art. 3)
- Right to life (art. 4)
- Right to humane Treatment (art. 5)
- Freedom from slavery (art. 6)
- Right to personal liberty (art. 7)
- Right to a fair trial (art. 8)
- Freedom from ex post facto laws (art. 9)
- Right to compensation (art. 10)
- Right to privacy (art. 11)
- Freedom from conscience and religion (art. 12)
- Freedom from thought and expression (art. 13)
- Right of reply (art. 14)
- Right of assembly (art. 15)
- Freedom of association (art. 16)
- Rights of the family (art. 17)
- Right to a name (art. 18)
- Rights of the child (art. 19)
- Right to nationality (art. 20)
- Right to property (art. 21)
- Freedom of movement and residence (art. 22)
- Right to participate in a government (art. 23)
- Right to equal protection (art. 26)
- Right to judicial protection (art. 25)

Economic, Social and Political Rights:

- Progressive development (art.26)

⁵⁰ CDES, CEDHU, DECOIN and Accion Ecologica, “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.

According to article 19(6) of the Additional Protocol to the American Convention 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 the union** (art. 8a) and the **right to education** (art. 13).

The American Declaration on the Rights and Duties of Man⁵¹

- 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 not⁵² 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, the Court confirmed that the Declaration is “a source of international obligations for the Member States of the OAS”.⁵³ 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 Convention, the Commission applies the Convention to process it. Otherwise, the Commission applies the American Declaration. These are not the only legal documents which the Commission can apply in its judgements. 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 Commission⁵⁴.

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.

⁵¹ IACHR, *American Declaration on the Rights and Duties of man*, adopted on 1948, www.cidh.org/Basicos/English/Basic2.American%20Declaration.htm

⁵² Antigua y Barbuda, Bahamas, Belize, Canada, Guyana, St Kitts & Nevis, St Lucie, St Vincent & Grenadines, USA.

⁵³ 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.

⁵⁴ For the full list of Conventions and their status of ratification: I/A Court H.R., “Instruments Inter-American System”, www.corteidh.or.cr/sistemas.cfm?id=2

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”.⁵⁵ 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.”⁵⁶ 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.⁵⁷

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 [...]”.⁵⁸

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.

⁵⁵ 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.

⁵⁶ 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.

⁵⁷ IACHR, *Guantanamo Bay Precautionary Measures*, 12 March 2002, 41 ILM (2002) 532.

⁵⁸ 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.

⦿ Who can file a petition?

Any person, group of persons or non-governmental organization 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. **The petition may be presented on behalf of the person filing the petition or on behalf of a third person.**

⦿ 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 (art. 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 (art. 32 of the Rules of procedure).

HOW TO FILE A PETITION?

Petitions addressed to the Commission must contain the following information (art.28 of the Rules of Procedure of the Commission):⁵⁹

- The name, nationality and signature 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;
- The address for receiving correspondence from the Commission;
- An account of the act or situation that is denounced;
- If possible, the name of the victim and of any public authority who has taken cognizance of the fact or situation alleged;
- The State responsible for the alleged violations;
- Compliance with the time period provided for in Article 32 of these Rules of Procedure;
- Any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure; and,
- An indication of whether the complaint has been submitted to another international settlement proceeding, as provided in Article 33 of these Rules of Procedure.

It is also possible to include information from experts to highlight and stress important points in support of the case.

⁵⁹ IIACHR, “Form for filing petitions alleging human Rights violations”, www.cidh.org/pdf%20files/petitionform.pdf

🔗 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 and,
- 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 to recommendations or precautionary measures.⁶⁰ 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 the 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 violations, and/or the exchange of information and documentation with governmental authorities and members of the Commission. The deadline for written requests for a hearing at the IACHR is at least 50 days before the next session. Requests must indicate the purpose of the hearing and the identity of the participants.⁶¹ Hearings are subsequently made available via audio or video recordings in the press section of the IACHR website. Private hearing may be held upon request of the parties. Both governmental and petitioners representatives are normally each allowed a 20 minute intervention.

The requests for hearings and working meetings should be addressed to the IACHR Executive Secretary, Dr. Santiago A. Canton, and sent via fax: (202) 458-3992.

It should be noted that the Commission does not cover the costs of individuals or organisations participating in hearings during the sessions of the Commission, held in Washington, USA.

⁶⁰ IACHR, *Rules of procedure of the Inter-American Commission on Human Rights, op.cit.*, Chapter VI.

⁶¹ *Ibid.*, art. 64(2).

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 and the situation of independent union leaders in Cuba. A full list can be found on the database of the Commission: www.cidh.oas.org/prensa/publichearings

Going further...exploring extraterritorial application

In cases where victims are suffering from the intervention of foreign companies on the territory of their country and have a case pending before the Commission against the state or even if they do not have a case pending but nevertheless want to raise awareness on a specific situation, it would be interesting to request a hearing concerning human rights violations that have been committed by businesses as a result of the failure of a “home State” (i.e. where the company is registered) to prevent companies based on its territory to commit violations abroad. This would provoke a discussion with the government where the company is legally registered (provided this country is a member of the OAS) regarding its extraterritoriality responsibilities to ensure its companies operating abroad are respecting human rights standards. As this is so far unexplored it is hard to tell how far reaching the impact of such a discussion would be.

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 for Freedom of Expression, on the Rights of Women, on the Rights of Migrant Workers and Their Families, on the Rights of the Child, on the Rights of Indigenous Peoples, on the Rights of Persons Deprived of Liberty, on the Rights of Afro-Descendants and against Racial Discrimination and a Unit for Human Rights Defenders.

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 Unit 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 Columbia, 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.⁶² 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.

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”.⁶³ 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.⁶⁴ 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.⁶⁵ 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.⁶⁶

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.⁶⁷

The Commission then prepares a second report with a new period of time granted

⁶² 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.

⁶³ IACHR, *Rules of procedure of the Inter-American Commission on Human Rights*, *op.cit.*, art. 25 (1).

⁶⁴ *Ibid.*, art. 25(2).

⁶⁵ *Ibid.*, art. 25(4c).

⁶⁶ *Ibid.*, art. 25(3), (8).

⁶⁷ *Ibid.*, art. 44(2).

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 (art. 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 (art. 34 of the Rules of Procedure of the Court).

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.⁶⁸

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.⁶⁹

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 Declaration⁷⁰, as well as their right to cultural identity (art. 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;

⁶⁸ *Ibid*, art. 44(3).

⁶⁹ 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>

⁷⁰ At the time this case was filed, Brazil was not a State Party to the American Convention.

- In permitting the massive penetration of outsiders carrying various contagious diseases into the Indians' 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".⁷¹

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 (art. I), the right to residence and movement (art.VIII)) and the right to the preservation of health and to well-being (art. XI).

The Commission issued recommendations to the Government of Brazil, including preventive and curative health measures to protect the lives and health of Indians, as well as the consultation of the Yanomami 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 (art. 4 of the American Convention), personal integrity (art. 5), judicial guarantees (art. 8), freedom of religion (art. 12), protection of their family (art. 17), property (art. 21) and right to judicial protection (art. 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".⁷²

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:⁷³

- 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.

⁷¹ IACHR, *Yanomami Community v. Brazil*, Case No. 7615, Resolution 12/85, 5 March 1985, § 2.

⁷² IACHR, *Mercedes Julia Huenteao Beroiza et al. v. Chile*, Case No. 4617/02, Report 30/04, March 2004, § 1-2.

⁷³ *Ibid.*, Chapter III.

Precautionary measures

As mentioned before, any person, group or NGO legally recognized in any of the OAS Member States can ask for precautionary measures to the Commission, which normally tends to grant them in cases threatening the right to life and to personal integrity and indigenous' peoples' rights, land rights, child rights and the right to health.⁷⁴ Unfortunately, as shown by the *Ngöbe Indigenous Communities et al. vs. Panama* case 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 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 IACHR 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.⁷⁵

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 does not intend to comply with its request.⁷⁶

⁷⁴ See C. Anicama, *op. cit.*

⁷⁵ IACHR, *Ngöbe Indigenous Community et al. v. Panama*, Precautionary Measures 56/08, 2009.

⁷⁶ Cultural Survival, "Panama does not intend to suspend Dam construction in Ngöbe lands", 21 July 2009, www.culturalsurvival.org/news/panama/panama-does-not-intend-suspend-dam-construction-ng-be-lands

➔ **Marco Arana, Mirtha Vasquez and others v. Peru**⁷⁷

The Yanacocha mine is a gold mine located in the Peruvian region of Cajamarca, and is run by NewMont, the largest US-based mining company. Allegations against the company for environmental contamination, and fears amongst the communities have led to various protests, intimidation, violence and fatal confrontations between pro and anti mining groups.

On April 23, 2007, the Commission granted precautionary measures in favour of priest Marco Arana and attorney Mirtha Vásquez, and other members of the organization “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”.⁷⁸ 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 the confrontations, and complaints made by Oxfam America, the company has 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. The independent review was published in June 2009. Oxfam America calls on the company to fully implement recommendations made.⁷⁹

➔ **Community of La Oroya v. Peru**⁸⁰

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

⁷⁷ IACHR, *Marco Arana, Mirtha Vasquez et al. v. Peru*, Precautionary Measures, 2007, § 44, www.cidh.org/medidas/2007.eng.htm

⁷⁸ See C. Animaca, *op. cit.*

⁷⁹ Oxfam, “Oxfam Calls on Mining Company to Respect Human Rights”, 1 July 2009, www.oxfamamerica.org/press/pressreleases/oxfam-calls-on-mining-company-to-respect-human-rights

⁸⁰ IACHR, *Marco Arana, Mirtha Vasquez et al. v. Peru, op.cit.*, § 46.

with the “Plan for environmental management and adjustment” (PAMA), which includes the reduction of toxic emissions.⁸¹

Since August 2009, the case has been under consideration by the Inter-American Commission.

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**.

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 – the Inter-American Commission).

🕒 Who can file a complaint?

Any individual or organization 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 (art. 35 of the Rules of Procedure of the Court).

⁸¹ Department of Mines and Energy (Peru), “Reglamentan ley que amplia el plazo de ejecución del PAMA de minera Doe Run”, NP 352-09, www.minem.gob.pe

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,⁸² 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.⁸³

🕒 Process and outcome

Process

The cases before the Court may be filed by the Commission (art. 35 Rules of Procedure) or by a State (art. 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 (art. 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.⁸⁴

Then the State has 2 months to respond, stating whether it accepts or disputes the facts and claims (art. 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. (art. 43 Rules of Procedure). During the oral phase,

⁸² 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, art. 37, www.corteidh.or.cr/reglamento/regla_ing.pdf

⁸³ I/A Court H.R., *Rules of Procedure of the Inter-American Court of Human Rights*, *op. cit.*, art. 44.

⁸⁴ 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, art.2, www.corteidh.or.cr/docs/regla_victimias/victimias_eng.pdf

the Court hears witnesses and experts and analyses the evidence presented prior to issuing its judgement.

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 people. 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.⁸⁵

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.

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.

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.⁸⁶

Judgements

→ Saramaka People v. Suriname⁸⁷

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 (art. 21) and their right to judicial protection.(art. 25).

⁸⁵ I/A Court H.R., *Rules of Procedure of the Inter-American Court of Human Rights*, *op.cit.*, art. 27(3).

⁸⁶ See C. Anicama, *op. cit.*

⁸⁷ I/A Court H.R., *Saramaka People v. Suriname*, Preliminary objections, Merits, Reparations and Costs, 28 November 2007, Series C No. 172.

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 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.”⁸⁸

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.”⁸⁹

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 Saramakas people receive any benefit from the logging in their territory”.⁹⁰ The Court came to the same conclusions regarding the gold mining concessions.⁹¹

In 2007, the government ended logging and mining operations in 9000 square kilometres of Saramaka territory.⁹²

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)⁹³. On March 17, 2008, the State filed an application seeking an interpretation of

⁸⁸ *Ibid.*, § 77.

⁸⁹ *Ibid.*, § 129.

⁹⁰ *Ibid.*, § 154.

⁹¹ *Ibid.*, §§ 156 & 158.

⁹² The Goldman Environmental Prize, “Wanze Eduards and S. Hugo Jabini - Suriname Forests”, www.goldmanprize.org/2009/southcentralamerica

⁹³ *Ibid.*, Chapter VIII.

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”.⁹⁴ 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”⁹⁵.

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.⁹⁶

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.⁹⁷

⁹⁴ IACHR, “Annual Report of the Inter-American Commission on Human Rights 2008”, 2008, Chapter III, § 1133.

⁹⁵ I/A Court H.R., *Baena-Ricardo et al. v. Panama*, 2 February 2001, Series C No. 72, § 134.

⁹⁶ ESCR-Net, “Baena Ricardo et al. (270 workers v. Panama)”, www.escr-net.org/caselaw

⁹⁷ FIDH, “Carta abierta al Presidente de Panama: Caso Beana Ricardo y otros vs. Panama”, 13 March 2008

→ **Claude Reyes et al. v. Chile**⁹⁸

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.

Provisional measures

→ **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.⁹⁹

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. This request was made in connection with a petition that the *Asociación del Pueblo Kichwa de Sarayaku*, the Center for Justice and International Law (CEJIL) and the Centre for Economic and Social Rights (CDES), filed with the Inter-American Commission in 2003.¹⁰⁰

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. The Court again ordered

⁹⁸ I/A Court H.R., *Claude Reyes et al. v. Chile*, 19 September 2006, Series C, § 151.

⁹⁹ 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.

¹⁰⁰ I/A Court H.R., *Kichwa Peoples of the Sarayaku community and its members v. Ecuador*, Report 64/04, 13 October 2004.

provisional measures in 2005. So far, those measures have only been partially upheld. For instance, only part of the explosives – apparently relatively small – have been removed. In addition, the government is showing signs that it will re-initiate oil activities in the region.¹⁰¹

On the 3rd of February 2010, the Inter-American Court held an audience to analyse how far Ecuador had complied with the provisional measures. In a subsequent resolution, the Court once again urged Ecuador to confiscate all explosive materials that the company left on the territory, in the Amazonian forest. The Court gave Ecuador two months to report on measures taken to confiscate the explosives, and to report on its plans for the oil exploration and exploitation in the concessions (“bloques 23 y 24”).

On 26 April 2010, the Inter-American Commission filed an application to send the case against Ecuador to the Court for having authorised oil exploration and exploitation on the territory of the Kichwa people of Sarayuku, without prior consultation of the community.

It is hoped that this case will encourage the Court to develop clear standards on indigenous peoples’ rights in the case of projects related to the extraction of natural resources.

➔ **Mayagna (Sumo) Awas Tingni Community v. Nicaragua**¹⁰²

In this case the Court concluded that Nicaragua had violated the right to judicial protection and to property.¹⁰³ 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.”¹⁰⁴

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”.¹⁰⁵ The Commission subsequently decided to submit the case to the Court on May 28, 1998.

¹⁰¹ Mario Melo (abogado del Pueblo de Sarayuku), “Sarayuku : un caso emblematico de defensa territorial”.

¹⁰² I/A Court H.R., *Mayagna (Sumo) Awas Tingni community v. Nicaragua*, 31 August 2001, Series C No. 70.

¹⁰³ See above section ‘Commission in action’ for the proceeding of the case before the Commission.

¹⁰⁴ IACHR, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Preliminary Objections, Report 27/98, 1 February 2000, § 142.

¹⁰⁵ *Ibid.*, §142, b.

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 activities¹⁰⁶. Finally, the Court asked the State to report every six months on measures taken to ensure compliance with their judgement.¹⁰⁷

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."¹⁰⁸

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.

* * *

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.

¹⁰⁶ I/A Court H.R., *Mayagna (Sumo) Awas Tingni community v. Nicaragua*, *op.cit.*, § 153.

¹⁰⁷ *Ibid.*, Chapter XII, § 8.

¹⁰⁸ IACHR, "IACHR hails titling of Awas Tingni Community lands in Nicaragua", Press Release No. 62/08, www.cidh.org/comunicados/english/2008/62.08eng.htm

ADDITIONAL RESOURCES

- **Inter-American Commission on Human Rights**
www.cidh.oas.org
 - **Inter-American Court on Human Rights**
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**
www1.umn.edu/humanrts/inter-americansystem.htm
 - **CELS (Centro de Estudios Legales y Sociales)**
www.cels.org.ar
 - **Centre for Justice and International Law (CEJIL)**
www.cejil.org/main.cfm
(See notably the Pro Bono Guide providing a list, by country, of organizations, universities, and individual practitioners willing to provide assistance in Inter-American litigation free of charge: www.cejil.org/probono.cfm)
 - **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**
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➤ Amongst this group, the first plaintiff in the case against Chevron/Texaco in Ecuador. Now involving 30 000 plaintiffs, this historic class action related to diseases caused by water contamination has been going on for 17 years.

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SECTION II

JUDICIAL MECHANISMS

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➤ 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

Multinational corporations do not benefit from legal personhood under international law. They enjoy a *de facto* immunity that protects them against all challenges. Invoking the civil liability of a multinational corporation can therefore be done only 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 or insufficient legal capacity among local authorities (inadequate legislation, poor infrastructure, corruption, lack of legal aid, the politicisation of the judiciary, etc), 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 the makes decisions that lead to the violation, evidence is often located in the multinational's country of origin. 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 two separate legal systems: those of the United States and the European Union.¹ Beyond the practical considerations

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 analyzing specific legislation.

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 US and E.U.,
- 2 – Over the past decade, the volume of legal proceedings brought by victims seeking recognition and compensation for their injuries has increased in countries where multinationals are domiciled, and
- 3 – More than those of other countries, these two legal systems have developed specific procedures to hold legal persons liable for acts committed abroad. References to specific cases brought before other courts, however, are inserted occasionally in the text.

What are the current methods of seeking compensation through **suing a multinational corporation in a US 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 judgments:** This point concerns the recognition and enforcement of foreign judgments 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 E.U.'s 27 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.²

2 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 instruments US courts use to establish their jurisdiction for cases that fall within our inquiry are the **Alien Tort Claims Act (ATCA) of 1789** and the **Torture Victim Protection Act (TVPA) of 1991**.³

→ An overview of the Alien Tort Claims Act

Enacted in 1789 for reasons that continue to be debated, the ATCA has become an **indispensable basis** invoked in most **tort cases** brought in the US against multinational corporations for human rights violations committed abroad.

US federal courts have near-universal jurisdiction. They may hear any civil case:

- Introduced by a **foreigner**,
- Introduced by a victim of a **serious violation of the "law of nations", or customary international law, in force in the US**,
- **Regardless** of where the crime was committed,
- **Regardless** of the nationality of the perpetrator (US or foreign citizen),⁴
- Knowing that **the defendant in the case must be on US soil when the suit is brought** (this is the only connecting factor).⁵

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

³ We recommend reading the chapter on the United States in: Pro Bono Publico Oxford, *op.cit.*, p. 303 and following.

⁴ 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."

⁵ B. Stephens and M. Ratner, *International Human Rights Litigation in US Courts*, Irvington-on-hudson, Transnational publishers Inc, New York, 1996, p. 9 ff.

➔ An overview of the Torture Victim Protection Act

Adopted in 1991, the TVPA allows US and foreign nationals to sue in federal court for redress from perpetrators of torture or extrajudicial executions,⁶ including those carried out outside the US. The TVPA does not replace the ATCA, but complements it. On the one hand, the TVPA's scope is more limited than that of the ATCA because only acts of torture and extrajudicial executions are litigable under the TVPA. On the other hand, the TVPA extends the scope of the ATCA, in that it accords the right to sue not only to foreigners but to US citizens as well.⁷

1. Applying the ATCA to private individuals and multinational corporations

The application of the ATCA for violations of international human rights law is the culmination of a long process of evolution. Initially, the ATCA applied only in situations involving human rights violations committed by persons **acting under color of law** as public officials (see *Filártiga v. Peña-Irala*).⁸ The ATCA's scope was subsequently extended to cover violations committed by individuals **acting outside any official capacity** (see *Kadic v. Karadzic*).⁹ The application of the ATCA to tort actions brought in the US **against multinational corporations for violations of human rights committed abroad** is more recent (*Sosa v. Alvarez-Machain* - see below).

In the **TVPA**, references to individuals exclude private and public actors, particularly governments. There is some controversy with respect to legal persons,¹⁰ as some courts have ruled that the law is applicable¹¹ while others ruled it is not.¹² What is clear is that the TVPA applies to physical persons (i.e. “natural persons”) representing or appointed by a legal person (e.g. an employee).¹³

⁶ Unlike the ATCA, which leaves to international law the task of defining the concept of harm (suits brought under the ATCA are still subject to internal rules of subject matter jurisdiction, personal jurisdiction and other procedural rules), the TVPA defines torture and summary execution.

⁷ B. Stephens and M. Ratner, *op.cit.*, 1996, p. 25; B. Stephens, “Corporate Accountability : International Human Rights Litigation Against Corporations in US Courts”, in M. T. Kamminga and S. Zia-Zarif (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).

⁸ *Filartiga v Pena-Irala* 577 F Supp 860 (DC NY 1980) 867.

⁹ *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995).

¹⁰ See *Beanal v. Freeport-McMoran, Inc*, 197 F.3d 161 (5th Cir. 1999).

¹¹ *Sinaltrainal et al. v. Coca Cola Company et al.*, 256 F. Supp. 2D 1345; *In re Sinaltrainal Litig.*, 474 F. Supp. 2D 1273.

¹² *Beanal v Freeport-McMoran, op.cit.*, 1999.

¹³ Oxford Pro Bono Publico, *op.cit.*, p 303.

a) Conditions for the application of the ATCA to private persons

The decision in *Kadic v. Karadzic* clarified the rules governing the ATCA'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 directly implicated. 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**.¹⁴ Private persons may be prosecuted directly using the ATCA.
- **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".¹⁵ Examples include torture, extrajudicial execution, prolonged arbitrary detention, racial discrimination and cruel, inhuman or degrading treatment.

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 is 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):¹⁶

- **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).¹⁷

¹⁴ *Doe v. Unocal*, 2002 US App. LEXIS 19263 (9th Cir. Cal. 2002).

¹⁵ See *Kadic v. Karadzic*, *op.cit.*, 1995, p. 239; *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, *op.cit.*, 2002; *Doe v. Unocal*, *op.cit.*, 2002 (Murder, kidnapping and torture require state action, unless they are part of genocide, war crimes, slavery or piracy). 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.

¹⁶ *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.

¹⁷ *Oxford Pro Bono Publico*, *op.cit.*, p. 310.

- **Joint action:** The violation resulted from a significant degree of collaboration between a private person and a public authority,¹⁸ or
- **Proximate cause:** The private person exercises control over government decisions linked to the commission of violations.¹⁹

Under the **TVPA**, 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”.²⁰ This state action must have been committed by a foreign state or by an official agent of the US government acting under the direction of or in partnership with a foreign government.²¹ Thus, individual liability cannot be invoked directly.

b) Applying the ATCA for violations committed by multinational corporations

Only after *Sosa v. Alvarez-Machain*²² did it become **possible to file suit for international law violations** by private actors, including those committed **by multinational corporations**.

→ Sosa v. Alvarez-Machain

At the request of the US Drug Enforcement Agency, a group of Mexican nationals took Mexican physician Alvarez-Machain by force on US soil to face trial in US courts. After being found not guilty, Alvarez-Machain brought an ATCA 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 US Supreme Court heard not only an ATCA case, but also a transnational human rights case**.

At first, the Court considered that the ATCA provides an opportunity for individuals with cause of action for a limited number of international law violations, a right that was previously unrecognized.

¹⁸ See *Wiwa v. Royal Dutch Petroleum Co*, *op.cit.*, 2002; *Doe v. Unocal Corp.*, 963 F.Supp. 880 (C.D. Cal., 1997), p. 891; *Presbyterian Church of Sudan v. Talisman Energy, Inc and The Republic of Sudan*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), 453F. Supp. 2D 633 (S.D.N.Y 2006), No. 07-0016cv (2d Cir. Oct. 2, 2009). This case is based on criteria developed under 42 USC § 1983 which governs liability in suits seeking reparation for constitutional rights breaches (Dennis v. Sparks, 449 US 24, 27-28, 101 S. Ct. 183, 186, 66 L. Ed., 2d 185 (1980)).

¹⁹ *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.

²⁰ TVPA, 28 USC. § 1350 note § 2(a).

²¹ 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.

²² *Sosa v. Alvarez-Machain* 542 US 692 (US SC 2004).

The Court subsequently provided a **more precise definition of the law of nations** contained in the ATCA, 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.²³ At that time, norms included for instance diplomatic immunity and the criminalisation of piracy. 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 ATCA provided that the violation is of a **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 does not violate well-established customary international law and therefore denied cause of action.²⁴

The Court also recognized that individuals could bring ATCA 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**”.²⁵ In a separate opinion, Justice Breyer was in favour of applying the ATCA to multinational corporations.²⁶

Following *Sosa*, numerous foreign victims addressed US 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 firms 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 firms in the United Kingdom, Australia and Canada, including Rio Tinto, Barclays Bank and Talisman Energy.

Both the US federal government and industrial groups have been active in these particular cases via *amicus curiae* or prosecution.²⁷ Faced with the multiplicity of cases against multinational corporations and due to concerns about the cases’ potential interference with the fight against terrorism, US 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 ATCA does not grant victims cause of action.

²³ *Ibid.*, p. 2761 and 2762.

²⁴ *Ibid.*, p. 2768 and 2769.

²⁵ *Ibid.*, as cited in Oxford Pro Bono Publico, *op.cit.*, p 309.

²⁶ *Sosa v Alvarez-Machain*, 2004, p. 2782. See also R.A. Tyz, *op.cit.*, p. 565.

²⁷ Oxford Pro Bono Publico, *op.cit.*, p 303.

➔ **National Coalition Government of the Union of Burma and Federation of Trade Union of Burma v. Unocal, Inc (Roe I)**²⁸

Since 2002, a consortium of oil companies, including Unocal (purchased by California's ChevronTexaco in July 2005) and Total (of France) has exploited the Yadana gas field in joint venture with Myanmar Oil and Gas Enterprise (MOGE), a Burmese oil company under the full control of the State Law and Order Restoration Council (SLORC), the Burmese junta's government. The pipeline transports natural gas from the Andaman Sea to Thailand through Burma's Tenasserim region. Lodged in September 1996 by the Federation of Trade Unions – Burma, the National Coalition Government of the Union of Burma and four Burmese villagers, *Roe I* was the first complaint against Total, Unocal and MOGE. The complaint was motivated by forced labour on the pipeline and uncompensated infringements of citizens' rights to property.

Because the parties reached a financial settlement, the court unfortunately did not rule on the brief the US government filed in the US District Court for the Central District of California using *amicus curiae*.²⁹

According to the *amicus curiae*, neither the ATCA nor the norms of international law included in treaties the US has not ratified or which are non self-executing and in non-binding UN resolutions establish cause of action in US federal courts. The courts are thus unable to grant cause of action to ensure the effectiveness of international law. Moreover, the State Department considered that although the ATCA would grant cause of action, its application would be limited to acts committed on US soil and, in exceptional cases, on the high seas. The ATCA does not grant cause of action for acts committed in a third country.

► **NOTE**

Determining the **direct liability of multinational corporations** in the US is a subject of some controversy. The question is whether strict liability should be guided by the norms of international law or those of US federal law.³⁰ With regards the **vicarious liability of multinational corporations**, *Kadic v. Karadzic* has clarified that in situation where multinationals are colluding with non-state armed groups exercising a *de facto* form of state authority, the vicarious liability of multinational corporations may be invoked using the ATCA.³¹ In other cases, the question remains open.

²⁸ *National Coalition Government of the Union of Burma and Federation of Trade Union of Burma v. Unocal, Inc (Roe I)* 176 F.R.D.329, 334 (C.D. Cal. 1997).

²⁹ *Doe v. Unocal*, Brief for the United States of America as amicus curiae for the Central District of California in the United States Court of Appeals for the Ninth Circuit, No. 00-56603 and 00-56628, May 2003. See also *Doe v. Unocal*, Supplemental Brief for the United States of America as Amicus Curia for the Central District of California in the United States Court of Appeals for the Ninth Circuit, No. 00-56603, 00-56628, August 2004.

³⁰ Oxford Pro Bono Publico, *op.cit.*, p. 311.

³¹ *Ibid.*, p. 312.

To date, no case citing a multinational corporation for human rights violations has come to a conclusion. In some of them, the parties have entered into financial settlement. The development of the ATCA's usage in US courts and the numerous exceptions that may arise during proceedings effectively render the **application of the ATCA difficult and unpredictable**.

2. Conditions for bringing action under the ATCA

a) An alien tort victim

The first material condition for bringing action under the ATCA is that the victim of the alleged tort is not a US national. **The ATCA 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. By contrast, **the locations of the tort and its repercussions are irrelevant.**

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 ATCA.³² The TVPA, by contrast, does require the exhaustion of domestic remedies.

→ Class action lawsuits in the US

In civil procedure, US 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 UK 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.

In addition to permitting class action lawsuits, the US 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.

³² 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.*, p. 315-316.

b) A violation of international law

For the ATCA 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 US court with jurisdiction may take two forms:

A violation of a treaty by which the US is bound

In most cases, the US has refused to recognize the direct applicability of human rights treaties it has signed. Accordingly, few cases cite this basis for jurisdiction.³³

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**.³⁴ These norms need not necessarily fall under *jus cogens*. The concept refers to customary practices and principles clearly defined by the international community.³⁵ The norm is flexible and should be interpreted dynamically.³⁶

A violation of a *jus cogens* norm, however, clearly provides US courts with jurisdiction to hear allegations of the following:³⁷

- 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.

³³ B. Stephens and M. Ratner, *op.cit.*, 1996, p. 60.

³⁴ *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), p. 1539; *Doe v. Unocal*, *op.cit.*, 2000, p. 1304; *Wiwa v. Royal Dutch Petroleum Co*, *op.cit.*, 2002; *Doe v. Unocal*, *op.cit.*, 2002; *Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc and The Republic of Sudan*, *op.cit.* 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.

³⁵ *Filartiga v. Peña-Irala*, *op.cit.*, 1980; *Beanal v. Freeport-McMoran Inc*, *op.cit.*, 1999; *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1264 (N.D. Ala. 2003); R.L. Herz, *op.cit.*, p. 554; *Kadic v. Karadzic*, *op.cit.*, 1995, p. 238; *Doe v. Unocal*, *op.cit.*, 1997; *Doe v. Unocal*, *op.cit.*, 2000, p. 1304; B. Stephens and M. Ratner, *op.cit.*, 1996, p. 54.

³⁶ *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.

³⁷ *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.

For the time being, environmental abuses **do not constitute violations** of international law under the ATCA.³⁸ 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.³⁹

A recent case against a US corporation deemed the human rights to freedom of association and collective bargaining defensible under the ATCA.⁴⁰ The fate of social rights, however, remains uncertain in the event of suits against non-US 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 ATCA to be applied.⁴¹

► **NOTE**

The Supreme Court’s ruling in *Sosa v. Alvarez-Machain* confirms earlier jurisprudence defining international law norms under the ATCA 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**.⁴² Prior to accepting jurisdiction, US courts must consider how the practical consequences of hearing a case will impact foreign relations.⁴³ In addition, if bringing action under the ATCA does not first require the exhaustion of domestic and international remedies, US courts may, according to the Supreme Court, take that fact into consideration before accepting jurisdiction. This is a **prudential** rather than a jurisdictional requirement.

In the interest of clarification, the Court has requested a legislative intervention in this matter.⁴⁴ Measuring the ruling’s practical impact will require additional jurisprudence in the future.⁴⁵

Meeting the abovementioned conditions, particularly with regard to violations of customary international law, is not easy and will likely be even more difficult in the future due to the Supreme Court’s decision in *Sosa v. Alvarez-Machain*.

In any event, it is clear that the jurisdiction granted to US courts is nearly universal.

³⁸ *Beanal v. Freeport-McMoran Inc, op.cit.*, 1999, p. 166; *Flores v. Southern Peru Copper Corp.*, 1587224 (S.D.N.Y. 2002).

³⁹ For an overview of this issue, see EarthRights International, *op.cit.*, 2006.

⁴⁰ *Estate of Rodriguez v. Drummond Co., op.cit.*, 2003

⁴¹ 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/ilr/Issue%20PDFs/ILR_94-4_Carrington.pdf

⁴² 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, p. 276 and following.

⁴³ *Sosa v. Alvarez-Machain et al., op.cit.*, 2004, p. 2766 and note 21.

⁴⁴ *Ibid.*, p. 2762, 2763 and 2765.

⁴⁵ For more, see E. Kontorovich, “Implementing *Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute”, *80 Notre Dame L. Rev.* 111, 2004, p. 111 ff.

In theory, US federal courts may accept a case **presenting no ties to US soil**. Domestic law, however, provides several procedures aimed at establishing a link between the case and the forum court.

c) A procedural requirement: personal jurisdiction

Whether a multinational defendant is headquartered in the US or elsewhere, plaintiffs must establish personal jurisdiction in a US court prior to bringing action under the ATCA. This requirement is complex. To fulfil it, plaintiffs must demonstrate that the corporation maintains minimum contacts with the forum state.⁴⁶ In order to establish jurisdiction, defendants must be unable to claim any applicable immunities, for example, if a corporation is fully controlled by a state (immunities are discussed below).

The concept of “minimum contacts”

In the US, the concept of a corporation’s minimum contacts with the forum state vary from state to state.⁴⁷ Generally speaking, however, regardless of where the facts of the case took place, US states recognize a court’s jurisdiction in the following situations:⁴⁸

- The corporation’s headquarters are located **in the state** of the forum court, or
- The company (US or foreign) has its head office in another state but is **conducting ongoing and systematic business** in the forum state.⁴⁹ *Wiwa et al v. Royal Dutch Petroleum et al*, detailed below, provides a good example of this “doing business” standard. Due to a foreign corporation’s maintenance of an office in New York, a judge ruled that a US federal court in the State of New York was the appropriate forum. The US court was thus able to establish personal jurisdiction in the legal action against Royal Dutch Shell / Shell Transport and Trade.

⁴⁶ *International Shoe v. Washington*, 326 US 310 (1945), p. 315.

⁴⁷ B. Stephens, *op.cit.*, in M.T. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, Kluwer Law International, 2000, note 53. Federal courts apply local state rules to determine their own jurisdiction, even when cases are brought under federal legislation. (*Forum State’s Long-arm Statute*).

⁴⁸ 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)).

⁴⁹ 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, “US 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.*

The following fictitious example, taken from a manual published by EarthRights International, illustrates the difficulty of the question:⁵⁰

Big Oil Inc is a multinational company with headquarters in the United Kingdom. It has two subsidiaries, Big Oil USA 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 US courts. They have three options:

- 1) **Pursue Big Oil Sudan directly** if the corporation has ties with the US. 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 operations anywhere else.
- 2) **Pursue Big Oil USA.** The US subsidiary is subject to the personal jurisdiction of US courts, but was not involved in the human rights violation. Unless there is a link between Big Oil USA and Big Oil Sudan, in which case the connection must be demonstrated, Big Oil USA cannot be pursued for human rights violations perpetrated by Big Oil Sudan.
- 3) **Pursue the UK-domiciled parent company in US court.** To establish a US court's personal jurisdiction, plaintiffs must prove that Big Oil Inc has sufficient connections with the US. This may be the case if the company is listed on a US stock exchange and maintains offices in the US, or if the parent company is sufficiently involved in the activities of its US 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 US subsidiary to those of a foreign parent company in order to establish a US 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 US soil satisfy the criteria for **minimum contacts** to establish a US forum court's personal jurisdiction under the ATCA?
- Failing this, is it possible to examine the US subsidiary's activities in the US in order to identify whether the foreign parent company is **doing business** in the US, thus establishing a US court's personal jurisdiction over the parent company?

⁵⁰ EarthRights International, *op.cit.*, 2006, p. 28.

These questions were raised in *Doe v. Unocal*⁵¹ and *Wiwa v. Royal Dutch Petroleum*.⁵² Beyond their symbolic nature, they raise a number of legal questions regarding the ATCA's applicability to the activities of multinational corporations abroad.

Doe v. Unocal⁵³ (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 ATCA. Seeking redress for harm to the population, eighteen Burmese villagers brought the class action suit in US 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 US federal court in Los Angeles ruled that the suit against Unocal and Total was admissible.

The US court's personal jurisdiction over Total⁵⁴: the concept of minimum contacts

In 1998, the US court had to determine its personal jurisdiction over Total, a French company with several subsidiaries on US soil. To do so, the court had to rule on contacts between the

⁵¹ *Doe v. Unocal, op.cit.*, 2001.

⁵² *Wiwa v. Royal Dutch Petroleum Co, op.cit.*, 2000.

⁵³ 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.

⁵⁴ *Doe I v. Unocal corp., op.cit.*, 1998.

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.⁵⁵ On their own, the identity of the entities' directors or the parent company's normal direct involvement as an investor are unlikely to call into question the general principles of separation under entity law.⁵⁶ 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 US 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 benefited 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. Although the terms of the agreement remain confidential, the damages totalled some U.S.D. 30 million.

⁵⁵ *Doe v. Unocal, op.cit.*, 2001, p. 926.

⁵⁶ P.I. Blumberg, "Asserting Human Rights Against Multinational Corporation Under United States Law: Conceptual and Procedural Problems", *American J. Comp. L.*, 2002, 50, p. 496 and following.

➔ **Wiwa et al v. Royal Dutch Petroleum et al**

The Center for Constitutional Rights (CCR) and co-counsel from EarthRights International have 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 in relation to their activities for the protection of human rights and the environment in Nigeria. The suits target The Hague, 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).

The defendants are accused under the ATCA and the TVPA of complicity in human rights violations against Nigeria's Ogoni people. The specific violations include summary execution, crimes against humanity, torture, inhumane treatment, arbitrary detention, murder, aggravated assault and subjection to emotional distress. The suit against Royal Dutch/Shell is 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 allege 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 ATCA, the TVPA 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. On 8 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 benefiting the Ogoni people, and the reimbursement of certain costs of litigation. The settlement is currently being implemented.

➔ **Sinaltrainal et al. v. Coca-Cola Company et al., Sinaltrainal I; In re Sinaltrainal Litig., Sinaltrainal II**⁵⁷

In July 2001, Colombian trade union Sinaltrainal filed suit in Miami federal court against the Coca-Cola Company and two of its Latin American partners, Bebidas y Alimentos and Panamerican Beverages, Inc (Panamco), companies which bottle the beverages Coca-Cola provides. Sinaltrainal represents workers in bottling companies and, more broadly, all workers working directly and indirectly for Coca-Cola in Colombia. Sinaltrainal has long denounced the existing relationship between Coca-Cola and armed groups that have committed atrocities against union workers, atrocities which form part of a policy of intimidation against the union workers. At the time, five union leaders had been kidnapped, arbitrarily detained and tortured, and one had been killed. The five victims accused the companies of violating the ATCA by having hired, or otherwise directed, the paramilitary security forces that acted on behalf of Coca-Cola and its commercial partners in Colombia.

The plaintiffs failed to demonstrate complicity between the corporations and the paramilitary security forces. In 2003, the court dismissed the suit against Coca-Cola, but agreed to rule on the suits against the two bottling companies. The following year the plaintiffs amended their complaint to include Coca-Cola, after the company became a Panamco shareholder in 2003.

The justiciability of murder and torture under international law:

To assume jurisdiction under international law (ATCA) to rule on acts of torture or murder, US courts consider the following:

- 1) If the abuses fall outside the framework of genocide or war crimes, they must be committed by a state agent or by an agent acting under color of law. Sinaltrainal first needed to prove that the armed groups which carried out the abuses had acted under color of law, then Sinaltrainal had to demonstrate a link between the government and the companies to render them liable.
- 2) If the abuses occur as part of hostilities, they constitute war crimes and a violation of international law regardless of whether the perpetrator acted under color of law of a foreign state or as a private agent. In this case, Sinaltrainal needed to prove that acts of torture and the murder of one of its members were committed **during hostilities**, i.e. during armed conflict and not during mere public disorder.

⁵⁷ *Sinaltrainal et al. v. Coca-Cola Company et al.* (256 F. Supp. 2D 1345); *In re Sinaltrainal Litig.* (474 F. Supp. 2D 1273).

In September 2006, having failed to prove 1) the existence of a sufficiently close link uniting the paramilitary security forces and the Colombian government, 2) the defendants' involvement with the Colombian government in carrying out acts of torture and 3) the existence of an armed conflict at all, the suit was dismissed. The court denied jurisdiction to judge such acts under the ATCA and the companies have not been held liable for human rights violations. In August 2009, the US Court of Appeals for the Eleventh Circuit upheld the decision to dismiss the case.

d) Time limits: the statute of limitations

Present in both the US and European legal systems, the statute of limitations, as it is known in US 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 US, 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 US soil,
- The plaintiff had access to ineffective remedies,⁵⁸
- It was difficult to gather evidence during a civil war, or
- The defendant attempted to conceal evidence.⁵⁹

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

⁵⁸ A 1991 US 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.

⁵⁹ *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 ATCA.

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

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 ATCA, however, prescribes no specific time period and US courts determine the statute of limitations by drawing parallels with similar federal laws. Given the ATCA and TVPA's common purpose (protecting human rights), the type of proceedings (civil suits to protect human rights), and the place they share in US legislation, several jurisdictions have borrowed the TVPA's 10-year statute of limitations for cases brought under the ATCA. Similarly, some courts have adopted the grounds for tolling denoted under the TVPA (listed by the 1991 US Senate report) for use with litigation invoking the ATCA.⁶⁰

What are the obstacles to a US 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 US, the doctrine calls upon the court hearing a case under the ATCA to consider whether US courts are best placed to hear the case, or whether a foreign court seems more appropriate, given the circumstances of the case. If a US court is best placed to hear the case, the court is to grant the relief requested.⁶¹

Applying this theory to our situation, however, often raises difficulties related to the fact that the legislative and judicial systems of countries where human rights violations occur – typically developing countries – are defective or incomplete and do not provide optimal conditions for the legal pursuit of multinational corporations that commit violations. Multinational defendants⁶² frequently invoke *forum non conveniens*, the acceptance of which severely limits the quasi-universal jurisdiction of US courts.⁶³

⁶⁰ S. Rep. No. 102-249, at 11 (1991), *op.cit.*

⁶¹ On this issue, see EarthRights International, *op.cit.*, 2006, p. 32.

⁶² Unlike in the UK, US 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.

⁶³ 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 US 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 interest⁶⁴) 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.⁶⁵

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.⁶⁶

By contrast, it has been held, for example, that the lack of a contingency fees system, under which an attorney is paid only for positive results, does not necessarily preclude the application of *forum non conveniens*.⁶⁷ The court may consider this factor, although it is not determinative on its own.

⁶⁴ 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.*, p. 506-509; R.L. Herz, *op.cit.*, p. 568, note 152.

⁶⁵ B. Stephens and M. Ratner, *op.cit.*, 1996, p. 151 and following; P.I. Blumberg, *op.cit.*, p. 501 and following.

⁶⁶ B. Stephens and M. Ratner, *op.cit.*, 1996, p. 151 and following; R.L. Herz, *op.cit.*, p. 567; P.I. Blumberg, *op.cit.*, p. 504.

⁶⁷ P.I. Blumberg, *op.cit.*, p. 507.

➔ **Sequihua v. Texaco, Inc**

Ecuadorian citizens who felt that Texaco's operations were causing air, water and soil pollution filed suit in US courts under the ATCA. 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 to evidence and witnesses, the opportunity to visit the disputed areas, the cost of travel between Ecuador and the US and uncertainty regarding the ability to enforce in Ecuador a court ruling made in the US.⁶⁸

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.**⁶⁹ For non-resident plaintiffs, the doctrine of *forum non conveniens* still applies.⁷⁰

Because the facts of ATCA cases (and therefore the parties, evidence, witnesses, etc.) are generally located abroad, *forum non conveniens* is a **major obstacle** to suits brought under the ATCA.⁷¹ In addition, exercising *forum non conveniens* often results in the **de facto rejection of civil liability**⁷² and few cases lead to legal proceedings in the foreign forum.

In the US, exercising *forum non conveniens* involves the definitive rejection of the suit from US 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.⁷³

➔ **Filártiga v. Peña-Irala**

In 1979, two Paraguayan citizens filed an ATCA lawsuit in US federal court after a Paraguayan police officer carried out acts of torture on US 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 ATCA. In 1984, the plaintiffs received U.S.D. 10,375,000 in damages. *Forum 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,⁷⁴ the US court accepted jurisdiction.

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

⁶⁹ *Wiwa v. Royal Dutch Petroleum Co*, *op.cit.*, 2000.

⁷⁰ P.I. Blumberg, *op.cit.*, p. 501.

⁷¹ B. Stephens and M. Ratner, *op.cit.*, p. 151; P.I. Blumberg, *op.cit.*, p. 503; S.M. Hall, *op.cit.*, p. 408.

⁷² A. Nuyts, *op.cit.*, p. 457.

⁷³ 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.

⁷⁴ *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”.

➔ **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 ATCA and the TVPA. Although several of the plaintiffs resided in the US, Royal Dutch/Shell is domiciled in the UK, and the US 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.⁷⁵ The appeals court, however, reversed that decision, identifying several criteria that preclude the application of *forum non conveniens*:⁷⁶

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 ATCA, foreigners residing in the US receive preference over foreigners living abroad. In addition, **requiring persons residing in the US to bring claim in the courts of another state would be particularly expensive**, and could lead to impunity for the perpetrators charged.⁷⁷
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 breaches of international law committed by persons on US 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.⁷⁸ According to the court, torture contradicts both international law and US domestic law. This resulted in the 1991 adoption of the TVPA which establishes the ability of US courts to rule on torture and extrajudicial executions committed by public officials or under color of law.⁷⁹ According to the court, it would be paradoxical to deny US courts jurisdiction under the ATCA for acts of torture in the name of *forum non conveniens* when 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 US courts recognizing jurisdiction over acts of torture under the ATCA, provided the criteria for the case's referral to another forum are not fully met.⁸⁰

⁷⁵ *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW)(HBP), 1998 US Dist. LEXIS 23064 (S.D.N.Y. Sept. 25, 1998).

⁷⁶ *Wiwa v. Royal Dutch Petroleum Co.*, *op.cit.*, 2000.

⁷⁷ *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".

⁷⁸ *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."

⁷⁹ *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"".

⁸⁰ P.I. Blumberg, *op.cit.*, p. 521.

The ruling in *Presbyterian Church v. Talisman*, a case based solely on the ATCA, not on the TVPA, adopted similar reasoning⁸¹ and the US court accepted jurisdiction. The case will be discussed in chapter III of this guide.

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 ATCA, not those involving torture or extrajudicial killings, which are covered under the TVPA.⁸² Some, however, believe that a judge’s unfettered discretion in the matter⁸³ and the multiplicity of factors at work prevent any consistency or predictability.⁸⁴

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 US 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.⁸⁵

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 disputes⁸⁶ 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.

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

⁸¹ *Presbyterian Church of Sudan v. Talisman Energy, Inc and The Republic of Sudan, op.cit.*

⁸² P.I. Blumberg, *op.cit.*, p. 521.

⁸³ P.I. Blumberg, *op.cit.*, p. 506; S.M. Hall, *op.cit.*, p. 408; R.L. Herz, *op.cit.*, p. 567-568.

⁸⁴ P.I. Blumberg, *op.cit.*, p. 505.

⁸⁵ Amnesty International, *Clouds of Injustice: Bhopal disaster 20 years on*, 2004.

⁸⁶ *In Re Union Carbide Corp Gas Plant Disaster at Bhopal*, 634 F Supp 842 (SDNY 1986), 846-48.

or not).⁸⁷ 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. As of 2 December 2009, the 25th anniversary of the disaster, the site had still not been decontaminated.⁸⁸

On 7 June 2010, a Court in Bhopal sentenced 8 former plant employees to two years of prison. They have been convicted of death by negligence. One had already passed away and the others are expected to appeal. According to human rights NGOs, the verdict was deceiving: "It sets a very sad precedent. The disaster has been treated like a traffic accident. It is a judicial disaster, and it is a betrayal [of Indian people] by the government."⁸⁹

Canadian examples

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

Bil'in is an agricultural village located in the eastern portion of the Occupied Palestinian Territories. 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

⁸⁷ *Union Carbide*, 809 F.2d 195 - 2nd Cir 1987.

⁸⁸ Amnesty International, "Bhopal: Indian government must end 25 years of injustice", www.amnesty.org/fr/appeals-for-action/bhopal-indian-government-must-end-25-years-injustice

⁸⁹ BBC, "Bhopal trial: Eight jail over India gas disaster", 7 June 2010.

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 regulations 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 abovementioned 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 abovementioned 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 territories. 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 Territories. 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.

➔ **Recherches Internationales Québec v. Cambior Inc.**⁹⁰

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.

2. Immunities and acts of state

a) Sovereign immunity

The US government

The US 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 ATCA, plaintiffs may not seek redress from the US government in US federal courts. In certain specific cases, however, the government has waived immunity.

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,⁹¹ which is often difficult to determine.

The Federal Tort Claim Act (FTCA) allows foreign US residents and non-residents to bring civil claims in US courts for harm caused by a federal employee. The FTCA contains many exceptions which could hypothetically result in the lifting

⁹⁰ *Recherches Internationales Québec v. Cambior*, [1998], Q.J., No. 2554.

⁹¹ EarthRights International, *op.cit.*, 2006, p. 29.

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.⁹² 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”⁹³ **benefits from absolute immunity in civil actions** heard by US courts.⁹⁴ “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.”⁹⁵

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 US must be established: this is most often done when the commercial activity is conducted directly by the foreign state on US soil (e.g. when a company whose majority shareholder is a foreign state is located in the U.S.), or where an act linked to the foreign state’s business was carried out on US soil (e.g., the signing of a commodities contract in the U.S.)⁹⁶.

⁹² *Richards v. United States*, 369 US 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”.

⁹³ Foreign Sovereign Immunities Act, 28 USC. § 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, p. 39 and 125 and following; L. Bowersett, *op.cit.*, p. 366 and following.

⁹⁴ 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 [...]”.

⁹⁵ 28 U.S.C. § 1603(b).

⁹⁶ 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;”.

→ **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 activity⁹⁷ 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 agents of a foreign government are a point of contention in US federal courts. In January 2009, the Fourth Circuit Court ruled in *Yousuf v. Samantar* that the text of the law itself provides no recognition of sovereign immunity for individuals representing a foreign state. Many federal courts have, nonetheless, recognized agents of foreign states as benefiting from immunity under the FSIA.⁹⁸ Many courts have ruled that if an officer acts within his or her duties, he or she will enjoy immunity.

In principle, both heads of state and heads of government enjoy absolute immunity under the ATCA and the FSIA.

b) Act of state immunity

US courts may also consider **act of state doctrine** in refusing 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. Evolved through jurisprudence, 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.⁹⁹ Such acts include, for example, the adoption of a law or decree, 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 and are carried out by the executive. 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 verifying the case's implications for US foreign policy against three criteria:

⁹⁷ *Doe v. Unocal*, *op.cit.*, 1997, p. 897; *Doe v. Unocal*, *op.cit.*, 2002; L. Bowersett, *op.cit.*, p. 370.

⁹⁸ See C.A. Bradley, "Foreign Officials and Sovereign Immunity in US Courts", *American Society of International Law*, vol. 13, 17 March 2009, www.asil.org/insights090317.cfm#_edn1

⁹⁹ *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.

- **The behaviour in question.** In evaluating the dispute, the court must consider the **degree of international consensus** regarding the behaviour. Some consider that universally condemned serious human rights violations (particularly *ius cogens* norms) cannot constitute an act of state.¹⁰⁰ The application of the act of state doctrine in the field of human rights remains ambiguous, however, although most US courts have ignored the doctrine when faced with human rights violations committed by state agents.
- **The official US position** regarding such behaviour. In terms of international relations, act of state doctrine is in some ways equivalent to political question doctrine (see below). When it comes to foreign affairs, courts are careful not to interfere with the activities of the executive and legislative branches of government.
- **The persistence of a state** in exhibiting such behaviour.¹⁰¹

The act of state doctrine has been used only once, in *Sarei v. Rio Tinto*, a claim based on environmental damage and justified by a lack of international consensus on the specific nature of the violation.¹⁰²

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.

Political question doctrine is often invoked in transnational disputes relating to human rights, and more generally in terms of foreign policy. It allows US 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.

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

¹⁰⁰ B. Stephens and M. Ratner, *op.cit.*, 1996, p. 139. *Doe v. Unocal, op.cit.*, 1997, p. 894.

¹⁰¹ *Doe v. Unocal, op.cit.*, 2002. The court adds a fourth criteria, that of public interest.

¹⁰² *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.

➔ **Aguinda v. Texaco – Jota v. Texaco**¹⁰³

This dispute opposed some 30,000 indigenous Ecuadorian farmers and the US 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 US federal court's decision to decline jurisdiction under **international comity doctrine**. US federal courts finally agreed to hear the case under the ATCA, 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.

In 2003, the same victims filed a class action suit against Chevron in the Superior Court of Nueva Loja, Ecuador, under the EMA. Since then, Chevron has engaged in a number of manoeuvres to evade justice in Ecuador. On 23 September 2009, the company asked the United Nations Commission on International Trade Law (UNCITRAL) to mediate the dispute, alleging a breach of the bilateral investment treaty between the Republic of Ecuador and the United States. In 2004, Chevron addressed another arbitration forum: the American Arbitration Association in New York. The case concluded in 2007 to Chevron's detriment.

Attorneys representing the Ecuadorian government denounced the company's use of "forum shopping": (1) Arbitration by the American Arbitration Association before US federal courts

¹⁰³ *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).

(the trial took place between 2004 and 2007), (2) Commercial arbitration before a panel of international experts (the yet-to-be established UNCITRAL commission), and (3) Trials in Ecuadorian courts (pending since 2003).

On 3 December 2009, the Ecuadorian government filed motion in New York federal court¹⁰⁴ denouncing Chevron’s call for an as of yet unestablished international arbitration tribunal (UNCITRAL) to order Ecuadorian courts to drop the case. Such a move would effectively remove the victims from the dispute, as they would not be permitted to participate in the UNCITRAL proceedings. The Ecuadorian government asked the US federal court to stay the international arbitration and to require that Chevron, through an injunction, permanently submit to the Ecuadorian court’s jurisdiction. On 11 March 2010, the US federal court sided with Chevron in authorizing the pursuit of arbitration. The court added, however, that Chevron’s pursuit of arbitration cannot affect the trial in Ecuador, where courts should decide shortly on the questions of shared liability and amount of compensation.

The trial in Ecuadorian courts is underway. The victims have sought compensation for more than 15 years. A legal expert in the Ecuador trial has estimated the damages for Chevron’s destructive activities in Ecuador at some at U.S.D 27 billion.

➔ **Apartheid in US courts**¹⁰⁵

In 2002, a group of South African nationals brought action under the ATCA 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 US 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. In particular, the victims needed to prove that companies can be held civilly and criminally liable under customary international law. The hearing was held in January 2010 and the court is

¹⁰⁴ *Republic of Ecuador v. Chevron*, Petition to stay arbitration, 09 CIV 9958 (S.D.N.Y.) www.jdsupra.com

¹⁰⁵ *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).

expected to rule soon on the questions of jurisdiction and appropriate legal grounds. If the court does not accept jurisdiction, the case will continue in district court.

Meanwhile, on 31 December 2009 federal judge Shira A. Scheindlin issued an opinion in which she stressed a point which may constitute an additional barrier for victims. To establish a corporation's liability for aiding and abetting human rights violations committed by a host country of an investment, it is not sufficient to show that the corporation invested in the state. Judge Scheindlin ruled that there must be a distinction between selling lethal weapons and selling raw materials or providing bank loans. To illustrate her point, the judge used the example of poison gas, a lethal weapon, which was sold to the Nazis for use in concentration camps during the Second World War. The trial is underway.

What law will the US forum court apply?

The very wording of the ATCA – “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 US jurisprudence and doctrine. In determining the applicable law, US courts have three options available to them:

- International law,
- The law of the forum court (*lex fori*), including federal common law,¹⁰⁶ and
- The law of the place where the damage occurred.¹⁰⁷

1. International law: jurisprudence selection

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

In *Doe v. Unocal*, the court ruled¹⁰⁸ that it was preferable to apply international law rather than the law of a particular country¹⁰⁹ in determining Unocal's liability for

¹⁰⁶ Common law countries, such as the US 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 US, based primarily on precedent.

¹⁰⁷ 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.

¹⁰⁸ 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.

¹⁰⁹ The defendants were in favour of *lex loci delicti commissi*, i.e. Burmese law.

violations committed by Burmese forces, due to the nature of the alleged violations (of *jus cogens* norms).¹¹⁰

The court’s decision was based on jurisprudence from international criminal tribunals for Rwanda and the former Yugoslavia.¹¹¹

References to international law may:

- Be **direct**, or
- Be **based in federal common law**.¹¹²

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.¹¹³

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.¹¹⁴

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

With several exceptions,¹¹⁵ jurisprudence indicates that **turning to the law of the place where the damage occurs (*lex loci damni*) is inadequate**.¹¹⁶

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.

¹¹⁰ *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*”.

¹¹¹ *Doe v. Unocal, op.cit.*, 2002, p. 14216 and following.

¹¹² See *Doe v. Unocal, op.cit.*, 2002, p. 14214 and following.

¹¹³ *Ibid.*, 2002, p. 14214, note 23; R. A. Tyz, *op.cit.*, p. 573-574.

¹¹⁴ B. Stephens and M. Ratner, *op.cit.*, 1996, p. 121-122; R. A. Tyz, *op.cit.*, p. 574-575.

¹¹⁵ 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).

¹¹⁶ See *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), p. 182-183.

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.¹¹⁷

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.¹¹⁸ It entered into force on 1 March 2002 and replaces the Brussels Convention of 27 September 1968.¹¹⁹

¹¹⁷ 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.

¹¹⁸ 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 has not yet entered into force: see www.hcch.net/index_fr.php?act=conventions.status&cid=98. 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.

¹¹⁹ 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.¹²⁰

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.¹²¹ 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.¹²²

Regulation 44/2001 applies regardless of whether a victim bringing action is a resident or national of a third,¹²³ 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.

¹²⁰ 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.

¹²¹ Subject to articles 22 and 23 relating to exclusive jurisdiction and the extension of jurisdiction, respectively, issues not considered in this study.

¹²² 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.

¹²³ 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 regulation¹²⁴). The Court of Justice of the European Communities independently interprets these concepts.¹²⁵

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,¹²⁶ 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.¹²⁷

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-delict¹²⁸ in the courts of the place where the harmful event occurred or may occur.¹²⁹

The concept of “place where the harmful event occurred”

The Court of Justice of the European Communities 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.**¹³⁰ For example, if a board of directors makes a decision in a state other than that in which the corporation is

¹²⁴ 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.

¹²⁵ EC Regulation 44/2001, *op.cit.*, §11.

¹²⁶ In reality, Regulation 44/2001 replaced Article 2 of the Brussels Convention.

¹²⁷ 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.

¹²⁸ 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 “Abblasgracht 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”.

¹²⁹ 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”.

¹³⁰ 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.¹³¹

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).¹³²

c) The court with jurisdiction is that of the place where a branch, agency or other establishment is located¹³³

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.¹³⁴

¹³¹ 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.

¹³² 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.

¹³³ 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).

¹³⁴ 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 transmit orders to the parent company, without taking part in managing or executing them”).

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.**¹³⁵ The dispute can also relate to rights, contractual or non-contractual obligations resulting from **activities the place of business itself has assumed¹³⁶ in relation to its own management.** This applies, for example, to a dispute arising out of employment contracts made by the place of business.¹³⁷

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.**¹³⁸ It is thus possible to bring joint action against a parent company and its subsidiary for harm caused by their activities

¹³⁵ 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.

¹³⁶ CJEC, *Somafer, op.cit.*, 33/78, §13.

¹³⁷ *Ibid.*

¹³⁸ 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.

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**,¹³⁹ 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”.¹⁴⁰

“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.¹⁴¹
- 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.¹⁴²

The European Commission is currently working to strengthen and harmonize collective redress mechanisms only in the areas of antitrust practices and consumer protection.¹⁴³

¹³⁹ 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: “In issues relating to the Convention’s application, these measures are intended to maintain a factual or legal situation in order to protect the rights the court has been asked to recognize.”

¹⁴⁰ 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.

¹⁴¹ French code of criminal procedure, Art. 2-4.

¹⁴² 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.

¹⁴³ European Commission, *White paper on damages action for breach of the EC antitrust rules*, 2 April 2008, COM (2008) 165 final.

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.**¹⁴⁴

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.**¹⁴⁵

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 domicile), the Court of Appeal in London held that such a basis for jurisdiction did not preclude the use of *forum non conveniens* to refer¹⁴⁶ the case to Argentina, 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."¹⁴⁷

¹⁴⁴ 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.

¹⁴⁵ *Re Harrods (Buenos Aires) Ltd* (1991) 4 All ER 334, (1992) Ch. 72 (C.A.).

¹⁴⁶ 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.

¹⁴⁷ 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.

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 2§1 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,¹⁴⁸ the House of Lords decided that *forum non conveniens* did not allow for the case to be stayed in English courts and heard in South Africa because although the injury, victims and evidence were located in South Africa, the victims could not receive legal aid there.

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**¹⁴⁹

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.

¹⁴⁸ 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.

¹⁴⁹ *Ngcobo v. Thor Chemicals Holdings* [1995] TLR 579; *Sithole v. Thor Chemicals Holdings* [1999] TLR 100.

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**.¹⁵⁰ 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.¹⁵¹ 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.

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.¹⁵² A state enterprise acting as an agent of the state could therefore be granted immunity when faced with a civil suit.

¹⁵⁰ 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 Contracting State's court from accepting the jurisdiction accorded to it under Article 2 of the Convention on the grounds that a non-Contracting State's court would be a more appropriate forum to hear the case in question, even if questions are not raised about the jurisdiction of another Contracting State or if the dispute has no other ties to another Contracting State".

¹⁵¹ See, for example ECJ, *Group Josi Reinsurance Company SA v. Universal General Insurance Company*, *op.cit.*

¹⁵² 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.

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 17 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 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 15 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 as many as five of Alstom Transport's plants in France produced 46 of the Jerusalem tramway's railcars.

Alstom and Alstom Transport appealed the decision regarding jurisdiction but on 17 December 2009, the Versailles Court of Appeal upheld the trial court's ruling. The trial on the facts of the case is ongoing.

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).¹⁵³ 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.

As of 11 January 2009, Rome II **will apply across all EU Member States except Denmark**.¹⁵⁴ 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

Each state's rules of private international law, not Regulation 44/2001, determine the law applicable to the dispute at hand. There is no clear legal test. Therefore it

¹⁵³ 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.

¹⁵⁴ *Ibid.*, art. 32.

is up to the courts to interpret the rules of attachment¹⁵⁵ for the law of the place where the event giving rise to damage occurs (*lex loci delicti commissi*), which is subject to two interpretations within Member States:

- 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 without knowing of or wilfully ignoring it, fails to take preventative measures to avoid harm. According to the criterion the court selects, either the law 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 different interpretations of *lex loci delicti commissi***,
- **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 true 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.¹⁵⁶

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.¹⁵⁷ 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

¹⁵⁵ 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.

¹⁵⁶ See *Oppenheimer v. Cattermole* (1976) AC 249.

¹⁵⁷ O. De Schutter, “The Accountability of Multinationals for Human Rights Violations in European Law”, *op.cit.*, p. 40.

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 in the forum court’s country,
- 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 forum court.

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.

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

Adopted on 11 July 2007¹⁵⁸ 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 2009.¹⁵⁹ 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 of law rules of the various 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 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**,

¹⁵⁸ Regulation (EC) 864/2007, *op.cit.* This regulation completes the Rome Convention of 1980 on the law applicable to contractual obligations.

¹⁵⁹ For the purposes of the regulation, the term “Member State” refers to all Member States except Denmark (Article 1(4)).

- (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*). Then 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.¹⁶⁰

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 has selected **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 Harmful and Potentially Dangerous Substances.

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 wronged person's habitual residence, the law of the place 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*¹⁶¹

These cases began on the night of 19 to 20 August 2006 when the *Probo Koala*, chartered by Trafigura Ltd., the UK subsidiary of 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

¹⁶⁰ Oxford Pro Bono Publico, *op.cit.*, p. 120 and following.

¹⁶¹ 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

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 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 12 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 released Trafigura and Puma Energy representatives who had been arrested and imprisoned after arriving in Côte d'Ivoire to ascertain the incident.¹⁶²

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,

¹⁶² 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/IMG/article_PDF/article_a2077.pdf. 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".

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 no way a recognition of guilt. In a press release, the company insisted that, in the worst case, the *Probo Koala* could “only have caused a range of short term, ‘flu like’ symptoms and anxiety”.¹⁶³

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.

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 4 November 2009, the High Court of Justice in London expressed “profound concern” that the money was not being redistributed. On 22 January 2010, the Court of Appeal in Abidjan unfroze the victims’ funds, but ordered the money transferred to the account Claude Gohourou’s group. On 14 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 beginning 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.¹⁶⁴ Criminal proceedings against Trafigura are pending in Dutch courts, as discussed in the corporate criminal liability section of this guide.

¹⁶³ 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/IMG/article_PDF/article_a7025.pdf

¹⁶⁴ 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/IMG/article_PDF/article_a5961.pdf

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 suit.¹⁶⁵ The European Court of Justice may also be asked to rule on interpretations of this exception.¹⁶⁶

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).¹⁶⁷

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,¹⁶⁸
- 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,

¹⁶⁵ *Ibid.*, 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".

¹⁶⁶ For more on the public policy exception in the E.U., see Oxford Pro Bono Publico, *op.cit.*, p. 116 and following.

¹⁶⁷ Oxford Pro Bono Publico, *op.cit.*, p. 124.

¹⁶⁸ 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.

- 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),
- Where the event giving rise to damage occurred, or
- Where the damage was suffered.¹⁶⁹

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, however, has ruled that foreign laws not conforming to the "principles of universal justice considered in French public opinion as being of absolute international value"¹⁷⁰ 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.

¹⁶⁹ French Code of Civil Procedure, Article 46§1 & 3.

¹⁷⁰ Cass. fr., ch. Civ., *Lautour*, 25 May 1948.

➔ 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, including in the UK on 18 November 2008, British Parliament adopted, however, a law entered into force on 11 January 2009 which brought UK law into compliance with the provisions of European Community law and harmonized, in some cases expanded, the conflict of law rules between England, Wales, Scotland, Northern Ireland and Gibraltar. With regard to events giving rise to damage occurring on or after 11 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 damage occurring prior to 11 January 2009, case law¹⁷¹ 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.



➤ On the left, Pablo Fajardo, winner of the 2008 Goldman Prize (received together with Luis Yanza) and lawyer in the ecuadorian class action against Chevron/Texaco. © Natalie Ayala

¹⁷¹ *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 the 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-subsidary 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**.¹⁷²

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.¹⁷³ The parent company’s participation in the event giving rise to damage may be either direct or indirect.

¹⁷² O. De Schutter, “Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations”, *op.cit.*, p. 35-37.

¹⁷³ 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 an ability to prevent the harm).

In these cases, the parent company falls under the classical legal concept of direct liability,¹⁷⁴ or joint and several liability if it acted together with another legal person, subsidiary, subcontractor or other provider. Legally, this situation poses no problem, although 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**

¹⁷⁴ 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.¹⁷⁵ 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**, such that they 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 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.¹⁷⁶

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.

¹⁷⁵ R. Meeran, *op.cit.*, 2000, p. 252.

¹⁷⁶ 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,¹⁷⁷ the theory of piercing the corporate veil derives from instrumentality doctrine (when the parent company completely dominates the other entity)¹⁷⁸ and alter ego doctrine (where the ownership and interests of the two entities overlap).¹⁷⁹ In practice, these theories are easily interchangeable.¹⁸⁰

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 shareholder, and
- A causal connection between the conduct and the injury suffered by the plaintiff.

Case studies reveal several trends:¹⁸¹

- 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.¹⁸²

¹⁷⁷ 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.

¹⁷⁸ 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.

¹⁷⁹ *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.

¹⁸⁰ *Ibid.*

¹⁸¹ 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.

¹⁸² 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 or 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.¹⁸³

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.

* * *

¹⁸³ 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.¹⁸⁴ 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.¹⁸⁵

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 then 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.¹⁸⁶ The court did not examine the other conditions.

By contrast, the State of California Court of Appeal established in its 18 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.¹⁸⁷

184 R.B. Thompson, "Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors", *op.cit.*, p. 391.

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

186 *Doe v. Unocal, op.cit.*, 2001, p. 927.

187 *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.¹⁸⁸

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.¹⁸⁹

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.¹⁹⁰

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).¹⁹¹

In the *Unocal* and *Wiwa* cases, however, the courts independently¹⁹² assess the application of this theory.

¹⁸⁸ P.I. Blumberg, *op.cit.*, p. 497, note 13. See also S. Joseph, *op.cit.*, p. 85.

¹⁸⁹ *Doe v. Unocal, op.cit.*, 2001; *Wiwa v. Royal Dutch Petroleum Co, op.cit.*, 2000, p. 95.

¹⁹⁰ *Wiwa v. Royal Dutch Petroleum Co, op.cit.*, 2000.

¹⁹¹ Restatement of Agency (Third) § 1.01 (Tentative Draft No. 2, Mar. 14, 2001).

¹⁹² 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.¹⁹³ The plaintiffs argued that the parent company, Chevron, and its subsidiaries should be held liable for having provided material and financial support, for having controlled the Nigerian security forces and for 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.¹⁹⁴ 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,¹⁹⁵ 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.

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

¹⁹³ *Bowoto v Chevron Texaco*, 2007 WL 2349336 (N.D. Cal. 2007), p. 15-16.

¹⁹⁴ *Bowoto 2004*, 312 F.Supp.2d at 1239.

¹⁹⁵ *Ibid.*, 1239-1240.

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.¹⁹⁶

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 the trial is underway.

In 2003, a similar complaint was filed against Chevron in California courts. The companies won the trial in 2008. The decision was appealed to the Ninth Circuit Court of Appeals, the trial was held on 14 June 2010. The decision was still pending at the time of writing.

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.¹⁹⁷

➔ **Doe I v. Unocal et al (Doe I)**

Californian courts establish personal jurisdiction 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

¹⁹⁶ 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.

¹⁹⁷ S. Joseph, *op.cit.*, p. 132.

exercise of indirect control and supervision of its subsidiaries' and holding companies' activities.¹⁹⁸ **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,¹⁹⁹ 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 Graspas 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. Graspas waited for approval from the defendants prior to making major decisions. The Investor Relations Office and James Graspas 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 28 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 that 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.²⁰⁰

➔ **Presbyterian Church of Sudan v. Talisman Energy**²⁰¹

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.

¹⁹⁸ *Doe v. Unocal, op.cit.*, 2001.

¹⁹⁹ *Doe v. Unocal, op.cit.*, 1998, p. 1186 and following.

²⁰⁰ *Wiwa v. Royal Dutch/Shell, op.cit.*, 2002, note 14.

²⁰¹ *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.²⁰²

On 12 September 2006, the court declared the complaint inadmissible due to a lack of evidence and on 2 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 great**²⁰³ 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.

²⁰² *Ibid.*, p. 330.

²⁰³ 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.²⁰⁴

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.²⁰⁵

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

²⁰⁴ For the situation in the Netherlands, see N. Jägers and M.J. Van Der Heijden, *op.cit.*, p. 840 and following.

²⁰⁵ Charleroi Commercial Court, 5 February 1998, *R.P.S.*, 1998, p. 443. See also P. Van Ommeslaghe 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.²⁰⁶

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).²⁰⁷ 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).²⁰⁸

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).²⁰⁹

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.²¹⁰

More recently, on 10 September 2009, the Court of Justice held in *Akzo Nobel*²¹¹ 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-**

²⁰⁶ T. Tilquin and V. Simonart, *Traité des sociétés*, t. 1, 1996, Kluwer, Belgique, p. 575 and following.

²⁰⁷ 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.

²⁰⁸ *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.

²⁰⁹ B. Oppetit, “Groupes de société et droit du travail”, *Rev. Soc.*, 1973, p. 69.

²¹⁰ 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, *Istituto Chimioteripaco Italiano Spa*, 6 March 1974, Rec.1974, 223; ECJ, *Moët et Chandon*, 27 November 1981, OJ, No. L94, p.259.

²¹¹ 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.²¹²

2. Direct liability – due diligence²¹³

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 UN Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie (see Section I), to develop the concept of due diligence. In the absence of international corporate legal liability mechanisms, Ruggie encourages multinational corporations to adopt the measures necessary to assess the impact of their activities on human rights, prevent breaches and remedy them. Companies are encouraged to integrate this approach into their managerial policy.

²¹² N. Jägers and M.J. Van Der Heijden, *op.cit.*, 2008, p. 842.

²¹³ 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 two examples illustrate the due diligence obligations multinational corporations face when operating abroad.

→ **Lubbe v. Cape plc**²¹⁴

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 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.²¹⁵ In 2001, the case was settled with the company offering compensation to the workers.

²¹⁴ *Lubbe et al. v. Cape plc, op.cit.*, 1998; *Rachel Lubbe et al. v. Cape plc, op.cit.*, 2000.

²¹⁵ 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.

→ 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. On 8 December 2009, the Royal Court of Justice held a hearing of the case and scheduled a trial for the autumn of 2011. 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 courts in Action: The Shell Nigeria case²¹⁶

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 2008.²¹⁷ Between 1998 and 2007 Shell Nigeria was responsible for 38% of Shell's oil spills in the world.²¹⁸

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 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,

²¹⁶ This information is largely pulled from Milieudefensie, "Documents on the Shell legal case", www.milieudefensie.nl/english/shell/documents-shell-courtcase

²¹⁷ Milieudefensie, "Factsheet oil spills in the Niger Delta", www.milieudefensie.nl/english/shell/documents-shell-courtcase

²¹⁸ Royal Dutch Shell plc, "Financial and Operational Information 2003-2007: Delivery and Growth", www.faoi.shell.com/2007/servicepages/welcome.php

at which time the defendants/plaintiffs filed a motion for disclosure,²¹⁹ 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 has been highly reluctant to share in the past. Hearings are scheduled for summer 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 Milieudéfensie 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 Milieudéfensie 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 Mileudéfensie, 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.

²¹⁹ Milieudéfensie, "Nigerian oil victims demand transparency from Shell via court", press release from 24 March 2010.

→ **Guerrero v. Monterrico Metals plc. & Rio Blanco Copper SA**²²⁰

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 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 2 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 the injunction. On 16 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 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

²²⁰ *Guerrero v. Monterrico Metals plc. & Rio Blanco Copper SA* [2009] EWHC 2475 (QB).

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 Kingdom**²²¹

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 witnesses. Throughout the trial, McDonald's Corporation was represented by lead and junior counsel with experience in libel law, and by one and sometimes two solicitors and other assistants. The trial took place before a single judge and lasted from 28 June 1994 to 13 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**."²²²

²²¹ ECHR, *Steel and Morris v. United Kingdom*, 15 February 2005, No. 68416/01.

²²² *Ibid.*, § 72.

A look at the US trial procedure

With the exception of the UK,²²³ 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.²²⁴ 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 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.²²⁵ 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.

²²³ For a comparison with UK trial procedure, see M. Byers, *op.cit.*, 2000, p. 244.

²²⁴ On US trial procedure, see EarthRights International, *op.cit.*, 2006, p. 51 and following.

²²⁵ 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.

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),²²⁶
- 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
- No compensation for **frivolous and vexatious**²²⁷ 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 / OBSTACLES**²²⁸

- 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

²²⁶ This adage refers to two rules: the suspension of a civil trial and the civil authority of *res judicata* in criminal cases.

²²⁷ 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.

²²⁸ Oxford Pro Bono Publico, *op.cit.*, p. 304 and 310.

enforcement agreements between the US and other countries.²²⁹ 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.

* * *

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

²²⁹ *Ibid.*, p. 325 and following.

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 25 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.²³⁰

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.

²³⁰ 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.

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.

ADDITIONAL RESOURCES

- International Commission of Jurists, *Corporate complicity & legal accountability*, vol. 3: *civil remedies*, Genève, 2008
 - 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
 - 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
 - EarthRights International, *Transnational Litigation Manual for Human Rights and Environmental Cases in United States Courts – A resource for Non-Lawyers*, Rev. Sec. Ed., 2006
 - 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
 - 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.²³¹ Frequently denounced violations by companies include the development and use of toxic chemicals in recent armed conflicts (former Yugoslavia)²³² and “pacts of connivance” – corrupt practices – between foreign companies and local governments.²³³

In South Africa, following hearings which began in November 1997 on the involvement of economic actors in the system of apartheid,²³⁴ 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.²³⁵ 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

²³¹ 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 Chartre, 2005, p. 243.

²³² D. Baigun, “Reponsabilidad penal de las transnacionales”, Geneva, 4-5 May 2001, CETIM/AAJ, p. 3-4.

²³³ See Global Witness, “Now it’s time for transparency”, Press Release of 24 March 2003, www.globalwitness.org

²³⁴ 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.

²³⁵ 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.”²³⁶

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,²³⁷ 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.²³⁸

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.²³⁹ 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

²³⁶ 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-Zarif, Kluwer Law International, The Hague/London/Boston, p. 173.

²³⁷ 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.

²³⁸ 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.

²³⁹ 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.²⁴⁰ 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.

²⁴⁰ 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.²⁴¹ 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. Alfred 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.²⁴²

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”.²⁴³

²⁴¹ 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.*

²⁴² 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”, *J.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.

²⁴³ 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): an 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.²⁴⁴

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.²⁴⁵

The gradual recognition of the “sphere of influence”²⁴⁶ 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.

²⁴⁴ 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.”

²⁴⁵ ICTR, Prosecutor v. Obed Ruzindana, ICTR-96-10-T et ICTR-96-1-T, June 1, 2001.

²⁴⁶ 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.²⁴⁷

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.²⁴⁸

🔍 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.

²⁴⁷ 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

²⁴⁸ 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

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.”²⁴⁹ 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 1 January 2017. Such limit imposed on the jurisdiction of the Court has been subject to criticism by NGOs.²⁵⁰

► 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.²⁵¹ However, it remains possible to individually prosecute the directors of a company.
- The ICC has jurisdiction over the authors, co-authors, principals, instigators, accomplices

²⁴⁹ ICC, “Review Conference of the Rome State concludes in Kampala”, Press Release, 12 June 2010, www.icc-cpi.int

²⁵⁰ FIDH, “Conclusion of Landmark ICC Review Conference: Difficult Compromise and Commitments to be COnfirmed”, 14 June 2010, www.fidh.org

²⁵¹ 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).²⁵²

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.²⁵³

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.²⁵⁴

- 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.

²⁵² K. Ambos, *op.cit.*, p.749. (free translation).

²⁵³ See FIDH, *Victims’ Rights before the ICC, op.cit.*

²⁵⁴ 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,²⁵⁵ 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.”²⁵⁶

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.

🕒 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.

²⁵⁵ United Nations Reports on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC. S/2001/357, april 12.l 2001; S/2001/1072, November 13, 2001; S/2002/1146, October 16, 2002; S/2003/1027, October 23, 2003.

²⁵⁶ 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.”²⁵⁷

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*.²⁵⁸ 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. 13b)

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”.²⁵⁹

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.²⁶⁰ 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 organiza-

²⁵⁷ M. Bassiouni, op.cit., p.18. (free translation).

²⁵⁸ D. Becharoui, op.cit., p.353. (free translation).

²⁵⁹ M. Bassiouni, op.cit., p. 18. (free translation).

²⁶⁰ K. Ambos, op.cit., p.745.

tions. At this stage of the proceedings, victims, intergovernmental organizations, 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 2010.²⁶¹

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.

🕒 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.²⁶²

²⁶¹ Coalition for the International Criminal Court, www.iccnw.org

²⁶² 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.²⁶³ 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.²⁶⁴ 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.

²⁶³ K. Ambos, *op.cit.*, p.746.

²⁶⁴ See FIDH, *Victim’s Rights before the ICC*, *op.cit.*

➤ 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)²⁶⁵ 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**²⁶⁶:

- Any individual who has suffered harm as a result of the commission of a crime within the jurisdiction of the Court;
- Any organization 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, case by case, 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*²⁶⁷

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.²⁶⁸ 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 decides to prosecute.²⁶⁹ They also have the **right to participate in the proceed-**

²⁶⁵ 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

²⁶⁶ J. Fernandez, *op.cit.*, p.7.

²⁶⁷ We will discuss here only the preliminary phase.

²⁶⁸ 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

²⁶⁹ J. Fernandez, *op.cit.*, p.7.

ings (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 ...”) and claim for reparation.²⁷⁰

Victims may also submit observations to the Court in an action challenging the jurisdiction of the ICC or the admissibility of prosecution.²⁷¹

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 MC Bassiouni²⁷² 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.²⁷³

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 of states, when the crimes were committed in the name of the legal entity or its agencies and representatives”.²⁷⁴

²⁷⁰ See FIDH, *Victims' Rights before the ICC*, *op.cit.*

²⁷¹ Statute, Art. 19. 3 ; L. Walleyn, “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.

²⁷² M.C. Bassiouni, *Draft Statute: International Criminal Tribunal*, 1998.

²⁷³ Cristina Chiomenti, “Corporations before the International Criminal Court”, Global Law Working Paper 01/05, Symposium: Transnational Corporations and Human Rights, NYU Law, 2005.

²⁷⁴ 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/doc/UNDOC>

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, 1998²⁷⁵, **France proposed to include the notion of criminal organizations and companies as legal entities in the Statute.**²⁷⁶

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.²⁷⁷ Many civil society groups continue to lobby for the creation of such a tribunal.

²⁷⁵ 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.

²⁷⁶ “[...] 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 organizations, or non-profit organizations.

²⁷⁷ 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.**²⁷⁸

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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➤ Secretariat of the Assembly of States Parties, ICC, the Hague, Netherlands. © ICC-CPI

²⁷⁸ 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.²⁷⁹

This chapter will not describe the laws of the 27 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.

²⁷⁹ 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.²⁸⁰ 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 recommendations²⁸¹ 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**.²⁸²

²⁸⁰ 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 Organization 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).

²⁸¹ 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.

²⁸² 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.²⁸³ **Germany** has adopted hybrid measures.²⁸⁴

Before addressing the principle of corporate criminal liability regimes in EU Member States, there is a central question in matters both civil and criminal, 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.²⁸⁵ 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.²⁸⁶ 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”.²⁸⁷

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

²⁸³ 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.

²⁸⁴ German law allows for measures of a punitive character to be applied to delinquent companies, according to German administrative-criminal law. (§ 30 OWiG).

²⁸⁵ 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.

²⁸⁶ 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.

²⁸⁷ 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.²⁸⁸

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**.²⁸⁹ 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 [...]”.²⁹⁰ 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.”²⁹¹ 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.²⁹² In its Green Paper on the approximation,

²⁸⁸ 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-Basacqz and M. Nihoul, La Chartre, Bruxelles, 2008, p. 126.

²⁸⁹ 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.

²⁹⁰ D. Vandermeersch, *op. cit.*, p.248.

²⁹¹ 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.


²⁹² 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.”²⁹³ 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.²⁹⁴

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.

🔍 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.²⁹⁵ 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, however, 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).²⁹⁶ The Belgian law of 4 May 1999 applies to private entities which exist in reality and are carrying out specific operations.²⁹⁷ The law applies primarily

²⁹³ 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.


²⁹⁴ See B. Bouloc, under Cass. crim., 9 December 1997, D., 1998, p. 296 and ff.


²⁹⁵ 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.

²⁹⁶ M. Nihoul, “Le champ d’application”, in *La responsabilité pénale des personnes morales en Belgique* / Ed. M. Nihoul, La Chartre, Bruxelles, 2005, p. 25.


²⁹⁷ 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-Basecqz and M. Nihoul, La Chartre, Bruxelles, 2008, p. 67.


to economic entities which function despite a lack of legal personhood in the strict sense.²⁹⁸

 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.²⁹⁹

 The **United Kingdom** also does not require abstract entities to hold legal personhood in the strict sense for them to be considered criminally liable.³⁰⁰

 **Portugal:** The principle was introduced in the Criminal Code of 1982.

 **Luxembourg:** On 4 February 2010, Luxembourg’s Parliament undertook to create a law creating a general regime of criminal liability for legal persons in the Criminal Code and the Code of Criminal Procedure. It has yet to be created.

 **Spain:** The reform to the Criminal Code, approved by the Senate on 9 June 2010, introduces corporate criminal liability for the first time (see the new article 31bis of the Spanish Criminal Code).

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.³⁰¹ The resulting impunity is the same if several companies form a new company by transferring their assets to the latter.³⁰²

🔗 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

²⁹⁸ Rapport de la Commission de la Justice, *Doc. parl.*, Sénat, sess. ord. 1998-99, No. 1-1217/6, p. 7.

²⁹⁹ “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.

³⁰⁰ 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.

³⁰¹ 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.

³⁰² 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-Basecqz et M. Nihoul, La Charte, Bruxelles, 2008, p. 236.

national criminal codes and additional laws and decrees.³⁰³ Others prefer the **principle of specificity** (including Portugal, Estonia, Finland and Denmark³⁰⁴) **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.³⁰⁵ 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.

🕒 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 international and regional instruments and in national legislation.³⁰⁶ 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.³⁰⁷ The question

³⁰³ 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.

³⁰⁴ In 1996, Denmark had more than 200 specific laws. H. de Doelder and K.Tiedemann, *La criminalisation du comportement collectif*, Kluwer, 1996, p.19.


³⁰⁵ Law No. 2004-204 of 9 March 2004, entered into force on 31 December 2005.

³⁰⁶ 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.


³⁰⁷ 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.

must be asked whether this condition may be satisfied not only by defending one’s **economic interests**, but also by pursuing a **moral interest**.³⁰⁸

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.

 In **France**, for example, Article 121-2 of the Penal Code specifies that only offences committed by individuals categorised as **directors**³⁰⁹ or **representatives**³¹⁰ 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.

🕒 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

³⁰⁸ 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.

³⁰⁹ The board is charged by law with managing and administering the company. It acts in the company’s name, both individually and collectively.

³¹⁰ 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.

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 liability³¹¹) and English law,³¹² 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**.³¹³ 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.³¹⁴

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*.³¹⁵

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".³¹⁶ 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.³¹⁷ This refers

³¹¹ In France, it must be proved that the board or one of its members committed both the material and moral elements of the offence.

³¹² "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.

³¹³ 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.

³¹⁴ Rapport de la Commission de la Justice du Sénat, *Doc. Parl.*, Sénat, sess. ord., 1998-1999, 1-1217/1, p.26.

³¹⁵ 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.

³¹⁶ 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.


³¹⁷ M. Lizée, *op. cit.*, p.147.


to “*de facto* directors”, those who were the “company incarnate” at the time of the offence.³¹⁸ 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 [...]”³¹⁹ One of the most interesting lessons in comparing the laws of EU Member States is that **the number of rules** in common targeting intentional offences **is significantly greater than those targeting unintentional offences.**³²⁰ 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 accomplices to offences. In the case of unintentional violations, the separation of liability is not mandatory.³²¹

 In the **Netherlands**, joint liability is expected, but not mandatory.³²²

³¹⁸ 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.


³¹⁹ M. Delmas-Marty and J.A.E. Vervaele, *The implementation of the Corpus juris in the Member States*, Intersentia, 2000.


³²⁰ R. Roth, *op.cit.*, p.686.

³²¹ On joint liability in French Criminal law, see J.-C. Saint-Pau, *op.cit.*, p. 138.

³²² See Article 51 of “Nederlandse wetboek van strafrecht”.

📌 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.³²³ 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**.

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.³²⁴ 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

³²³ 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-Basecqz and M. Nihoul, La Charte, Bruxelles, 2008, p. 277.

³²⁴ 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.


is headquartered.³²⁵ 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.

Determining a court’s extraterritorial jurisdiction

Territoriality remains the guiding principle of criminal jurisdiction.³²⁶ 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.³²⁷

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.³²⁸ Belgian law and doctrine hold that the Belgian courts have jurisdiction to try

³²⁵ “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.

³²⁶ 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 Chartre, p. 56-57, 62-70.

³²⁷ 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. (CPIJ, *Lotus - France c. Turquie*, 7 September 1927, Series A, No. 10).

³²⁸ 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 JurisClasser*, March 2005, p. 13-14.

offences which are only partially carried out in Belgium.³²⁹ “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.”³³⁰

In addition to that of territoriality, six “derogatory” principles of jurisdiction can be identified in the various national laws:³³¹

- 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,³³² regardless of the location of the crime and the nationality of the perpetrator or the victim),³³³
- 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.³³⁴

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.

³²⁹ 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.

³³⁰ D. Vandermeersch, *op. cit.*, p.250. See also H.-D. Bosly and D. Vandermeersch, *Droit de la procédure pénale*, La Chartre, 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.

³³¹ L. Reydams, *Universal Jurisdiction: International and Municipal legal perspectives*, Oxford, Oxford University Press, 2003, p. 21-22.

³³² 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.

³³³ L. Reydams, *Universal Jurisdiction: International and Municipal legal perspectives*, *op. cit.*, p. 5.

³³⁴ On the principle of representation, L. Reydams 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. Reydams, *Universal Jurisdiction: International and Municipal legal perspectives*, *op. cit.*, p. 22.


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 personality 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.


– 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**.³³⁵ 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

³³⁵ 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.

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**.³³⁶

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 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.³³⁷ In the case at hand **the defendant is not required to be in Belgium**³³⁸ (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.³³⁹ Where the French national is an accomplice, the public prosecutor alone may open a prosecution,³⁴⁰ and only **following a complaint from a victim or his or her heirs, or following an official complaint from a government authority**

³³⁶ 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.

³³⁷ Art. 6, No. *1bis* 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.

³³⁸ 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.

³³⁹ 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. Fourmie.

³⁴⁰ 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.

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,³⁴¹ 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.

➔ **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.³⁴² In light of previous accusations levelled against SFID,³⁴³ Rougier SA could not have been unaware of its subsidiary's illegal activities.

³⁴¹ Article 113-9 of the French Criminal Code.

³⁴² 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.

³⁴³ 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.

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.³⁴⁴ 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 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.³⁴⁵

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

³⁴⁴ Most of SFID’s representatives and managers held French nationality.

³⁴⁵ See Sherpa, “Rapport d’activités 2006, actualisé au 2 mai 2007”, p. 2.

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.³⁴⁶

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 press release, "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."³⁴⁷ The case is ongoing.

The general principle of active personality is embodied in the criminal codes of **Germany, Austria, Denmark, Spain, Finland, Greece, the Netherlands, Portugal and Sweden.**

³⁴⁶ 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.

³⁴⁷ Global Witness, "International timber company DLH accused of funding Liberian War", 18 November 2009, www.globalwitness.org

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).



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 Sweden³⁴⁸ 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.³⁴⁹ Departures from this rule may be found, however in cases under the *Offences against the Person Act of 1861*³⁵⁰ and the *International Criminal Court Act 2001*.³⁵¹

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.

³⁴⁸ 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. Pölonen, *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.

³⁴⁹ 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.

³⁵⁰ 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.

³⁵¹ 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.

a) The meaning of nationality and how it is acquired

The use of “nationality” as a connecting factor may be problematic in corporate 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 state³⁵².

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.”³⁵³ 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.”³⁵⁴ 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.³⁵⁵

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

³⁵² Watts & Jennings, *Oppenheim’s International Law*, vol. 1, 9th ed., 1996, p. 861: “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”. See L. Reydams, *Universal Jurisdiction: International and Municipal legal perspectives*, *op. cit.*, p.23.


³⁵³ See P. Van Ommeslaghe and X. Dieux, “Examen de jurisprudence (1979-1990). Les sociétés commerciales”, *R.C.J.B.*, 1992, p. 673.


³⁵⁴ ICJ, *Barcelona Traction Light and Power Company (Belgique v. Espagne)*, 5 February 1970, *Rec.* 1970, p. 43.

³⁵⁵ 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).

persons who actually run the company, could also be used to establish the company's nationality.³⁵⁶ The same goes for the **place of the company's core activity**.³⁵⁷

The application of the nationality criteria, even when clearly established by law, can be controversial.³⁵⁸

 Under **Belgian law**, (Art. 56 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."³⁵⁹ 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).³⁶⁰ The actual headquarters can be defined as the place where the company's legal; finance and management departments are located.³⁶¹

 **French law** similarly argues that a corporation with its actual headquarters in France is French, even if it is controlled by foreigners.³⁶²

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**.³⁶³ 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".³⁶⁴ The Council added that in the absence of

³⁵⁶ 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.

³⁵⁷ 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.

³⁵⁸ 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.

³⁵⁹ D. Vandermeersch, *op.cit.*, p. 246.

³⁶⁰ 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.

³⁶¹ 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.

³⁶² 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.

³⁶³ M. Henzelin, *Le principe de l'universalité en droit pénal international ... op. cit.*, p. 26.

³⁶⁴ Council of Europe, "Compétence extraterritoriale en matière pénale", 1990, p. 29-30.

such clarifications, “for the sake of predictability, the location of a legal person’s headquarters appears to be the only acceptable criterion.”³⁶⁵

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.³⁶⁶



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.³⁶⁷



The **United Kingdom** and **Belgium** apply the residence principle to alleged perpetrators provided they are suspected of violating international humanitarian law.³⁶⁸



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.³⁶⁹

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

³⁶⁵ *Ibid.*

³⁶⁶ A. Cassese, *International Criminal Law*, Oxford, 2003, p. 282.

³⁶⁷ M. Henzelin, *Le principe de l’universalité en droit pénal international ...*, *op. cit.*, p. 25.

³⁶⁸ 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, Ibis of the Preliminary Title of Code of Criminal Procedure.

³⁶⁹ 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.

own legal personhood and therefore cannot be regarded as the head office or place of business of the separate company TotalFinaElf.”³⁷⁰ 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.

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”.³⁷¹

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).

³⁷⁰ Cass. b., 5 May 2004, réf. P.04.0482.F/3 (TotalFinaElf).

³⁷¹ 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.

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.

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.**³⁷²


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*³⁷³). 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.³⁷⁴ **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.


³⁷² 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.

³⁷³ 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.

³⁷⁴ 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.

 This is the case in **France** when a French national is the primary perpetrator of a crime in a third country.

 **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 *ius cogens*, it is often believed that their prohibition applies by necessity to all persons – both natural and legal – regardless of the inclusion of specific offences under various national criminal laws.

 **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,³⁷⁵ 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.”³⁷⁶ 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 complaint³⁷⁷

From its inception in 1992, the pipeline project has been strongly criticised by several human rights organisations³⁷⁸ 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

³⁷⁵ For more on this subject, see the section on corporate civil liability.

³⁷⁶ The amicus curiae is reproduced in an addendum to the work of F. Christophe, *TotalFina: entre marée noire et blanchiment*, Villeurbanne, Editions Golias, 2000.

³⁷⁷ 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>

³⁷⁸ 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

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.

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.”³⁷⁹ One witness claims to have seen about 300 workers build a heliport for Total’s dedicated use.³⁸⁰ 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 facilities³⁸¹ and having **knowingly benefitted from forced labour** on the worksite despite repeated protests from the International Labour Organization 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).³⁸²

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

³⁷⁹ Extract from CA Versailles, Ch. de l’instruction, 10^e Ch.-Section A, 11 January 2005, p. 8.

³⁸⁰ 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.

³⁸¹ The facilities monitoring was provided under an agreement between the Burmese authorities and the French company.

³⁸² CA Versailles, Ch. de l’instruction, 10^e Ch.-Section A, 11 January 2005, p. 10.

person). On 11 January 2005, the Examining Chamber of the Versailles Court of Appeals³⁸³ rejected a motion for dismissal by the Nanterre prosecutor.³⁸⁴ 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.”³⁸⁵

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.”**³⁸⁶

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.³⁸⁷ Although the Group reiterated a categorical denial of the forced labour allegations, the fund provides up to 10,000 Euros³⁸⁸ 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

³⁸³ 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.

³⁸⁴ See CA Versailles, Ch. de l’instruction, 10^e Ch.-Section A, 11 January 2005, p. 16.

³⁸⁵ 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.

³⁸⁶ 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.

³⁸⁷ 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/

³⁸⁸ Six victims joined the two original plaintiffs.

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 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”.³⁸⁹

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.³⁹⁰

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.³⁹¹

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).³⁹²

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,

³⁸⁹ See M. Bastian, “Non-lieu pour Total, même si le travail forcé a existé en Birmanie”, op.cit.


³⁹⁰ See FIDH, “Upholding Human Rights and Ensuring Coherence”, Position Paper, October 2010, www.fidh.org


³⁹¹ CoE, “Compétence extraterritoriale en matière pénale”, 1990, p. 26-31.


³⁹² No international convention, however, mentions a passive personality option for victims residing in a State without holding that State’s nationality.

in particular when the maximum penalty under the law governing the place of the crime exceeds five years imprisonment.³⁹³ 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.³⁹⁴ In these situations, however, prosecution may be brought only by the federal prosecutor, and not through civil action.³⁹⁵ 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.³⁹⁶

 **Finland and Sweden** extend the scope of passive personality jurisdiction to foreigners permanently residing in Finland and to foreigners domiciled in Sweden.³⁹⁷ In Sweden, however, jurisdiction applies only to acts committed in an area lacking a State judiciary.


³⁹³ 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.


³⁹⁴ Article 10, Ibis of the Preliminary Title of the Code of Criminal Procedure.


³⁹⁵ 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.


³⁹⁶ § 7 of the German Criminal Code; Article 7 of the Greek Criminal Code; Article 5(d) of the Portuguese Criminal Code.


³⁹⁷ 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 does not really exist.

 In **Denmark**, the principle of passive personality exists only in exceptional cases, and then it is extended to residents.³⁹⁸

 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.³⁹⁹

 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 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

³⁹⁸ “[E]xcept when an offence of a certain severity is committed against a Dane or a person resident in the Danish State outside the territory of any State” (Strfl. §8(1)(3)).

³⁹⁹ 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.

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.”⁴⁰⁰ 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. 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 [...]”⁴⁰¹ This novel approach is, however, affected 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

⁴⁰⁰ Cass. fr., 31 January 2001, *Bull. crim.*, 2001, No. 31, p.81.

⁴⁰¹ 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.

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.⁴⁰² 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.⁴⁰³

⁴⁰² 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.

⁴⁰³ 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.⁴⁰⁴ 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."⁴⁰⁵ 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.⁴⁰⁶ 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.⁴⁰⁷

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.⁴⁰⁸

⁴⁰⁴ 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.

⁴⁰⁵ 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.

⁴⁰⁶ Cass. b., 29 June 2005, www.cass.be

⁴⁰⁷ 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.

⁴⁰⁸ 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.⁴⁰⁹ 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**.⁴¹⁰



Universal jurisdiction deriving from treaty obligations exists in **Germany, Austria, Belgium, Denmark, Spain, Finland, France, Portugal and Sweden**.⁴¹¹





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.


⁴⁰⁹ 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


⁴¹⁰ 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 Treatment 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.

⁴¹¹ 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.⁴¹²

 **Ireland** and **Luxembourg** both recognise the universal jurisdiction of their courts for war crimes and torture, *inter alia*.

 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,⁴¹³ 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).

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**

⁴¹² 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. Reydams, *op. cit.*; L. Reydams, *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.

⁴¹³ SeeFIDH, "Mise au pas du Parlement: le gouvernement défend l'impunité des bourreaux", 25 May 2010, www.fidh.org

when the suspect is present.⁴¹⁴ 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.⁴¹⁵ Some, however, stress the importance of a specific extradition request to avoid conducting a trial in the absence of the accused.⁴¹⁶ 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*,⁴¹⁷ 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.

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

⁴¹⁴ 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, le 26 June 2002, on the receivability of complaints against A. Sharon and L. Gbabgo. 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.

⁴¹⁵ 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

⁴¹⁶ A. Poels, "Universal Jurisdiction *in absentia*", *op. cit.*, p. 84.

⁴¹⁷ 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.

humanitarian law.⁴¹⁸ 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. 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.

⁴¹⁸ *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.


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, Spain, Greece, Luxembourg and Portugal**⁴¹⁹ 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,⁴²⁰ 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.⁴²¹

⁴¹⁹ See “Additional Resources” at the end of this part.

⁴²⁰ 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.

⁴²¹ *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 ICTR.⁴²²

 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**”.

⌚ 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.

⁴²² These laws grant jurisdiction over all crimes falling under *ratione materiae, loci* and *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),⁴²³ the time of the trial (see the Spanish position, below)⁴²⁴ or a “less determined” moment.⁴²⁵ 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.⁴²⁶

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.⁴²⁷ 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

⁴²³ 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*)).

⁴²⁴ 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.

⁴²⁵ 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.

⁴²⁶ C. Reyngaert, “Universal criminal Jurisdiction over Torture”, *op. cit.*, p. 591.

⁴²⁷ 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."⁴²⁸

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."⁴²⁹

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.⁴³⁰ While investigations *in absentia* are relatively common and uncontroversial in international law, trials *in absentia* may provoke debate.⁴³¹

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 a foreign company to the United States are sufficient to create the minimum ties necessary to establish jurisdiction in US courts.⁴³²

⁴²⁸ CAT, *Observations finales – France*, 24 November 2005, CAT/C/FRA/CO/13/CPRCRP.51, § 14.

⁴²⁹ Redress & FIDH, "Legal Redress for Victims of International Crimes", *op. cit.*, p. 57.

⁴³⁰ 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.

⁴³¹ 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.

⁴³² M. Henzelin, *Le principe de l'universalité en droit pénal international...*, *op. cit.*, p. 185.

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 county, 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.⁴³³

→ 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.

⁴³³ 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.


🔗 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

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

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).

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.⁴³⁵

 **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**⁴³⁶ 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 nonexistent in Spanish prosecutions.⁴³⁷

⁴³⁴ 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.

⁴³⁵ Redress & FIDH, "Legal Redress for Victims of International Crimes", op.cit., 2004, p. 7.

⁴³⁶ 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).

⁴³⁷ 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,⁴³⁸ or else the prosecutor alone can bring victims on as representatives of the executive branch.⁴³⁹



Germany has a hybrid system. Although victims are unable to bring legal action, they may eventually join the proceedings as auxiliaries to the prosecutor.⁴⁴⁰

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,⁴⁴¹ it has also been warned that the lodging of symbolic, ideological or political complaints risks turning the judiciary away from its original purpose.⁴⁴²

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.

⁴³⁸ In Belgium, France, Italy and Luxembourg. A. Poels, "Universal Jurisdiction *in absentia*", N.Q.H.R., 2005, p.79.

⁴³⁹ 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.


⁴⁴⁰ On this prosecution, see Redress & FIDH, "Legal Remedies for Victims of International Crimes", *op. cit.*, p. 45; M.E.I. Brienen 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.


⁴⁴¹ Most investigations are initiated following a concerted effort by victims. See Redress & FIDH, "Legal remedies for victims of 'international crimes'", *op.cit.*

⁴⁴² L. Reydams, *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.

 **Germany, Greece and the Netherlands** also expressly allow for prosecutions to be dropped for political reasons.⁴⁴³

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,⁴⁴⁴ would undoubtedly be a useful measure for countries to adopt.⁴⁴⁵

 In 2003, **Belgium** limited the scope of civil actions available to plaintiffs for violations of international humanitarian law.⁴⁴⁶ Civil action is now possible only when the company and/or its leader are of Belgian nationality or reside on Belgian soil (active personality).⁴⁴⁷ In other situations, only the Federal Prosecutor may initiate investigations.

 Similarly, **the French government** plans to submit to the National Assembly a bill which incorporates crimes under the Statute of the International Criminal Court into French national law. The ICC statutes grant a monopoly to the prosecutor and deny victims the ability to bring civil action.⁴⁴⁸

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.⁴⁴⁹ Through these provisions, States comply with international guidelines which hold that the rights of victims, particularly those who are victims of serious human rights breaches, must receive special attention.⁴⁵⁰

⁴⁴³ Section 153, German Code of Criminal Procedure; Art. 67, 242 of the Dutch Code of Criminal Procedure.

⁴⁴⁴ 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.

⁴⁴⁵ See the *Brussels Principles against Impunity and for International Justice*, Principle 16 § 3.

⁴⁴⁶ Suits have been filed against George W. Bush with respect to the second military intervention in Iraq.


⁴⁴⁷ 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.


⁴⁴⁸ See the bill adapting French legislation to the Statute of the International Criminal Court and amending certain provisions of the Criminal Code, Code of Military Justice, the Law of 29 July 1881 on freedom of the press and the Code of Criminal Procedure June 2003. See also the National Consultative Commission of Human Rights, "Avis sur l'avant-projet de loi portant adaptation de la législation française au Statut de la Cour pénale internationale", 15 May 2003, point III, www.commission-droits-homme.fr/ (French only).


⁴⁴⁹ 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.


⁴⁵⁰ 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).

📌 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*.⁴⁵¹ 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.⁴⁵²

 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”.⁴⁵³ 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”.⁴⁵⁴ A 3 November 2009 reform introduced a new hurdle to universal jurisdiction under Spanish law (Ley Organica del Poder Judicial) whereby Spanish courts cannot exercise 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.⁴⁵⁵

 **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.⁴⁵⁶ The existence of a better forum in such a situation is but a theoretical possibility.

⁴⁵¹ See Articles 10, *1bis*, Paragraph 3, 4 and *12bis*, Paragraph 3, of the Preliminary Title of the Code of Criminal Procedure.

⁴⁵² § 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.

⁴⁵³ 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.

⁴⁵⁴ 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 Luarca*, Auto 550/2010, 4 March 2010.

⁴⁵⁵ Art. 24.3 of the LOPJ, Ley Orgánica 1/2009, 3 November 2009.

⁴⁵⁶ C. Reyngaert, *op. cit.*, p.602. Redress & FIDH, *op. cit.*, 2004, p. 58.

➔ **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 Ugborugbo Salomon Amejuma (the director of Tommy) and others.*”⁴⁵⁷

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.⁴⁵⁸

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

⁴⁵⁷ Decision by the Indictment Division of the Abidjan Court of appeal, 19 March 2008, p. 25-26.

⁴⁵⁸ 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

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.⁴⁵⁹

Ongoing 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.⁴⁶⁰

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 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. **To date, there has been no response to the appeal.**

⁴⁵⁹ 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

⁴⁶⁰ 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

Ongoing 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'Ivoire⁴⁶¹. 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. 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. The case against Trafigura is still pending.

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).⁴⁶² The trial began on 2 June 2010.

* * *

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

⁴⁶¹ Greenpeace, which is party to the proceedings, has challenged the limitation of the case to events that occurred in Amsterdam. An appeal is pending.

⁴⁶² See the article published in *Libération* on 18 May 2010, "Probo Koala: the charterer Trafigura called to witness" www.liberation.fr/monde/0101636039-probo-koala-l-affreteur-trafigura-pris-a-temoins

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”⁴⁶³ 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-Basecqz and M. Nihoul, *La responsabilité pénale des personnes morales en Europe – Corporate Criminal Liability in Europe*, Bruxelles/Bruges, La Charte/Die Keure, 2008.

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*

⁴⁶³ D. Vandermeersch, “La dimension internationale de la loi”, *op. cit.*, p. 273.

morales en Europe / S. Adam (dir.), N. Colette-Basecqz and M. Nihoul, La Charte, 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:** Chapter 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 absentia* 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 of 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.
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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:⁴⁶⁴

- **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 individu-

⁴⁶⁴ E. Engel, "Extraterritorial criminal liability: a remedy for human rights violations?" *Saint John's Journal of Legal Commentary*, spring 2006, p. 2.

als. Complicity must feature a **shared criminal intent**.⁴⁶⁵ In the US, **the accomplice 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.⁴⁶⁶ 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.⁴⁶⁷

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.⁴⁶⁸

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.⁴⁶⁹

⁴⁶⁵ In the United States, this intentional element is called “state of mind”: the intention to commit or participate in a crime.

⁴⁶⁶ 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.

⁴⁶⁷ 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.

⁴⁶⁸ J. Jacobs, “L’évolution du droit pénal américain”, *Revue électronique du département d’Etat*, volume 6, No. 1, 1 July 2001, p.6.

⁴⁶⁹ M. Wagner, “Corporate Criminal Liability: National and International responses.” *Commonwealth Law Bulletin*, 1999, p. 8-9.

- **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 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.⁴⁷⁰
- **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.⁴⁷¹

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**”⁴⁷² (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**.⁴⁷³ 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**

⁴⁷⁰ Title 18 USC. A§ 1964 (a).

⁴⁷¹ M. Wagner, *op. cit.*, p.9.

⁴⁷² 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 2nd Circuit Court of Appeals in *United States v. Aluminum Co. of America (Alcoa)*. We analyze its particular use under RICO later.

⁴⁷³ *Idem*, p. 36.

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.⁴⁷⁴

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 primarily on legal doctrine and precedent to create law rather than on written law,⁴⁷⁵ 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.⁴⁷⁶ US states cannot extend their jurisdiction beyond those crimes committed on their soil.⁴⁷⁷

The federal government itself can enact extraterritorial criminal laws,⁴⁷⁸ 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.

⁴⁷⁴ A. Ramasastry, R. C. Thompson, *op.cit.*, p. 16.

⁴⁷⁵ 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.

⁴⁷⁶ A. Cassese and M. Delmas-Marty, *Juridictions nationales et crimes internationaux*, PUF, Paris, 2002, p. 458.

⁴⁷⁷ See 14th Amendment (1868 clause on preserving individual liberties).

⁴⁷⁸ A. Cassese et M. Delmas-Marty, *op.cit.*, p.458.

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*⁴⁷⁹ 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.

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. Federal law does establish jurisdictional requirements,⁴⁸⁰ however, 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.⁴⁸¹

The United States has also incorporated an element of the Geneva Conventions through the War Crimes Statute.⁴⁸² 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.⁴⁸³

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.**⁴⁸⁴

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*,

⁴⁷⁹ See 18 USC 2340A.

⁴⁸⁰ See 18 USC 1091.

⁴⁸¹ 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.*

⁴⁸² See 18 USC 2441.

⁴⁸³ There is currently a debate in the US as to whether a federal law targeting crimes against humanity will be adopted.

⁴⁸⁴ 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.

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.

The special case of the Foreign Corrupt Practices Act (FCPA) and Racketeering Influenced and Corrupt Organizations (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.⁴⁸⁵

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 Organization 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.

⁴⁸⁵ *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.⁴⁸⁶

► **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.

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."⁴⁸⁷

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."⁴⁸⁸ A parent company and a subsidiary can be treated as a single enterprise if an offense is committed as part of their relationship.⁴⁸⁹

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.⁴⁹⁰ 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**⁴⁹¹ (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.

⁴⁸⁶ 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.

⁴⁸⁷ Title 18 USC. A§ 1962 (c).

⁴⁸⁸ Title 18 USC. A§ 1961 (3).

⁴⁸⁹ E. Engel, *op. cit.*, p. 7.

⁴⁹⁰ 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.

⁴⁹¹ 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.⁴⁹² This suggests that in many cases, prosecutors may, for reasons more political and economic than strictly legal, 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*⁴⁹³ (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.

⁴⁹² J. Jacobs, *op. cit.*, p.2.

⁴⁹³ *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. Such exceptions do not exist, however, 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 “organizations” – 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 organizations.” 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 organization 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 organization’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 organization 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 organization is a party to the offence if, with the intent at least in part to benefit the organization, 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 organization so that they carry out the act or make the omission specified in the offence; or (c) knowing that a representative of the organization 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.⁴⁹⁴

The Criminal Code also provides for probation orders for companies.⁴⁹⁵ 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

⁴⁹⁴ 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.

⁴⁹⁵ 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 Code⁴⁹⁶ 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”⁴⁹⁷ 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;⁴⁹⁸
- War crimes and crimes against humanity⁴⁹⁹ and treason.⁵⁰⁰

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,⁵⁰¹ any person who commits an act or omission constituting an international war crime or crime against humanity

⁴⁹⁶ Criminal Code Art. 6(2) (L.R.C. 1985, ch. C-46, modified).

⁴⁹⁷ See e.g., *R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.).

⁴⁹⁸ 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.

⁴⁹⁹ Criminal Code Art. 7(3.71) (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.

⁵⁰⁰ Criminal Code Art. 46(3) (L.R.C. 1985, ch. C-46, modified).

⁵⁰¹ 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.⁵⁰²

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.

⁵⁰² 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.⁵⁰³ With regard to international crimes, however, the personal written consent of the Attorney General or his Deputy Attorney General is required to prosecute.⁵⁰⁴ 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

⁵⁰³ Canadian Code of Penal Procedure, Art. 11.

⁵⁰⁴ 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).

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.⁵⁰⁵ 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.

⁵⁰⁵ *Operation Dismantle v. The Queen*, 1985.



➤ 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.

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SECTION III
MEDIATION MECHANISMS

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SECTION III

MEDIATION MECHANISMS

PART I

OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises (the Guidelines) are part of the OECD Declaration on International Investment and Multinational Enterprises dating from June 21st, 1976.¹ They were drafted at a time of rapid change in the structure and operation of multinational enterprises, which were diversifying their activities and investing directly abroad whilst expanding into developing countries.

The Guidelines, by way of the voluntary and non-binding rules that they encompass, were presented as a necessary counterbalance to the protection of the rights of investors by the Organisation for Economic Co-operation and Development (OECD).² Given the growing impact of economic globalisation the Guidelines were revised in June 2000, notably so as to include references to the requirement of multinational enterprises to respect **human rights** and **combat bribery**.

The Guidelines constitute recommendations addressed to companies by the OECD member countries and other states having signed up to the principles. They are intended to act only as a 'benchmark' for multinational enterprises: compliance is not, therefore, obligatory.

The **31 member countries of the OECD**³ adhere to the Guidelines, as do an **additional 11 other countries**: Argentina, Brazil, Egypt, Estonia, Israel, Latvia, Lithuania, Peru, Romania and Slovenia. Of the EU Member States only Bulgaria, Cyprus and Malta have yet to join. Egypt remains the only African nation to

- 1 Following the adoption of the revised OECD Guidelines for Multinational Enterprises on June 27th, 2000, the OECD published a booklet containing the revised text of the Guidelines and commentaries, the procedures for their implementation, and the Declaration on International Investment and Multinational Enterprises. The official text is available in English and French, as well as in Arabic, German, Chinese, Korean, Spanish, Hungarian, Polish, Slovak, Swedish, Czech and Turkish. Other translations are available on the websites of adhering states. www.oecd.org/dataoecd/56/36/1922428.pdf
- 2 J. Karl, "The OECD Guidelines for Multinational Enterprises", in, *Human Rights Standards and the Responsibility of Transnational Corporations*, (ed) M.K. Addo, Kluwer Law International, The Hague, 1999, p. 89.
- 3 Australia, Austria, Belgium, Canada, Chile, Korea, Denmark, Spain, USA, Finland, France, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, South Africa Netherlands, Poland, Portugal, Czech Republic, Slovakia, United Kingdom, Sweden, Switzerland, Turkey.

have signed up to the Guidelines. **Companies present in all adhering states, operating in or from their territories, are covered by the Guidelines (including, furthermore, their operations in countries that have not adhered to the Guidelines).**⁴ According to an OECD study in 2005, the territories of adhering states account for around 90% of foreign direct investment and host 97 of the top 100 largest multinational enterprises.⁵

The Guidelines have been translated into 24 languages; moreover, 22% of executives at multinationals cite them directly as the international benchmark.⁶

While the Guidelines are aimed at companies, the acceding states bear the ultimate responsibility to promote their application and ensure that they influence the behaviour of companies operating either internally, or directly out of, their territory.

Governments adhering to the Guidelines should not use them for protectionist purposes, nor exploit them in a way that calls into question their comparative advantage over other countries where multinational enterprises invest.⁷ This last point expresses the ambiguity of the Guidelines, touching on the complexity of the OECD's predicament in having to 'contribute to development' just as much in industrialized countries as in the developing economies.

The Guidelines are divided into three parts: the Guidelines themselves (Part I), their procedures for implementation (Part II) and the commentaries of the Investment Committee that relate to the Guidelines and their implementation (Part III).

The first part of the Guidelines focuses on ten chapters covering the following topics:

- I. Concepts and Principles
- II. General Principles
- III. Disclosure
- IV. Employment and Industrial Relations
- V. Environment
- VI. Combating Bribery
- VII. Consumer Interests
- VIII. Science and Technology
- IX. Competition
- X. Taxation

4 OECD, *OECD Guidelines for Multinational Enterprises*, June 27, 2000, Chapter I, § 2, p. 14.

5 OECD, *OECD Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, 2005 - Report of the President, meeting 15-16 June 2005*, 2005 (Note: At that point in time the Guidelines counted 39 states as adherents).

6 OECD, *Promoting Corporate Responsibility: The OECD Guidelines for Multinational Enterprises*, p.7, www.oecd.org/dataoecd/54/17/34896809.pdf

7 OECD, *Guidelines ...*, op. cit., Chapter I, § 8, p.13.

The second part focuses on the procedures for implementing the Guidelines. In particular, it establishes a mechanism for the resolution of issues pertaining to “specific instances” for any interested party that considers a company has failed to respect the Guidelines within the context of its activities.



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CHAPITRE I

Content and Scope of the OECD Guidelines

* * *

What are the rights and requirements set by the Guidelines?

1. Human rights

Chapter II focuses on the “General Principles”. Since the Guidelines’ revision in June 2000, chapter II focuses particularly on the **respect and protection of human rights by multinational enterprises** in their operations. It confirms the importance for multinational corporations to consider fundamental rights of those impacted by their activities.

MAIN RECOMMENDATIONS RELATING TO THE RESPECT AND PROTECTION OF HUMAN RIGHTS BY MULTINATIONAL ENTERPRISES:

“Enterprises should take fully into account the established policies in the countries in which they operate, and consider the views of other stakeholders. Therefore, enterprises should: [...]

1. Contribute to economic, social and environmental progress with a view to achieving sustainable development.
2. Respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments. [...]
4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.
5. Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues. [...]
8. Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.
9. Refrain from discriminatory or disciplinary action against employees who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise’s policies.
10. Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines. [...]

The scope of the application of the recommendations on human rights is potentially broad. Allegations of human rights violations under the “specific instances” mechanism concern both civil and political rights and economic, social and cultural rights.

Amongst the violations examined have been the following concerns:

- Right to life and prohibition of torture and arbitrary arrests⁸
- Right to health, nutrition, housing, education and standard of living⁹
- Right to receive and share information and freedom of expression¹⁰
- Right to non-discrimination, rights of indigenous peoples and prohibition of forced evictions¹¹
- Prohibition of child labour, elimination of forced labour, right to education and non-discrimination¹²
- Children’s rights, prohibition of arbitrary detention and rights of asylum seekers¹³
- Access to effective remedies¹⁴
- Crimes against humanity and war crimes committed by a private security company¹⁵

Regrettable, though, are the use of conditional forms and the lack of specific principles relating to respect for human rights by companies beyond the sphere of employment and labour (covered in Chapter IV).

One of the weaknesses of the Guidelines is that they enjoin enterprises to respect human rights in conformity with the international obligations and commitments of the host country, **without mentioning the obligations that derive from the company’s country of origin.**

2. Fundamental labour rights

Respect for the human rights of those impacted by the activities of companies is framed principally in terms of employment and industrial relations. These rights are **addressed in Chapter IV of the Guidelines separately from the issues of human rights.**

⁸ NCP Norway, *Aker Kvaerner ASA*, 2005.

⁹ NCP Belgium, *George Forrest International Belgium and OM Group*, USA, 2004.

¹⁰ NCP Canada, *Ascendant Copper*, 2005.

¹¹ NCP France, *Electricité de France (EDF)*, 2004.

¹² NCP Germany, *Bayer AG*, 2004.

¹³ NCP Australia, *Global Solutions (GSL)*, 2006.

¹⁴ NCP Netherlands, *G-Star*, 2007.

¹⁵ NCP United Kingdom, *Avient Ltd.*, 2004.

In compliance with the obligations specified by the relevant ILO conventions, the Guidelines establish **four basic obligations toward workers**:¹⁶

- **Freedom of association, 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 conditions of employment, and a guarantee against the use of employee transfer as a threat, etc¹⁷)
- **Abolition of child labour**¹⁸
- **Elimination of all forms of forced or compulsory labour**¹⁹
- **Non-discrimination** in employment and occupations (notably in hiring, dismissal, remuneration, promotion, training and retirement)²⁰

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.”²¹

Another set of provisions invites businesses to employ local personnel and provide, without discrimination, training with a view to improving skill levels.²²

3. Recommendations relating to disclosure

The issue of multinational enterprises publishing information to be made available to employees, local communities, special interest groups, and the public at large has been highlighted in the Guidelines on the basis of its financial value (Chapter III).

- *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.”²³

¹⁶ OECD, *Guidelines ...*, *op. cit.*, Commentaries, § 21-25, p. 44-45.

¹⁷ *Ibid.*, Chapter IV, § 2, 7 and 8, p. 17-18.

¹⁸ See ILO, *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.

¹⁹ See 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.

²⁰ 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.*, Commentaries, § 24, p.44 (The full list of grounds of discrimination such as «marriage, pregnancy, maternity or paternity»), *OECD, Guidelines ...*, *op. cit.*, Chapter IV, § 1, p.17; ILO, *Declaration of Principles concerning Multinational Enterprises and Social Policy*, adopted in 1977, amended in 2000.

²¹ OECD, *Guidelines ...*, *op. cit.*, Chapter IV, § 4, p.17-18.

²² *Ibid.*, Chapter IV, § 5, p.18.

²³ *Ibid.*, Commentaries, § 13, p.42.

- *Non-financial disclosure* – companies are also encouraged by the Guidelines to disseminate pertinent information of a non-financial nature, especially in areas where “reporting standards are still emerging.”²⁴ This includes disclosure regarding:
- the company’s aims;
 - social, environmental and risk reporting;²⁵
 - 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.”²⁶ 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). 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.**”²⁷

As regards disclosures specifically intended for workers (see Chapter IV), companies are encouraged to inform workers 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”²⁸ and, ideally, giving stakeholders prior notice before a final decision is taken.²⁹

²⁴ OECD, *Guidelines ...*, *op. cit.*, Commentaries, § 14, p.42.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ OECD, *Guidelines ...*, *op. cit.*, Commentaries, § 17, p. 43.

²⁸ *Ibid.*, Chapter IV, § 6, p. 18.

²⁹ *Ibid.*, Commentaries, § 29, p. 46.

4. Environmental protection

Three distinct axes structure the principles in the field of environmental protection (Chapter V of the Guidelines):³⁰

Environmental management system

The Guidelines adopt a three-pronged approach that encourages multinational enterprises to establish an environmental management system, which should feature:³¹

- 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 encouraged to continually seek to improve corporate environmental performance³² with regard to both operating procedures and in the development and provision of products or services. In a similar vein, they should research ways to improve environmental performance and promote higher levels of awareness among customers as to the implications of using the company's products or services.

Companies are requested to provide adequate education and training to employees in environmental health and safety matters.³³ 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.”³⁴

Communications on environmental matters

Companies are also required to be transparent in their communication of information³⁵ regarding:

- Providing the public at large and employees with adequate information concerning **the environmental, health and safety impacts of their activities**;

³⁰ OECD, *Guidelines ...*, *op. cit.*, Commentaries, § 30, p. 46.

³¹ *Ibid.*, Chapter V, § 1, p. 19.

³² *Ibid.*, Chapter V, § 6, p. 20.

³³ *Ibid.*, Chapter V, § 7, p. 20.

³⁴ *Ibid.*, Commentaries, § 40, p. 48

³⁵ *Ibid.*, Chapter V, § 2, p. 19.

- **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.³⁶

The precautionary principle

Invoking the precautionary principle that emerged from the Rio Declaration³⁷ in 1992, the Guidelines call on companies to:

- **Assess**, and address in decision-making (where appropriate via the **preparation of a suitable environmental impact assessment**) the environmental, security and health impacts of the proposed activities;³⁸
- **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);³⁹
- **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.⁴⁰

5. Combating bribery

Companies are encouraged to participate in the fight against corruption and are referred to the OECD Convention on Action against Corruption or Foreign Public Officials in International Business Transactions and its commentary.⁴¹

6. Consumer protection

Companies are encouraged in this area to comply with fair and honest practices⁴² in their commercial business, marketing and advertising activities, and to take all reasonable steps to ensure the safety and quality of goods or services they provide.⁴³

³⁶ OECD, *Guidelines ...*, *op. cit.*, Commentaries, § 35, p. 52.

³⁷ 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.”

³⁸ OECD, *Guidelines ...*, *op. cit.*, Chapter V, § 3, p.19.

³⁹ *Ibid.*, Chapter V, § 3, p.20.

⁴⁰ *Ibid.*, Chapter V, § 5, p. 20.

⁴¹ OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, www.oecd.org/dataoecd/4/18/38028044.pdf

⁴² OECD, *Guidelines ...*, *op. cit.*, Chapter VII, § 4, p. 22.

⁴³ *Ibid.*, Chapter VII, Preamble, p. 22.

Enterprises are urged to develop **honest business practices**⁴⁴ and respect the **right of consumers** to privacy and the protection of their personal data.⁴⁵

More specifically, the Guidelines develop the obligation to inform consumers, and to make available transparent and effective means⁴⁶ to ensure the health and safety of consumers so as to allow them to make informed decisions.

For more information regarding the use of legislation protecting consumers, see section V on the use of voluntary commitments for greater accountability.

The scope of the Guidelines: how far does corporate responsibility extend?

Whilst they are addressed to multinational enterprises, the Guidelines do not in fact provide a precise definition of this term.⁴⁷ Chapter I, section 3 merely states that in general these usually comprise: “Companies or other entities established in more than one 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).”⁴⁸

Several criteria, stemming from both the Guidelines and the practice of NCPs and the committees, define the extent of a company’s responsibilities.

⁴⁴ *Ibid.*, Chapter VII, § 4, p. 22.

⁴⁵ OECD, *Guidelines ...*, *op. cit.*, Chapter VII, § 5, p. 26. In terms of privacy, section 52 of the Commentaries suggests that companies refer to the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.

⁴⁶ 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; *OECD Guidelines ...*, *op. cit.*, Commentaries, § 50, p. 50.

⁴⁷ OECD, *Guidelines ...*, *op. cit.*, Chapter I, § 3, p. 12.

⁴⁸ *Ibid.*, Chapter I, § 3, p. 12. OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, October 31, 2001 (DAFFE / IME / WPG (2000) 15/FINAL): the clarifications provided on Chapter I, Concepts and Principles, in October 2001 follows this approach in stating that: “These arrangements can include traditional international direct investment based on equity participation, or other means which do not necessarily include an equity capital element. Majority ownership is not the exclusive form of linkage between two companies in different countries which allows one to exercise a significant influence over activities of others. Accordingly, an entity may be considered part of a multinational enterprise without necessarily being a majority owned subsidiary. The sharing of knowledge and resources among companies or other entities does not in itself indicate that such companies or entities constitute a multinational enterprise.” [www.oalis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/\\$FILE/JT00115758.PDF](http://www.oalis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/$FILE/JT00115758.PDF)

1. The “sphere of influence” and supply chains

Multinational enterprises are required to respect the Guidelines **across their operations worldwide**. Different criteria are applied to determine the extent of an enterprise’s responsibilities toward its subsidiaries or other entities overseas.

The recommendation of Chapter II, section 10 of the Guidelines addresses the issue of supply chains. It articulates the aspiration that the principles of the Guidelines proliferate through a **viral effect** by engaging enterprises so as to “**encourage, where practicable, business partners, including suppliers and sub-contractors**, to apply principles of corporate conduct compatible with the Guidelines.”⁴⁹ The Commentary pertaining to this recommendation does however recognise **practical limitations in the capacity of enterprises to influence the conduct of their business partners**.⁵⁰

“[The influence]... is normally restricted to the category of products or services they are sourcing, rather than to the full range of activities of suppliers or business partners... Established or direct business relationships are the major object of this recommendation rather than all individual or ad hoc contracts or transactions that are based solely on open market operations or client relationships.”⁵¹

Thus, the **sphere of influence** an enterprise exercises over another is the **determining factor** in establishing the extent of its responsibility vis-à-vis the Guidelines. 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 power⁵² or other market arrangements (for example, accreditation programmes and product tracing systems that ensure supplier accountability for particular aspects of their performance).⁵³

The Sphere of Influence

In relation to the case of *ANZ Bank* funding the logging company RH in Papua, New Guinea, the NGOs noted that the NCP only undertook a formal analysis as to the bank’s capacity to influence its client noting that the bank did not hold any position in the organs of the company RH.⁵⁴

⁴⁹ OECD, *Guidelines ...*, *op. cit.*, Chapter II, § 10, p.14.

⁵⁰ *Ibid.*, Commentaries, § 10, p.41.

⁵¹ *Ibid.*

⁵² 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.

⁵³ OECD, *Report by the Chair of the Annual Meeting of National Contact Points*, 2003, p. 26. www.oecd.org/dataoecd/3/47/15941397.pdf

⁵⁴ Y. Quéinnec, *Les principes directeurs de l’OCDE à l’intention des entreprises multinationales. Un statut juridique en mutation*, Sherpa, June 2007, p. 31.

NGOs and trade unions contend that a restrictive interpretation is contrary to the Guidelines' commentary, believing that it is the **capacity to influence business partners in practice**, in contrast to mere formal duties, that must be taken into account. A company should be held responsible in situations "where it is reasonable to expect the business in question to engineer its processes and to structure its relations with business partners and suppliers in such a way as to be able to influence them."⁵⁵

At the annual meeting of the NCPs in 2008 John G. Ruggie (Special Representative of the Secretary General of the United Nations on Human Rights and Transnational Corporations) stressed the need for companies to take into account **human rights performance of both current and potential business partners**, and also to consider the **possible adverse impacts of their own purchasing practices**.⁵⁶ These requirements stem from the standard due diligence process that a company should implement.

Assessments may vary between NCPs and are established on a case-by-case basis that "takes account of all factors relevant to the nature of the relationship and the degree of influence."⁵⁷

2. The principle of the "investment nexus"

In 2003 CIME issued a declarative statement that introduces a new criterion in the application of the Guidelines: the **investment nexus** (referring to the capacity of enterprises to influence the conduct of commercial partners vis-à-vis conditions under which they are considered investors). This proposition relates uniquely to those associations resembling that of an investment like relationship.⁵⁸

The introduction of the concept of an "investment nexus" by CIME has been strongly criticised.⁵⁹ In practice, NCPs frequently use the requirement of an investment link rather than apply the concept of an influential relationship. Several specific instances cases have been rejected as they could not demonstrate that the company had an "investment relationship" with its suppliers.⁶⁰

⁵⁵ OECD, *Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points*, 2003 - *op. cit.* p. 27.

⁵⁶ John Ruggie, Special Representative of the Speech of Secretary General of the United Nations on Human Rights and Transnational Corporations: Keynote Presentation, Annual Meeting of National Contact Points for the OECD, Paris, June 24, 2008, www.oecd.org/dataoecd/9/63/40933850.pdf

⁵⁷ CIME, «The scope of the Guidelines and the investment nexus», 2003, www.oecd.org/document/3/0,3343,en_2649_34889_37356074_1_1_1_1,00.html

⁵⁸ *Ibid.*

⁵⁹ See note Sherpa, www.asso-sherpa.org

⁶⁰ OECD Watch, C. Freeman, C. Heydenreich and S. Lillywhite, *Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure – Lessons from Past NGO Complaints*, June 2006, p. 12, http://oecdwatch.org/publications-en/Publication_1664/at_download/fullfile

➔ The Concept of an Investment Nexus as interpreted by the Dutch NCP – Chemie Pharmacie Holland BV

In 2003, the Institute for South Africa in the Netherlands (Niza & Co.) brought together a number of NGOs, including Milieudefensie and Oxfam Novib, to file a complaint with the Dutch NCP against the company Chemie Pharmacie Holland BV (CPH). It was accused of having contributed, via its US business partner Eagle Wings Resources International (EWRI), to illegally exploiting mineral resources at the time of the conflict in eastern Democratic Republic of the Congo between 1998 and 2002. Several principles of the Guidelines had allegedly been violated by CPH; namely Chapter II, sections 10 and 11; Chapter IV, sections 1(b) (c) and 4 (b) and Chapter V, sections 2 and 3.

The Relationship between CPH and EWRI

The offices of EWRI were situated in Bukavu (in eastern DRC), Bujumbura (Burundi) and in Kigali (Rwanda). Suppliers were paid following confirmation of small shipments of minerals made to the offices of EWRI. EWRI then sent the shipments to Kigali. CPH then took over the transportation of the minerals from Kigali to their final destinations via Rotterdam. CPH was also responsible for financing the transactions: the money transfer from Kigali to Bujumbura being made by order of EWRI, who then proceeded to pay the suppliers. EWRI retained sole ownership over the goods as well as entrepreneurial risk over the commodities. CPH hired a controller agency to inspect the shipments at the request of EWRI. The relationship between EWRI and CPH lasted from October 1999 until March 2002.

In May 2004 the NCP published its decision. According to the NCP, there existed no investment like relationship between CPH and EWRI, nor between CPH and EWRI's suppliers. The reasons given were:

- The duration of the partnership between EWRI and CPH: 2 1/2 years
- The nature of the influence exercised by CPH over EWRI: even if CPH had acted as a facilitator of EWRI's operations by way of logistics and through financing, it was never the owner of the goods in question and had worked only on a commission basis. The controller responsible for inspecting shipments had been hired by CPH by order of EWRI.

Novib and Niza expressed their displeasure with the findings in a press release on June 15th, 2004.⁶¹ If, as had been claimed by the NCP, the business relationship between CPH and EWRI could only be regarded as a trade relationship and not as an investment relationship, this would reflect a misinterpretation of the Guidelines in respect of the provisions relating to supply chains. The NGOs stated that there should be a distinction drawn between the relationship between a parent company and its subsidiary and a relationship linking a company with its suppliers. In the latter case, the Guidelines may still be applicable in cases where there exists no direct influence (i.e. in the absence of a direct investment nexus). Furthermore, the NCP recognised that CPH could have done more to get information on the conditions under which mineral resources were being sourced, and yet it refused to apply the Guidelines in this respect. For Novib and Niza the sheer fact of embarking, over an

⁶¹ NOVIB & NIZA, Press Release, 15 June 2004, http://oecdwatch.org/cases/Case_33/74/at_download/file

extended period, upon a regular stream of business transactions (as was the case between CPH and its partners) should constitute a conscious investment in the commercial relations between them. By relying only on their services, CPH explicitly assumed the risk of becoming dependent on its suppliers. All these factors should have led the NCP to acknowledge the existence of an investment nexus between these trading partners.

The Dutch NCP conducts reviews on a case-by-case basis. It has very carefully formulated the indicators that it takes into account to determine the degree of influence a Dutch company has on its foreign business partner. In cases where the Dutch company is not a shareholder, it focuses on:

- the duration of the commercial relationship between the buyer and the supplier;
- the percentage of the supplier’s annual production that the buyer purchases;
- whether the products are labelled by the Dutch buyer (whether the product is sold as the buyer’s own product);
- specific requirements of the buyer as to the methods of production, working conditions or environmental standards; whether the buyer supplies product designs, specifications or semi-manufactured goods and;
- the degree of contact between the Dutch company and local stakeholders (the government, trade unions, etc.).

In the ANZ case of October 2006 the Australian NCP also rejected the application on the grounds that “**an investment nexus presumes an acceptance of the risk,**” which was not the case, according to the NCP, where a bank offers to guarantee the operations of its client. Whilst CIME has referred to the concept of “an investment like relationship”, the Australian NCP determines there need exist a tangible investment link.

These restrictive interpretations appear to contradict the spirit of the Guidelines. Not only does the formulation of the Guidelines suggest that some “**flexibility be allowed when evaluating the influence of multinational enterprises,**”⁶² but the Guidelines also explicitly address the **commercial dimension of activities** of multinational enterprises in which: “Their trade and investment activities contribute to the efficient use of capital, technology and human and natural resources” and promote sustainable development where “trade and investment are conducted in a context of open, competitive and appropriately regulated markets.”⁶³

62 The preface of the Guidelines states in paragraph 2 that “multinational companies designate a wide range of industrial and commercial procedures and organizational forms in which strategic alliances and closer links with suppliers and subcontractors tend to blur the boundaries of the enterprise.” See also the paper of the Working Group of the OECD on the OECD Declaration on International Investment and Multinational Enterprises, quoted in RAID & SOMO, *OECD Watch Review of National Contacts Points for the OECD Guidelines 2003/2004*, p. 7-8, <http://oecdwatch.org>

63 OECD, *Guidelines ...*, *op. cit.*, Preface, §§ 4 and 5, p. 12.

3. The nature of business activities

Aside from the issues concerning the extent of a multinational enterprise's reach in respect of the criteria thus far discussed, analysing 'specific instances' cases reveals that within NCPs there remain questions as to the nature of business activities covered by the Guidelines.

In the specific instance case relating to BOTNIA, the Finnish NCP declined to apply the Guidelines in the context of **company export credits**. The NCP determined that the activities in question were regulated nationally by special legislation, rather than at the level of the OECD, and that the CIME commentary on investment nexus did not infer that the Guidelines be applied to special financing activities.⁶⁴

This decision was strongly criticized by some organisations, who felt that the Finnish NCP had disregarded both the meaning and spirit of the Guidelines on the following grounds:⁶⁵

- While the concerned companies' activity may fall within the remit of national laws, this should not preclude the Guidelines' application.
- The commentary provided by CIME "does not expressly (or implicitly) exclude export credit activity, rather, quite the opposite." It mentions that several governments (including that of Finland) refer in various ways to the Guidelines with regard to export credits or programmes involving promotion or guarantee of investments.⁶⁶

In the specific instance case relating to ANZ, the Australian NCP adopted a narrow definition of business activities covered by the Guidelines. The NCP considered **that financial services** are not part of the supply chain, although financial services can be seen to be a clear feature of supply chains.

However, the Guidelines appear both pertinent and applicable in respect of the financial sector, as has indeed been highlighted in an OECD report.⁶⁷ The report stresses that the Guidelines can support the actions of financial institutions as regards corporate responsibility, in particular "with respect to relationships with suppliers and interactions with business partners." The Swedish NCP also confirmed the applicability of the Guidelines to the financial sector in the Nordea case of 2006 (see table at the end of this part).

⁶⁴ OECD, Finland's NCP statement on the specific instance concerning the Orion paper mill factory project (Uruguay, Botnia SA) and Finnvera Oyj, 2006, www.oecd.org/dataoecd/28/27/39202146.pdf

⁶⁵ Y. Queinnec, *op. cit.*, p. 32.

⁶⁶ OECD, *Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, 2003 – op. cit.*, p. 5. For a table showing country-by-country links between the OECD Guidelines and programs of export credit, foreign investment guarantees and investment promotions, see: Annual Report on the OECD Guidelines for Multinational Enterprises - 2006 Edition Conducting Business in Weak Governance Zones, Ed. OECD, 2006, p. 17

⁶⁷ OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2007 - Corporate Responsibility in the Financial Sector*, Ed. OECD, 2007, p. 123 s. www.oecd.org/publications

CHAPITRE II

The mechanism for implementing the Guidelines

* * *

What bodies are involved in the implementation of the Guidelines?

The **institutional mechanism** set up to promote respect for the Guidelines' principles is based on three main organs:

- The National Contact Points
- The Advisory Committees of employers federations and trade unions (BIAC and TUAC)
- The Investment Committee (formerly the Committee on International Investment and Multinational Enterprises - CIME).

1. The National Contact Points

The revision of the Guidelines in June 2000 introduced a new obligation for each adhering country to create a **National Contact Point** (NCP) according to the criteria that it be visible and accessible, while operating transparently and with accountability in its procedures.

NCPs have various duties. Specifically, they must **ensure the promotion of the Guidelines** at the national level, **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 instances" procedure, constitutes the **most important competency of the NCPs** with respect to multinational enterprises' responsibilities as regards human rights. It allows for trade unions and other interested parties to refer a case to the NCP where a company has failed to comply with the Guidelines (see below).

Structure of the NCPs

NCPs are **governmental agencies organised in various different 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.⁶⁸ 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 just one public agency, or several; 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.

The NCP of the United Kingdom

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 committee composed of various government officials and four external members appointed by the Trades Union Congress, the Confederation of British Industry, the All-Party Parliamentary Group on the Great Lakes Region of Africa as well as NGOs.⁶⁹

Despite the innovative nature this model of establishing NCPs by each adhering state represents, the functioning, efficiency and independence of the NCPs vary considerably, and indeed remain the subject of much criticism. Certain NCPs have adopted interesting practices and have demonstrated their concern to promote the principles of corporate social responsibility.

The British and Dutch initiatives stem from a desire to give greater transparency, independence and responsibility to the NCPs. This can be achieved through the involvement of stakeholders involved in the processes, allowing for the avoidance of conflicts of interest that arise within a governmental structure whose priorities can sometimes appear contradictory.

The NCP of the Netherlands

In 2007 the Dutch government undertook to restructure its NCP as a multipartite group, consisting of four individuals of different (non-governmental) backgrounds in addition to four government representatives of various ministries, charged with reviewing complaints. The *curricula vitae* of the independent members is available online.⁷⁰

⁶⁸ OECD, *Guidelines ...*, *op. cit.*, Procedural Guidelines, Chapter IA, p. 37; For an overview of recent developments in 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.*

⁶⁹ UK Department for Business, Innovation & Skills, The UK National Contact Point for the OECD Guidelines for Multinational Enterprises, October 2009, www.berr.gov.uk/files/file53566.pdf

⁷⁰ NCP Netherlands, www.oecdguidelines.nl/ncp/organisation

Monitoring the function of the NCP via a steering committee incorporating stakeholders has become a priority for the United Kingdom.⁷¹

Lack of financial resources and permanent staff, hampering the proper functioning of a National Contact Point, is a recurrent problem for most NCPs.⁷²

NCPs are required to prepare an annual report to the Investment Committee that communicates both the nature and results of its activities (including those relating to the procedures for 'specific instances').⁷³ These reports are submitted to the Investment Committee at the annual meeting of the NCPs.⁷⁴

2. 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**.⁷⁵ 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.

3. 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 55 trade union affiliates in 30 countries and represents approximately 70 million workers.⁷⁶ As an international association, TUAC is the interface between trade unions and the OECD.

TUAC's 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 also charged with encouraging observance of the OECD Guidelines.

71 Rights and Accountability in Development (RAID), The Corporate Responsibility (CORE) Coalition and the Trades Union Congress (TUC), *Fit for Purpose? A Review of the UK National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises*, 2008.

72 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

73 OECD, *Guidelines ...*, *op. cit.*, Procedural Guidelines, Chapter I-D, p. 35.

74 OECD, «OECD Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points» www.oecd.org/document

75 BIAC, www.biac.org/

76 TUAC, *Users' Guide for Trade Unionists to the OECD Guidelines for Multinational Enterprises*, p.2 <http://old.tuac.org/publicat/guidelines-EN.pdf>

TUAC is required to **formulate recommendations** in a number of different areas, including with regard to the Guidelines. The organisation was prominent in calling for the reform of the National Contact Points and establishing a process for monitoring compliance with the Guidelines.

TUAC's Assistance to the Trade Unions

In 1997 TUAC intervened in the closure of Renault's Vilvoorde plant in Belgium, providing support to the company's workers to safeguard their rights. On this occasion TUAC was clear in its denunciation of the violation of the Guidelines by Renault management at Vilvoorde (notably, both on matters concerning the parent company-subsidiary relationship, and as regards giving sufficient notice to employees prior to the plant's impending closure).⁷⁸

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.⁷⁷

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.

4. The Investment Committee

The Investment Committee was created in April 2004 following the merger of CIME (Committee on International Investment and Multinational Enterprises) and CMIT (Committee on Capital Movements and Invisible Transactions). The Investment Committee is the OECD body that **oversees the execution of the Guidelines**. It is also charged with both **promoting and improving the effectiveness** of these principles. The Investment Committee is composed of government representatives of member countries of the OECD. It has been assigned five specific tasks in relation to the Guidelines:⁷⁹

- 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 be requested by member countries, TUAC and BIAC – though not by NGOs);
- Reviewing the Guidelines and procedures of implementation in order to ensure their relevance and effectiveness;
- To provide reports to the OECD Committee.

⁷⁷ TUAC, *Users' Guide ...*, *op. cit.*, p. 5.

⁷⁸ TUAC, "TUAC Statement on Renault and the OECD Guidelines for Multinational Enterprises", May 1997, <http://old.tuac.org/statemen/communiq/psreno3.htm>

⁷⁹ OECD, "OECD Guidelines for Multinational Enterprises: Frequently asked questions", www.oecd.org

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.⁸⁰

However, the actual efficacy of the Investment Committee's actions in promoting respect of the Guidelines is **firmly in doubt**, where the clarifications it has been called upon to provide have often been formulated in such a way as to impart insufficient guidance to litigants.

The “Specific Instances” Procedure

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 The scope of the Guidelines: how far does corporate responsibility extend?).

🕒 Who can file a complaint?

Any interested party – representatives of employers’ organisations, trade unions, NGOs and individuals – can file a complaint with an NCP.

Complaints made by individuals still remain rather limited.⁸¹ It is not a requirement that the complainant have a direct interest in the concern in order to be eligible to file a complaint with the NCP. Any individual or group of people from, for example, a village or community, or an employee, could therefore file a complaint through an NGO or trade union.

► NOTE TO TRADE UNIONS

A trade union wishing to file a complaint should in the first instance contact its national body and the International Trade Secretariat and jointly explore what steps might prove helpful in resolving the dispute.⁸² TUAC can then intervene at this point as an informal adviser to the parties.⁸³

Depending on the outcome of these preliminary contacts, the trade union may then make contact with the **NCP of the country in which the breach of the Guidelines has occurred**. If the country in which the company is operating is not an adherent to the Guidelines nor an OECD member country, then the trade union should

⁸⁰ OECD, *Guidelines ...*, *op. cit.*, Commentary on the procedures for implementation, §§ 27-28, p.60-61.

⁸¹ Complaints from individuals are still limited. See: OECD Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, 2003, *op.cit.*, p.30.

⁸² TUAC, *User’s Guide Guidelines ...*, *op. cit.*, p 6

⁸³ *Ibid.*, p 8.

contact the NCP in the country in which the enterprise is based or has its subsidiary (if that state has signed up to the Guidelines).

② Under what conditions?

The NCP can be engaged where there exists any question as to the compliance of a particular company operating within, or from, a state that is duty bound to ensure that the Guidelines are respected.⁸⁴

Two 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**. Regarding this issue, please see the detailed discussion of the investment nexus and spheres of influence appearing earlier in this guide.
- Inadmissibility due to **ongoing judicial proceedings** in relation to the issue at hand. With increasing frequency NCPs are refusing to adjudicate a grievance where the matter is pending before a court. However, the text of the Guidelines does not stipulate that any parallel proceeding take precedence. The Investment Committee has allowed for some flexibility on this issue, while the NCPs generally handle the matter on a case-by-case basis, weighing up the advantages and disadvantages of a particular approach.⁸⁵

② Process and outcome

Process

The NCP will first conduct an initial examination as to the impact of the issues highlighted; 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.⁸⁶

⁸⁴ Friends of the Earth Netherlands, *Using the OECD Guidelines for Multinational Enterprises. A critical starterkit for NGOs*, August 2002, p. 9, www.milieudefensie.nl/globalisering/publicaties/ngotookit/OESO_toolkit_text_only.pdf

This document cites as an example the large number of legitimate complaints raised about the behaviour of transnational corporations established (or with branches) in OECD countries that operate in Burma (noting that Burma is neither an OECD member nor an adherent to the Guidelines).

⁸⁵ For a study on the issue of “parallel proceedings”, and a list of factors that might be considered by NCPs regarding specific instances subject to parallel proceedings (and related comments by BIAC, TUAC, RAID and The Corner House), see: OECD, *OECD Guidelines for Multinational Enterprises: Annual meeting of NCPs 2006 - Report of the President, meeting of 20-21 June 2006*, p. 16 and following and p. 74 and following.

⁸⁶ Regarding the term “comprehensive review”, see: OECD, *Guidelines ...*, *op. cit.*, Procedural Guidance, C-1, p. 34.

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. In the case of a disagreement, and **where the party concerned is a trade union, it may contact the TUAC to determine whether the issue may be submitted to the Investment Committee**. If the Investment Committee considers that the complaint has merit, or if it believes that the NCP did not properly review the submission, it may either clarify the interpretation of the Guidelines and its procedures for implementation or make other recommendations to the NCP concerned. Unlike trade unions, **NGOs unsatisfied with the decision do not have recourse to lodging an 'appeal' with the Investment Committee**.⁸⁷ At best they can only ask the Investment Committee for further clarification on issues raised by the complaint. Several NGOs have indeed sought to invoke this right, though to date the Investment Committee has on each occasion refused these requests.⁸⁸

Declare the complaint admissible

In this situation the **NCP should make every effort to ensure that the issues raised are resolved**.

If the matter raised merits more in-depth examination, or where, for example, issues arise in relation to countries not adhering to the Guidelines, the NCP will take steps to further its understanding of the points of concern. The NCP shall then consult the parties and, where appropriate, it will:

- 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).⁸⁹
- 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.
- 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.

If the parties can reach an agreement the matter will be considered resolved.

If, however, no solution is found, the NCP will normally be obliged to issue a public statement.⁹⁰ The NCP may also make recommendations to the parties concerned.

⁸⁷ C. Freeman et al, *op.cit.*, p. 21.

⁸⁸ *Ibid.*, p. 22.

⁸⁹ OECD, *Guidelines ...*, *op. cit.*, Commentary on the Implementation Procedures, § 20, p. 60.

⁹⁰ TUAC, *Users' Guide...*, *op. cit.*, p 6.

The Duration of the Procedure

The time taken by the NCP to complete the procedure of investigating a specific instance case is on average 12 months, although in some instances the process has taken twice as long (even simply to decide as to the admissibility of the case).⁹¹

The Confidentiality of Proceedings

In general, in facilitating resolution of the issues raised, the NCP will take the necessary steps to ensure that both the business's and other party's sensitive material remains confidential.⁹² 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.⁹³

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 that other party agrees 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."⁹⁴ 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. Furthermore, many of the complaints are never publicly communicated by the NCPs.

The confidentiality of the procedure remains an issue that is still debated. BIAC and certain NCPs⁹⁵ 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 are of the view that the confidentiality of proceedings facilitates the mediation process.⁹⁶ On the other hand, publicity can be a useful means of applying pressure, helping ensure that the Guidelines are more effectively applied. According to the

⁹¹ OECD Watch, *OECD Watch - Five Years On: A review of the OECD Guidelines and National Contact Points*, (ed.) P. Feeney, 2005, <http://oecdwatch.org>

⁹² OECD, *Guidelines ...*, *op. cit.*, Procedural Guidance, C-4, p. 34-35.

⁹³ OECD Watch & SOMO, *Guide to the OECD Guidelines for Multinational Enterprises' Complaint Procedure*, 2006, p.18, <http://oecdwatch.org>

⁹⁴ OECD, *Guidelines ...*, *op. cit.*, Procedural Guidance, C-4 (b), p. 34.

⁹⁵ Some NCPs advocate extending confidentiality to all phases of the procedure; see the Australian NCP's statements at : <http://www.ausncp.gov.au/> and the British NCP's at: www.berr.gov.uk

⁹⁶ OECD Watch, *The Confidentiality Principle, Transparency and Specific Instance Procedure*, 2006, p.3, www.raid-uk.org/docs/Guidelines/Trans_Conf_Brief.pdf

NGOs, the Guidelines do not impose a confidentiality that is absolute; rather they only explicitly protect sensitive company information relating to their business. The Guidelines' commentaries **require that a balance be struck between privacy and transparency**.⁹⁷ 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.⁹⁸

HOW TO FILE A COMPLAINT?

Legal representation is not required before the NCPs, therefore organisations can avoid financial expenses.⁹⁹ It is nonetheless important to note that companies are increasingly likely to engage legal counsel. Ironically, the companies have contributed toward this consensus-based mechanism attaining a quasi-judicial character.¹⁰⁰ 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.¹⁰¹ This is what the Dutch NCP refers to as the optional preliminary consultation.

There is no definitive model for writing a complaint, though there exist certain essential elements that it must include:

- The identity of the complainant and their interest in the issue.
 - The identity of the company concerned and a description of the activity forming the basis of the dispute.
 - A reference to the Guidelines that the violation is said to breach.
 - Information relevant to proving that the alleged violation of the Guidelines has occurred.
 - The relevant laws and procedures relating to the case.
 - An outline of how the case might be handled by national or international courts and the eventual fora in which parallel proceedings relating to the case might be heard.
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⁹⁷ OECD, *Guidelines ...*, 2000, § 19, p. 59, “Thus, although the C4 paragraph states that the work associated with implementation will normally remain confidential, the results will normally transparent.” www.oecd.org/dataoecd/56/36/1922428.pdf

⁹⁸ OECD, *Guidelines ...*, *op. cit.*, Commentary on the Implementation Procedures, § 19, p. 59.

⁹⁹ It should be noted that many companies frequently employ legal counsel. Thus, for NGOs to refrain from doing so might contribute to an increasing inequality in terms of the legal resources available to the parties.

¹⁰⁰ P. Feeney, “The Relevance of the OECD Guidelines for Multinational Enterprises to the Mining Sector and the Promotion of Sustainable Development”, *The Center for Energy, Petroleum and Mineral Law Policy Journal* 13, vol.10, s.6, 2002, www.dundee.ac.uk/cepmlp/journal/html/vol10/article10-6.html

¹⁰¹ ILO-OECD Conference on Employment and Industrial Relations: Promoting Responsible Business Conduct in a Globalizing Economy, *op. cit.*, p. 11.

Elements extracted from a model complaint jointly composed by the NGOs Rights and Accountability in Development and Action Against Impunity for Human Rights, is shown below.¹⁰² The guidance provided aims to group together all of the requirements the NCPs expect. To this list have been added some additional details and helpful clarifications. The greater the level of detail and precision within the complaint filed, the more likely its chance of both proving successful and being processed expeditiously.

1. Your details:

- Name of the person to be contacted
- Name of the organisation
- Address
- Telephone number/fax number
- Email address

2. Name and location of the National Contact Point (NCP)

3. Identify your organisation and state the basis for your complaint:

- Name of organisation; name of supporting parties and NGOs.
- Your petition to the NCP(s) of the country/countries in which the company is located.

4. List the paragraphs of the Guidelines that the company has violated:

- Read carefully the commentaries and the clarifications of the Guidelines so as to ensure you have a thorough understanding of the text.

5. Prepare a detailed and comprehensive presentation of your organisation and explain your interest in the case:

- Any person, whether an inhabitant, member of the community or employee affected by the activities of the company, may lodge a complaint against it through an NGO or a trade union.
- NGOs established in the same country as that of the parent company, and are representing people affected by the activities of the enterprise, may file a complaint directly against it.
- NCPs will not accept complaints where only the name of the filing organisation appears: they require more detailed information as to its role and the tasks it performs.

Example: 'The NGO has been working with communities affected by the activities of 'Company X' in ... since; the NGO is engaged in promoting ... for ...'

6. Provide relevant information relating to company location and structure:

Example: Company X has its headquarters in ... and operates in ... This company is owned by Y and Z, and is controlled by company W.

¹⁰² ACIDH & RAID, *Guide to the OECD Guidelines for Multinational Enterprises and The Principles of the Extractive Industries Transparency Initiative (EITI) - Making a complaint against multinational companies in violation*, www.raid-uk.org/docs/Guidelines/Guide_to_Guidelines_FR.pdf

7. Provide relevant and detailed information on the alleged violations and their progression to date:

- Explain in detail the violations committed by the company: what, where, when, how - who is involved, and who is affected?
- The NGO must ensure that the information and evidence provided is both reliable and credible, and proves that the complainants understand 100% the problem they are experiencing.
- All information supporting the complaint must be attached.
- As best as is possible, you should also provide: precise details of the nature of the breach and the names of the parent company, subsidiary, supplier and location.¹⁰³
- If the company's business involves a supply chain, provide and explain in detail the relationships and links.
- Do not hesitate to make a complaint even if all the information required cannot be provided, as it may be the case that it remains impossible to get all the necessary details.

8. Describe your contact with the company or other actors or institutions involved:

- Keep a journal noting how the complaint is progressing: retain copies of letters and emails (both sent and received), and note when meetings are held.
- Include any information relating to the company's responses.

9. Specify what information should be kept confidential and should not be disclosed to the company:

- It is very important to keep the names of witnesses and sources of documents confidential to prevent any form of retaliation.
- Confidential information must be clearly identified and acknowledged by the NCP before the complaint is actioned.

10. Explain your request and the actions you require of the company to resolve the issue at hand:

- In certain cases it can be important to explain your ideas as to what the company needs to do to solve the problem your complaint raises.
- In other cases it is best to discuss your proposals with the NCP and the company after the complaint has been accepted.
- Sometimes it is better to wait for the reaction of the company to the violations you have accused it of.

11. Explain what you expect from the NCP:

- Explain that you expect the NCP to process the complaint appropriately in a manner that is both fair and transparent.

12. Provide a numbered list of appendices:

- The evidence you provide must be easily accessible.

¹⁰³ TUAC, *Users' Guide ...*, *op. cit.*, p.8.

13. Specify the names and addresses of all the other recipients of the complaint:

- Other recipients may include: officials of the host country and those in the company’s country or origin; other institutions.
- Send a copy of your complaint to OECD Watch: info@oecdwatch.org
- If your complaint refers to employment or labour issues, send a copy of your complaint to TUAC: tuac@tuac.org

14. Translate the complaint:

- The complaint must be written in the language of the NCP who receives it.
- If the complaint is sent to various NCPs, it must be written in a language that each NCP can understand.
- You can, in return, ask the NCP and the company to translate their documents.
- If a translation is too difficult to obtain you can submit the complaint in your language, though this may delay processing of your complaint.

Where should your complaint be sent?

- Your file must be submitted to the NCP of the country where the company in question operates or, failing that, to the country of origin of the company concerned.
- The list of the different NCPs can be found at the following address:
www.oecd.org/dataoecd/17/44/1900962.pdf

Outcome

The NCPs perform mainly a **role of consultation and mediation**, the quality of which tends to vary considerably between them. The NCP’s findings are not coercive 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 judgments, **the mere fact that the NCP’s conclusions are out in the public domain can have an influence on the conduct of the parties.**

One way in which the recommendations of the NCP could be given greater weight would be to link certain recommendations to government sanctions, most notably in relation to export credit programmes, overseas investment guarantees and inward investment promotion programmes. The effectiveness of the Investment Committee’s actions on this issue remains questionable, though. It has adopted rather weak stances on issues, and its authority remains uncertain.

The relationship between the Guidelines and export programmes ¹⁰⁴

In the **United States** export credits and investment guarantees are reviewed as part of a co-operative effort in which the NCP works with the Export-Import Bank and the Department of Commerce. They provide information on the Guidelines to companies wanting to participate in their programmes providing support to US businesses overseas.

In **Canada** Export Development Canada (EDC) promotes corporate social responsibility standards in addition to the principles of the Guidelines. The EDC has linked its website with that of Canada's NCP.

In **Finland** an export promotion programme, adopted in July 2001, introduces "environmental and other principles" for "export credit guarantees." It "calls applicants' attention" to the Guidelines.

The NCPs in action in corporate-related human rights abuses

➔ First Quantum Minerals

The First Quantum Minerals case is frequently cited as one of the first major successes of an NGO filing a complaint with an NCP.

The Canadian company First Quantum Mineral owned a subsidiary in Zambia by the name of Mopani Copper Mines. The subsidiary intended to expel from its area of operations local inhabitants, including both residents and squatters, in order to open a copper mine.

The Canadian branch of the NGO Oxfam filed the complaint in July 2001 with both the Canadian and Swiss NCPs (as a Swiss company, Glencore Int. AG, was also implicated in the offending activities). It alleged that the subsidiary Mopani had violated Chapter II, paragraph 2 of the Guidelines, which affirms companies must: "respect the human rights of those affected by their activities" consistent "with the host government's international obligations and commitments"; Chapter II, paragraph 7, regarding the development of practices that foster a relationship of mutual trust between the enterprises and the societies in which they operate; and paragraph 2(b) of Chapter V, in respect of communications and consultations with communities in terms of policies on the environment, health and safety.

In February 2002 the company First Quantum Minerals **agreed to stop the threat of forced evictions** and immediately suspended such evictions; it offered land to farmers, lowered property taxes and established a resettlement plan for the population.¹⁰⁵

¹⁰⁴ OECD, *Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, 2006*, *op.cit.*, p.8

¹⁰⁵ Social Responsibility and Sustainable Development Research Chair ESG UQAM (Univ. Quebec), "Le Forum social mondial 2007 à Nairobi: bilan mitigé et remise en question au sein du mouvement altermondialiste", *Oeconomia Humana*, Special Edition World Social Forum 2007, vol. 5, No.3, March 2007, www.crsdd.uqam.ca/Pages/docs/pdfBulletinsOH/OeconomiaHumanaMars07.pdf

The Canadian NCP sent a final communication to the Canadian company (a copy of which was also sent to the Canadian NGO): it **congratulated the two parties for the spirit of co-operation** they had shown. The NCP also invited the company to maintain an open dialogue with the NGO and other groups concerned with the welfare of those affected by the mining company in Zambia. Throughout the process the Canadian NCP kept the Swiss NCP informed of the progress of events.¹⁰⁶

➔ **The illegal exploitation of natural resources in the Democratic Republic of the Congo before the Belgian NCP**

In November 2004 a coalition of NGOs in Belgium (including FIDH) set in motion the specific instances procedure following a violation of the Guidelines by four Belgian companies that the NGOs suspected of being involved in the illegal exploitation of resources in the Democratic Republic of the Congo (DRC). The illicit trade was considered one of the principle factors in the ongoing armed conflict and a major obstacle to the country's reconstruction and development.

Several **UN experts' reports** on the illegal exploitation of natural resources from within the DRC¹⁰⁷ and a report of the Commission of Inquiry established by the Belgian Senate supported the NGOs' claims.

The Belgian companies cited were Cogecom, Belgolaise, NamiGems, and the Belgian division of George Forest International. The Belgian company Cogecom (now bankrupt) was accused of violating Congolese law and breaching the Guidelines by importing coltan and cassiterite from the DRC to Belgium, via Rwanda, and **directly participating in the financing of the Goma rebel movement**.

The complaint against Banque Belgolaise (an affiliate of Fortis Banque, which maintained a strong presence in the DRC) condemned the firm for not having in place the necessary measures to prevent money laundering. This failure undermined efforts to achieve sustainable development, impeded the observance of the principles of good corporate governance and limited development and implementation of effective management systems that would foster mutual trust between the bank and the business group in which it was involved.

More specifically, Belgolaise was implicated in facilitating the financial transactions of the Ugandan and Rwandan elite, who were also involved in exploiting the natural resources and other riches of the DRC. Belgolaise, in its legal capacity as a corporation, was indicted in Belgium in June 2004 for money laundering. The enquiry being conducted by the Belgian NCP was subsequently suspended, as was the investigation regarding Cogecom.

¹⁰⁶ NCP Canada, "Specific Instances", www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/specific-specifique.aspx?lang=eng

¹⁰⁷ UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, reports, April 12, 2001, S/2001/357 and addenda dated 13 November 2001, S/2001/1072, May 22, 2002, S/2002/565, October 16, 2002, S/2002/1146, October 23, 2003, S/2003/1027.

As for the Belgian company NamiGems, which was actively involved in the diamond trade, it had allegedly breached both Article 10 of the DRC's Constitution (which states: "the surface and subsurface are, and remain, the property of the nation including mines, quarries, mineral springs and hydrocarbons") and Chapter 1, § 7 of the Guidelines affirming: "Governments have the right to prescribe the conditions under what multinational enterprises operate." NamiGems had allegedly evaded tax, concealed income and smuggled diamonds from the DRC via Uganda to Belgium.¹⁰⁸ In violating established standards, NamiGems had used **unfair competitive practices** that disadvantaged law-abiding purchasers that properly declared the value of their goods. NamiGems was also accused of indirectly providing funds to the MLC rebel group.

Lastly, the NGOs heavily criticized the Belgian division of George Forrest International (GFI), which was actively involved in the exploitation of mineral resources. They denounced the following practices:

- 1) The failure to take action to ensure **workplace health and safety** in the plant at Lubumbashi (linked to the processing of radioactive minerals – in respect of Chapter IV, paragraph 4(b) of the Guidelines);
- 2) Alleged **conflict of interest**, where the company was improperly involved in political affairs.
- 3) Breach of contract, resulting in significant losses for the Congolese State;
- 4) The failure to **publicly disclose information**.

On November 18th, 2005, following five meetings with the NCP (including three with the parties involved), the Belgian NCP (comprising of representatives from the federal and regional public authorities, in addition to three business and trade union organisations) issued a public statement. The declaration affirmed: "Forrest Group, in both its direct and indirect investment in the country, as well as in its joint ventures with other companies in which it has a minority role, has followed the Guidelines as far as was possible." To reach this conclusion, the NCP noted that it had taken into account the discussions of the OECD on economic relations with countries with weak governance. The complaints against the other companies were all rejected. The filings against Belgolaise and Cogecom were rejected on the basis that the two companies were at the time subject to parallel proceedings.¹⁰⁹ The complaint against NamiGems was dismissed for the lack of an **investment nexus**; the Belgian NCP also noting that the facts relating to the situation had changed since the original filing.¹¹⁰

The NCP nonetheless recommended to Forrest Group International that it **provide 'reliable and accurate' information on environmental, social and financial matters** and that it work to promote and support the Guidelines with its suppliers. The NCP also recommended that Forrest Group International assist the political authorities of the DRC in putting in place

¹⁰⁸ International Peace Information Service (IPIS), Supporting the War Economy in the Democratic Republic of Congo: European Companies and the Coltan Trade. Five case studies, an IPIS Report, Antwerp, Belgium, January 2002.

¹⁰⁹ OECD Watch, "11.11.11 et al vs. Belgolaise", http://oecdwatch.org/cases/Case_67/ and "11.11.11. vs. et al. Cogecom", http://oecdwatch.org/cases/Case_65/

¹¹⁰ OECD Watch, "11.11.11. vs. et al. Nami Gems", http://oecdwatch.org/cases/Case_66/

economic and industrial frameworks that take into consideration impacts on populations close to industrial sites.”

The NGOs, while welcoming the broadening of Forrest Group International’s responsibilities toward the Guidelines to its subsidiaries and suppliers, regretted that the NCP had not taken up their recommendations to: “publish a list of the different suppliers to Forest Group International’s various divisions; conduct environmental audits and studies of public health in the communities close to the cobalt processing plant at Lubumbashi; and mandate a review by an independent international body of the mining concession at Kamoto recently granted to Forest Group International in disputed circumstances.”

➔ **The illegal exploitation of resources in the Democratic Republic of the Congo by the British Company Afrimex Ltd**

On February 20th 2007, the non-governmental organisation Global Witness filed a complaint with the British NCP against the UK-registered company Afrimex. It cited its activities in the Democratic Republic of the Congo between 1998 and 2007 as violating the Guidelines. According to Global Witness, Afrimex had contributed to the conflict in the DRC not only by paying taxes to rebel forces (in Goma, DRC) but also in buying minerals (specifically, coltan and cassiterite) from mines in which both forced and child labour working under deplorable conditions of sanitation and safety existed. Afrimex could not furnish evidence of having conducted due diligence vis-à-vis its supply chain.

Global Witness relied on the reports of the UN experts on the illegal exploitation of natural resources in the DRC, which outlined the pivotal role of the private sector in the exploitation of these resources and the resulting impact in the continuation of the conflict. The experts’ report of April 12th 2001¹¹¹ characterises the implicated companies as being “the engine of the conflict in the Democratic Republic of the Congo” having “prepared the field for illegal mining activities in the country.” In October 2002, Afrimex appeared in Annex III of the UN experts’ report, which listed those companies that were violating the Guidelines.

The NCP accepted the complaint filed under the specific instances procedure.

The relationship between the three companies Afrimex, Kotecha and SOCOMI

Afrimex operates in the DRC through the Congolese company Kotecha, which in turn operates in conjunction with the Congolese business SOCOMI. The NCP noted in particular the link between the CEOs of the three companies. This link was both of a familial and commercial nature: two of them (the directors of Afrimex and Kotecha) were shareholders in Kotecha, whilst the director of Kotecha was also head of SOCOMI. A special commercial relationship existed between Afrimex and Kotecha - the latter being the main client of the former. According to the NCP, Afrimex had therefore the **potential to exert a decisive influence** on both Kotecha and SOCOMI in the DRC.

¹¹¹ UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, report of April 12, 2001, S/2001/357, § 215.

Consideration of previous factors prior to the revision of the Guidelines

The current version of the Guidelines came into force in June 2000. Thus any injurious acts having occurred before that date should not, in theory, be referred before the NCP. However, the UK NCP accepts the retroactive application of the Guidelines provided that the parties have consented. This was not the case with Afrimex. Even so, the NCP still declared that on this occasion it would take into account prior conduct in determining and assessing injurious events occurring after June 2000.

The lack of due diligence and the principal ability of Afrimex to influence the actions of its commercial partners

The British NCP determined that Afrimex had not properly exercised its capacity to influence SOCOMI. SOCOMI had paid taxes and levies on licenses to extract minerals to the rebel forces, contributing to the continuation of the conflict (the funds being used to purchase weapons). Afrimex did not encourage its business partners and suppliers (SOCOMI – Kotecha) to behave responsibly in line with the Guidelines. The NCP concluded that Afrimex failed to conduct sufficient due diligence vis-à-vis the supply chain: it had not taken the necessary steps to ensure that minerals were extracted in accordance with international standards (i.e. that mining activities should not involve forced or child labour, and that acceptable working conditions include provisions for health and safety). However, the charges relating to corruption were not upheld.

Human rights impact assessments and the OECD Risk Awareness Tool

In its recommendations the NCP referred to the need for companies to conduct human rights impact assessments. These assessments should be covered by company policy, which itself should exist as an official document – a requirement that Afrimex has now undertaken to complete. The NCP also encouraged Afrimex to use the OECD's Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.

The NCP's final declaration was at first greeted with enthusiasm. However, some six months later (in February 2009) Global Witness condemned Afrimex's failure to implement the NCP's recommendations; meanwhile it continued its mining activities in eastern DRC. In March 2009 the company responded in a letter addressed to the NCP in which it stated that this trade in minerals had ceased as of September 2008. Global Witness called on the NCP to ensure that its recommendations be implemented and that it investigates the new information provided by Afrimex.

COMPLAINTS LODGED BY NGOS - OVERVIEW

As of January 2010 there had been 90 complaints lodged by NGOs with NCPs in accordance with the specific instances procedure. Noting that a complaint may in fact concern breaches of multiple sections of the Guidelines, the statistics reveal that:

- 76 complaints concerned allegations of violations of the general principles (human rights and the supply chain, Chapter II)
- 48 complaints involved questions pertaining to the protection of the environment (Chapter V)
- 29 complaints involved issues relating to employment and industrial relations (Chapter IV)
- 30 complaints concerned the disclosure (Chapter III).

To date, 27 of the 90 complaints have been rejected by the NCPs and 26 have been concluded. The others are either being processed, are pending or have been withdrawn.¹¹²

The following table outlines features of selected specific instances cases examined by the different NCPs.

* * *

A questionable effectiveness...

In its review of the first five years of the implementation of the Guidelines following their revision in 2000, OECD Watch highlighted different causes of concern.¹¹³

The most frequent criticisms concern:

- The proximity of the NCPs to the business community and the unequal treatment given to NGOs regarding the structure of NCPs.
- The NCPs' lack of an investigatory capacity. Thus NGOs, whose resources are limited, carry the burden of providing evidence to support the claims made against the business¹¹⁴ (running the risk that the complaint be dismissed where the infor-

¹¹² OECD Watch, "Quarterly Case Update February 2010", February 2010, p. 12, <http://oecdwatch.org>

¹¹³ OECD Watch, *Five Years On: A review of the OECD Guidelines and National Contact Points*, *op. cit.*

¹¹⁴ *Ibid.*

mation provided proves insufficient).¹¹⁵ The following example illustrates this concern:

➔ **The complaint against the mining company Anvil before the Canadian NCP**

The mining company Anvil was accused of having played a role in an incident that claimed over 100 victims during a military counter-offensive conducted by the Congolese army against the rebels in the Democratic Republic of the Congo in October 2004. Anvil acknowledged that it had provided logistical support to the Congolese armed forces but stated that it was forced to do so when its vehicles were requisitioned. The information contained in the report of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo confirmed these allegations. However, in May 2006 the Canadian NCP declared itself unable to mediate the case. It also stated its incapacity to pursue the investigations demanded of it by the complainants.

Even when information is furnished by NGOs, the NCPs are not always willing to accept complaints favourably.

- **The assessment of admissibility is too restrictive** in determining whether a complaint should be accepted.
- **The NCPs prove reluctant to act, issue questionable statements and at times contradictory interpretations** of the concepts embodied in the Guidelines.
- There exists a **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.¹¹⁶
- The specific instances procedures are increasingly being **conducted in a confidential manner**.
- The **delay in examining complaints** is still too important.

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.

¹¹⁵ In the case concerning the activities of mining companies in the DRC, the NCP of Belgium said that because of incomplete information produced by the Expert Group and the Belgian company SMC, "it was not in a position to pursue its consideration of SMC's activities in the DRC." The French NCP also decided to terminate consideration of the case "given the lack of information on the two companies." See: OECD, *OECD Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, 2006, op. cit.*, p. 16.

¹¹⁶ However, there are efforts to improve coordination, see : OECD, *Guidelines for Multinational Enterprises: Annual Meeting of National Contact Points, 2007, op. cit.*, p. 3.

... some steps forward

- The Guidelines are increasingly **becoming more visible and widespread**, as recognised by the States,¹¹⁷ the NCPs and the companies.¹¹⁸ The Guidelines are increasingly utilised as a benchmark and constitute one of the principal measures by which companies’ responsibilities are assessed.
- **A recognised mediatory 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.¹¹⁹
- A wide scope of application: **the broad nature of the principles and extraterritorial scope of the Guidelines** (where the parent company is based in an adhering state) render them a potentially powerful instrument, regulating companies even in weak governance zones.¹²⁰
- The development of the **Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones**.¹²¹

Regardless of their deficiencies, the Guidelines nonetheless retain an important role. Aside from their functioning as a means to judge and sanction activity, they also help forge public opinion and guide companies in acting more responsibly. In 2009 the NCPs recommended that member countries, under the auspices of the Investment Committee of the OECD, proceed with drafting terms of reference for a possible revision of the Guidelines. A consultation process involves civil society groups. Terms of reference were drafted and distributed in February 2010.¹²² Various procedural and substantive issues have been raised that will be examined prior to the eventual revision.

At the procedural level:

- Include the concepts of visibility, accessibility, transparency and accountability in the functioning of NCPs: the aim being to avoid possible conflicts of interest and be more inclusive of the stakeholders.
- Provide greater oversight of the NCPs regarding the processing time of complaints.

¹¹⁷ States have made particular mention of the Guidelines at a meeting of G8 Summit in Eiligidamm in 2007.

¹¹⁸ The Guidelines are directly cited by 22% of executives at multinational enterprises. OECD, *Promoting Corporate Responsibility ...*, *op. cit.*, p. 7.

¹¹⁹ Global Union Research Network, *The OECD Guidelines for Multinational Enterprises*, p. 4, www.gum.info

¹²⁰ OECD, *Promoting Corporate Responsibility ...*, *op. cit.*, p.9.

¹²¹ OECD, *OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones*, 2006, www.oecd.org/dataoecd/26/21/36885821.pdf; For a list of additional resources for businesses operating in these zones of weak governance (in the areas of human rights, humanitarian law, security forces, fighting corruption, and on budgetary matters), see: OECD, “Resources for companies working in zones of weak governance”, www.oecd.org/document/7/0,3343,en_2649_34889_37523911_1_1_1_1,00.html; See also: Annual Report on the OECD Guidelines for Multinational Enterprises - Conducting business in weak governance zones, 2006, *op. cit.*

¹²² DAF/INV/WP(2010)1

- Consider the appropriateness of current arrangements in respect of confidentiality and transparency in proceedings.
- Clarify the role of the NCP in terms of its mediatory/quasi-judicial functions.
- Ascribe the NCPs the task of overseeing companies' implementation of the recommendations made within the final declarations.
- Enhance co-operation between the NCPs.
- Resolve the problems arising from the issue of parallel proceedings, which can result in the NCP dismissing or suspending proceedings.
- Draw learnings from NCPs experiences.

At the substantive level:

- Review the concept of appropriate due diligence, particularly in relation to finance and investment activity. Additionally, examine due diligence with regards to the relationship between companies and security forces, and between companies and local communities and indigenous peoples (in connection with the proposal made by the UN Special Rapporteur John G. Ruggie that the focus be shifted to the concept of appropriate due diligence in the supply chain, as opposed to the sphere of influence).
- Review the appropriateness of the concept of the 'investment nexus', which is frequently used by the NCPs when determining a company's influence over its supply chain.
- For further reference:
 - The Principles of Corporate Governance 2004 and the G3 Guidelines of the Global Reporting Initiative with regard to public disclosures. Specifically, initiatives such as the Extractive Industries Transparency Initiative (EITI) and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones in relation to investment-related taxes, commissions and other payments made to governments of host countries.
 - The ILO'S Decent Work Agenda and Declaration on Social Justice for a Fair Globalization in relation to employment and industrial relations.
 - The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (in relation to the revision of the chapter relating to the fight against corruption).

The revision of the Guidelines will get underway at the annual meeting of the NCPs in June 2010, and should be completed by June 2011 after extensive regional consultations where non-adhering countries will be invited to participate.

ADDITIONAL RESOURCES

- OECD, “Text of the OECD Guidelines for Multinational Enterprises”
www.oecd.org/document/18/0,3343,en_2649_34889_2397532_1_1_1_1,00.html
 - OECD, National Contact Points, october 2009
www.oecd.org/dataoecd/17/44/1900962.pdf
 - OECD WATCH, International network of 47 civil society organisations, created to facilitate the implementation of the Guidelines by the civil society, and to involve NGOs in the work of the OECD Investment Committee
www.oecdwatch.org
 - TUAC, “Trade Union Advisory Committee to the OECD”
www.tuac.org/en/public/index.phtml
 - TUAC, A Users’ Guide For Trade Unionists to the OECD Guidelines for Multinational Enterprises, 2007
www.tuac.org/en/public/e-docs/00/00/00/67/document_doc.phtml
 - C. Freeman, C. Heydenreich et S. Lillywhite, Guide to the OECD guidelines for multinationals enterprises’ complaint procedure, Lessons from past NGO complaints, OECD Watch & SOMO, 2006
http://oecdwatch.org/publications-en/Publication_1664/view?set_language=en
 - N. Ascoly, The OECD Guidelines and Socially Responsible Investment, Factsheet 3 : Assessing Adherence to the OECD Guidelines’ Human Rights provisions, OECD Watch and Eurosif, 2007
http://oecdwatch.org/publications-en/Publication_2402/at_download/fullfile
 - R. Blanpain, “Guidelines for Multinational Enterprises for ever ? The OECD Guidelines, 20 years later”, The Ind. Journ. of Comp. Lab. Law and Ind. Relat., 1998, p. 337-348.
 - S.C. Van Eyck, The OECD Declaration and Decisions Concerning Multinational Enterprises: An Attempt to Tame the Schrew, Ars Aequi Libri, Nijmegen, 1995.
 - J. Oldenziel, The 2000 Review of the OECD Guidelines for Multinational Enterprises: A New Code of Conduct?, SOMO, 2000
http://oecdwatch.org/publications-en/Publication_1870/at_download/fullfile
 - Joriz Oldenziel, Joseph Wilde-Ramsing, Patricia Feeney, “10 years on: Assessing the contribution of the OECD Guidelines for Multinational Enterprises to responsible business conduct”, OECD Watch, June 2010.
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➤ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
Argentina	<p>Trade Union: Union Obrera Molinera Argentina</p> <p>Company: CARGILL</p>	<p>- Violation of several sections of the Guidelines relating to human rights, transparency and industrial relations.</p>	<p>II. General Policies</p> <p>III. Disclosure</p> <p>IV. Employment and Industrial Relations</p>	
Australia (agreement established with the UK's NCP in June 2005)	<p>NGOs:</p> <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 <p>Company: GSL Australia Pty Ltd, a 100% subsidiary of the parent company Global Solutions Ltd (UK-registered company)</p>	<p>- 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:</p> <ul style="list-style-type: none"> - 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>	<p>II.2 General Policies</p> <p>VII.4 Consumer Interests</p>	
Australia (with similar cases being filed with the UK and Swiss NCPs regarding British and Swiss firms also implicated).	<p>Complainant: Mr Ralph Bleechmore, Adelaide barrister.</p> <p>Companies:</p> <ul style="list-style-type: none"> - BHP Billiton - Cerrejon Coal Company 	<p>- Attempted depopulation and forced expulsion of residents of the slums in Tabaco (five additional communities in the region were affected by the same policy).</p>	<p>II. General Policies</p> <p>III. Disclosure</p> <p>V. Environment</p>	
Chile	<p>Trade Unions: Several French trade unions</p> <p>Companies: The NCP engaged in discussions with various companies operating in Burma.</p>	<ul style="list-style-type: none"> - Infringement of the right to collective bargaining. - Failure to respect the 5-mile zone reserved to local fishers, and infringement of boundaries relating to the aquaculture industry. - Non-respect of the precautionary principle with regard to the intensive exploitation of natural resources (inadequate environmental impact assessments). 	<p>IV. Employment and Industrial Relations.</p> <p>V.Environment</p>	
France	<p>NGO: Friends of the Earth-France</p> <p>Companies: Consortium Nam Theun Power Company (EDF – Electricité de France, is the largest shareholder)</p>	<p>- Negative impact of the hydroelectric dam project on the environment and local communities.</p>	<p>II. General Policies</p> <p>IV. Employment and Industrial Relations</p> <p>V. Environment</p> <p>IX.Competition</p>	

FILING DATE	HOST COUNTRY	RESULT
2004	Argentina	<ul style="list-style-type: none"> - Mediation. - Mutual agreement between the concerned parties (the terms of which remain confidential) - Statement issued 31st July, 2007: www.oecd.org/dataoecd/28/25/39201998.pdf
2006	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
2005	Colombia	<ul style="list-style-type: none"> - Mediation - Statement adopted on June 12th, 2009, procedure closed: www.oecd.org/dataoecd/4/35/43175359.pdf
2007	Chile	<ul style="list-style-type: none"> - Mediation. - NCP Recommendations (notably relating to the respect of workers' rights by subcontractors and suppliers). - Statement released on November 6th, 2003: www.oecd.org/dataoecd/42/13/32429072.pdf
2002	Laos	<ul style="list-style-type: none"> - No proof of violation of the Guidelines. - Recommendations adopted on May 26th, 2005 (compliance with environmental and social standards by companies, valid in their country of origin, with regard to their activities abroad): www.oecd.org/dataoecd/5/34/38032866.pdf

➤ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
Germany	<p>NGOs: Germanwatch, Global March, and Coordination gegen Bayer-Gefahren</p> <p>Company: Bayer CropScience</p>	<ul style="list-style-type: none"> - Bayer CropScience accused of ignoring the use of child labour in cotton cultivation by suppliers. - Failure to take steps to influence the activities of sub-contractors. 	<p>II. General Policies.</p> <p>IV. Employment and Industrial Relations</p>	
Mexico (in consultation with the German NCP)	<p>Trade union: Sindicato Nacional Revolucionario de Trabajadores de the company Euzkadi</p> <p>Company: Euzkadi, a subsidiary of the German multinational Continental Tire.</p>	<ul style="list-style-type: none"> - Closure of the Euzkadi plant by Continental Tire without consultation or notification of the workers. - Deplorable working conditions (in particular, relating to the use of dangerous chemicals such as ammonia). 	<p>IV. Employment and Industrial Relations</p>	
Norway	<p>NGO: Forum for Environment and Development (ForUM) – a network of over 50 NGOs.</p> <p>Company: Aker Kværner ASA</p>	<ul style="list-style-type: none"> - Provision of support and maintenance services at the detention centre in Guantanamo Bay through its subsidiary Kværner Process Services Inc., including electricity and water supply and pipes operations; thereby abetting human rights violations and perpetuating deplorable conditions at the centre. 	<p>II.2. General Policies</p>	
Netherlands	<p>NGO: Netherlands Institute for Southern Africa (Niza) & Co. (Milieudefensie Pax Christi, Novib, the NC-IUCN, CENADEP, RECORE et PAL)</p> <p>Company: Chemie Pharmacie Holland BV (CPH)</p>	<ul style="list-style-type: none"> - CPH, a partner of the American company Eagle Wings Resources International (EWRI), was condemned for its role in the DRC's mineral trade between 1998 and 2002. It was alleged to have contributed to the continuation of the DRC's conflict through its minerals trading activities and illegal exploitation of natural resources. 	<p>II.10. General Policies</p> <p>IV.1(b)(c) 4.(b) Employment and Industrial Relations</p> <p>V.2.3 Environment</p>	
Netherlands	<p>NGOs: - Fenceline Community for Human Safety and Environmental Protection - Milieudefensie - Friends of the Earth International</p> <p>Company: Pilipinas Shell Petroleum Corporation</p>	<ul style="list-style-type: none"> - Contamination of soil by petroleum products and detrimental impacts on the inhabitants of Pandacan. - Accusations of corruption: the involvement of Shell in local political activities and the manipulation of public authorities. - Lack of information regarding the potential risks resulting from the project, and a lack of consultation with local communities in the decision-making process. - Failure to educate and prepare local people for potential industrial accidents. - Failure to improve infrastructure. 	<p>II.5.11. General Policies</p> <p>III.4(e) Disclosure</p> <p>V.2.5,6 Environment</p> <p>VI. Combating Bribery</p>	

FILING DATE	HOST COUNTRY	RESULT
2001	India	<ul style="list-style-type: none"> - Claims processed separately; a joint statement could not be adopted. - Adoption by Bayer CropScience of a voluntary declaration of commitments to combat the use of child labour in the supply chain. - Closure of the specific instance procedures following the company's adoption of a voluntary declaration. - Statement issued August 30th, 2007: www.oecd.org/dataoecd/60/45/39311489.pdf
2004	Mexico	<ul style="list-style-type: none"> - After a three-year strike, an agreement was reached between the trade union Euzkadi and Continental Tire (January 17th ,2005) : Continental Tire withdrawal; compensation of \$12 million to the 600 remaining employees; granting workers a 50% stake in the factory (with the remaining 50% being acquired by the Mexican company Llanta Systems); creation of a co-operative for former employees (<i>Travailleurs démocratiques d'Occident</i>, or "Tradoc"); assistance of Continental Tire to Euzkadi as a production adviser.
2002	United States	<ul style="list-style-type: none"> - No communication of information by Aker Kværner – subsequently limited examination by the NCP. - The NCP outlined the failure to consider the Guidelines in the company's evaluation of the ethical aspects of its decision-making. - Aker Kværner was requested to develop and adhere to an ethical code of conduct. - Press release issued on November 29th, 2005 : www.oecd.org/dataoecd/5/48/38038283.pdf
2005	Democratic Republic of the Congo (DRC)	<ul style="list-style-type: none"> - Lack of an investment nexus (based on the duration of the partnership between CPH and EWRI – 2½ years). CPH had facilitated, in terms of logistics and financial transactions, EWRI activities – however it did not take ownership of the goods concerned, receiving only a contractually agreed sum plus commissions. - Statement released May 2004: www.oecd.org/dataoecd/5/1/38031157.pdf
2003	Philippines	<ul style="list-style-type: none"> - Confirmation of the violation of the Guidelines in relation to the disclosure of non-financial information (referring to environmental reporting) and failure to comply with the highest safety and environmental standards. The requirement to respect the practices and judicial processes of the OECD countries, rather than the weaker standards of some domestic jurisdictions, was highlighted. - Statement published July 14th, 2009 : www.oecd.org/dataoecd/2/12/43663730.pdf

➤ Examples of specific instances cases examined by the various NCPs

NCP	PARTIES	ALLEGATION(S)	BASIS	
<p>United Kingdom</p>	<p>NGO: RAID (Rights and Accountability in Development)</p> <p>Company: Das Air</p>	<p>- Lack of appropriate due diligence in relation to its mineral transportation activities (the trade being a contributory factor in the DRC's conflict).</p> <p>- Operation of flights in the DRC's conflict zone (violating the Chicago Convention) during the illegal occupation of the territory by Ugandan forces under which human rights violations were committed.</p>	<p>II. General Policies</p>	
<p>Sweden (in consultation with the Norwegian NCP, which received the same complaint). As Nordea's head office is in Stockholm, the matter was taken up by the Swedish NCP.</p> <p>Judicial proceedings were instigated in Argentina and Uruguay at the initiative of the NGO CEDHA.</p>	<p>NGO: - CEDHA (Centre for Human Rights and Environment - Argentina) - Bellona (Norway)</p> <p>Company: Nordea (a Sweden-registered company) had a stake in financing the construction of a pulp mill by Botnia (registered in Finland).</p>	<p>- Financing of a project adversely affecting the environment, and lack of consultation with stakeholders.</p>	<p>II.1.2.5.7. General Policies III.1.2. Disclosure V.1.6. Environment</p>	
<p>Switzerland</p>	<p>Trade union: - International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)</p> <p>- The Swiss Confederation of Trade Unions (<i>Union Syndicale Suisse</i>)</p> <p>Company: Nestlé Korea (a subsidiary of Nestlé) val International</p>	<p>- Restructuring, layoffs and threatened relocations.</p>	<p>IV.7 (3) Employment and Industrial Relations</p>	
<p>United Kingdom</p>	<p>NGO: Survival International</p> <p>Company: Vedanta Resources</p>	<p>- Lack of consultation of the indigenous people (the Dongria Kondh) affected by the construction of a mine.</p>	<p>II.2.7. General Policies V.2.b. Environment</p>	

FILING DATE	HOST COUNTRY	RESULT
2006	Democratic Republic of the Congo (DRC)	<ul style="list-style-type: none"> - Reference to the reports of the UN Expert Panel on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the DRC. - Allegations confirmed: violation of the Chicago Convention – lack of appropriate due diligence in relation to the supply chain. <p>The NCP examined the degree of influence of Das Air on its suppliers: While Das Air did not have a monopoly, it nonetheless had significant market share in the export of minerals from Kigali; Das Air failed to inform itself of the provenance of the minerals: with most of Das Air's activities being based in Africa, it should have known of the likely impact of its actions on the conflict.</p> <ul style="list-style-type: none"> - Statement released July 18th, 2008: www.oecd.org/dataoecd/11/31/44479531.pdf
2005	Uruguay	<ul style="list-style-type: none"> - Applicability of the Guidelines to the financial services sector, notably with regard to disclosure and transparency: "The NCP states that the Guidelines can and should be applied to the financial sector as well as to other multinational enterprises." - Statement issued January 24th, 2008 (in accordance with the statement released by the Finnish NCP concerning Botnia): no violation of the Guidelines. www.oecd.org/dataoecd/39/23/40016775.pdf
2008	South Korea	<ul style="list-style-type: none"> - Mediation. - A new collective bargaining agreement was signed: it gave workers a 5,5% increase in salaries, created a commission composed of union representatives and management to review any restructuring of work conditions and terminated the threat of legal action against strikers and the trade union. - Press release published November 21st, 2003: www.oecd.org/dataoecd/5/15/38033610.pdf
2003	India	<ul style="list-style-type: none"> - Allegations confirmed: lack of an appropriate mechanism for consulting the indigenous people regarding both health and safety and environmental issues relating to the project (notably, the failure to conduct a human rights impact assessment). Violation of the rights and freedoms of the indigenous peoples recognised by India as a signatory to international conventions. - The NCP made recommendations to Vedanta to aid its conformity with the Guidelines (the conduct of impact assessments on human rights and the indigenous peoples; integration of a human rights-based approach within company management). - Final statement adopted September 25th, 2009: www.oecd.org/dataoecd/49/16/43884129.pdf

PART II

National Human Rights Institutions (NHRIs)

National Human Rights Institutions¹²³ are independent public bodies established under the 1993 UN Paris Principles¹²⁴. Their main functions include monitoring and advising home governments, raising awareness through human rights education activities and coordinating local initiatives with international bodies. More than 100 countries have established NHRIs, with 63 maintaining an 'A-level' accreditation.¹²⁵

Some national institutions have a mandate to deal with complaints from individuals or groups of individuals, victims of violations of human rights. These institutions generally make reviews and recommendations to the attention of States. The recommendations they issue vary in scope depending on the mandate of the institution. Although not legally binding, the recommendations have, however, a certain authority and are often seen as serving “authoritative interpretation”. They can sometimes be enforceable by national judicial bodies.¹²⁶

NHRIs and corporate accountability

Out of 43 national institutions that responded to a survey conducted in 2008 by the High Commissioner for Human Rights¹²⁷ upon request from the UN Special Representative on the issue of business and human rights:

- 14 have no complaint mechanism for business-related abuses;¹²⁸
- 10 have a mechanism for receiving complaints of violations of all rights but can only target certain types of companies, that is to say mainly companies owned or controlled by State;¹²⁹

¹²³ A full list of NHRIs and their accreditation: www.nhri.net/2009/Chart_of_the_Status_of_NIs_January_2010.pdf

¹²⁴ OHCHR, Paris Principles, www2.ohchr.org/english/law/parisprinciples.htm

¹²⁵ Rules of Procedure for the ICC Sub-Committee on Accreditation, www.nhri.net/pdf/RP_ICC%20_Sub-Com_%20Acc_140904_en.pdf

¹²⁶ For example, decisions of the Hearing Panel of the Kenyan Human Rights Commission are enforceable by the High Court. See OHCHR survey.

¹²⁷ Business and Human Rights Practices: A Survey of NHRI Practices, Results from a survey distributed by the OHCHR, http://baseswiki.org/w/images/en/6/69/Upload--2008_Survey_of_NHRI_Practices.doc

¹²⁸ Among them, Belgium, Finland, France, Germany, Norway, Switzerland.

¹²⁹ Notably Argentina, Hungary, Peru, Spain.

- 9 have a mechanism for all types of companies but only certain rights (can only consider allegations of discrimination)¹³⁰ and,
- 10 have a mechanism for all human rights and all types of companies, private or public.¹³¹

The survey highlights a range of functions that NHRIs perform in monitoring and addressing human rights violations involving corporations, such as public inquiries, fact-finding missions, the dissemination of human rights educational tools, handling of complaints and dispute resolutions. The work on business and human rights greatly varies from a NRHI to another and some NHRIs such as in Kenya, Denmark and South Africa have been particularly active on these issues. Regarding the handling of complaints, some of them are already directly or indirectly looking at corporate responsibility by examining complaints related to the discrimination in the workplace. Others such as the South African Human Rights Commission (SAHRC) have even 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.¹³²

THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS¹³³

The Kenya National Commission on Human Rights is an autonomous National Human Rights Institution established by an Act of Parliament in 2002¹³⁴. Its core mandate is to act as a watchdog over the Government in order to further the protection and promotion of human rights in Kenya.

Functions

According to the Act (art.16.1), the functions of the KNCHR include, in addition to raising awareness on human rights, make recommendations in respect of Parliament, and visit places of detention, to investigate on its own initiative or further to a complaint filed by any person or group of persons, on alleged violations of human rights. The KNHRC is one of the NHRIs competent to hear complaints concerning violations of human rights by all types of companies.¹³⁵

The KNHRC's experience with business has been primarily through complaints related to employment issues (unemployment, discrimination, workers compensation). The commission made inquiries into violations of human rights involving

¹³⁰ Among them, Australia, Canada, Denmark, Netherlands, New Zealand, Sweden.

¹³¹ Notably Egypt, Kenya, Nigeria, Philippines, Rwanda.

¹³² ICC and OHCHR, *Engaging NHRIs in securing the promotion and protection of human rights in business*, June 2009.

¹³³ Kenya National Commission on Human Rights www.knchr.org

¹³⁴ Kenyan National Commission on Human Rights Act, 2002: www.knchr.org/dmdocuments/knchr_Act.pdf

¹³⁵ See OHCHR survey, p18-19: http://baseswiki.org/w/images/en/6/69/Upload--2008_Survey_of_NHRI_Practices.doc

corporations such as an inquiry into salt mining companies and labour practices in Malindi, where communities as well as employees had filed complaints.¹³⁶

HOW TO FILE A COMPLAINT?

Complaints investigated by the KNCHR include: complaints against security agencies (police, armed forces, prison wardens); complaints on discrimination on grounds such as race, class, gender; complaints relating to abuse or misuse of power by government officials; complaints on denial of rights recognized in national law and international treaties which Kenya has ratified.

The Commission shall not investigate (a) any matter which is pending before a court or a judicial tribunal, (b) a matter essentially involving the relations or dealings between the Government and the Government of a foreign state or international organization recognized as such under international law, or (c) a matter relating to the exercise of the prerogative of mercy.

Complaints can be sent to the Commission by **letter, email or telephone**. Petitioners may also make **physical visits** to the Commission's offices located in Nairobi and Wajir (regional office).

A complaint form is available on the Commission's website¹³⁷.

Kenyan National Human Rights Commission
1st floor CVS Plaza,
Lenana Road,
Nairobi, Kenya
Tel: +254-020-2717900/00/28/32
Mobile: +254-726-610159
Fax: +254-020- 2716160
email: haki@knchr.org
Wajir Office: Tel: (046)-421-512

Working Group on Business and Human Rights¹³⁸

Following a roundtable on Human Rights and Business held in July 2008 and convened by the Danish Institute's Human Rights and Business Project, a thematic Working Group on the issue of Business and Human Rights was established by the International Coordination Committee of Nationals Institutions (ICC) in August 2009.

¹³⁶ ICC and OHCHR, *Engaging NHRIs in securing the promotion and protection of human rights in business*, Report of the ICC and OHCHR Side event, Held during the Human Rights Council, 11th session, 2 to 18 June 2009, www.reports-and-materials.org/Official-report-NHRI-side-event-5-Jun-2009.doc

¹³⁷ Kenya National Commission on Human Rights, "Legal Services", www.knchr.org/index.php?Itemid=79&id=39&option=com_content&task=view

¹³⁸ The Danish Institute for Human Rights, "Human rights and business", www.humanrightsbusiness.org/?f=nhri_working_group

The Danish Institute for Human Rights has been elected Chair of the ICC Working Group on Business and Human Rights for the 2009-2011 term. The Working Group is composed of nine voting members drawn from across world regions (Kenya, Togo, Nicaragua, Venezuela, Jordan, Korea, Denmark, Scotland and Canada), and includes a representative of the current ICC Chair.

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."¹³⁹ In October 2010, ICC will hold its biennial conference. It will focus on the theme of business and human rights. One of the main objectives will be to explore ways in which NHRIs can perform additional tasks to promote and protect human rights from abuses by companies.

* * *

To date, few NHRIs can receive complaints on violations committed by companies. The fact that NHRIs are beginning to pay attention to the issue of business and human rights represents an opportunity for civil society to 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 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 can explore States' extraterritorial obligations.**

¹³⁹ *Ibid.*

ADDITIONAL RESOURCES

- Asia Pacific Forum – The 13th Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, ACJ Reference on human rights, corporate accountability and government responsibility, Kuala Lumpur, Malaysia, 27-31 July, 2008: www.asiapacificforum.net/acj/references/corporate-accountability/downloads/ACJ_Report_Corporate_Accountability.doc
 - ICC, “Engaging NHRIs in securing the promotion and protection of human rights in business Report of the ICC and OHCHR Side event, Held during the Human Rights Council, 11th session, 2 to 18 June 2009, www.reports-and-materials.org/Official-report-NHRI-side-event-5-Jun-2009.doc
-

PART III

Ombudsmen

Ombudsmen represent another type of mediation mechanism where 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 organizations from both public and private sectors. After reviewing the complaint, the Ombudsman determines whether the complaint is justified and makes recommendations to the organization to resolve the problem.

An ombudsman may be appointed by a legislature, a professional regulatory organization or a local or municipal government, but may also be appointed directly by a company to handle complaints internally, or by an NGO. Depending on the type of ombudsmen 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 of ombudsmen in many countries, mandated to hear complaints from individuals against public or private actors (industry, electricity and gas, banking, insurance, telecommunications, consumer, etc...), notably in places such as the United Kingdom¹⁴⁰, New Zealand¹⁴¹ and India.¹⁴²

A number of mediation mechanisms including ombudsmen are reviewed under other section 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).

¹⁴⁰ British and Irish Ombudsman Association, “Members”, www.bioa.org.uk/site2/list.php?navletter=P

¹⁴¹ Office of the Ombudsman, “Other complaints handling bodies”, www.ombudsmen.parliament.nz/index.php?CID=100025#osh

¹⁴² The Central Vigilance Commission, <http://cvc.nic.in>

This chapter briefly illustrates one example of a singular Ombudsman created by civil society, the Mining Ombudsman, established by Oxfam Australia.

Oxfam Mining Ombudsman

In 2000, due to the numerous problems caused by mining activities on the environment and local people, Oxfam Australia established the mining ombudsman (MO). The role of the Mining Ombudsman¹⁴³ (MO) is to:

- Assist women and men from local and indigenous communities whose human rights are threatened by the operations of Australian-based mining companies.
- Assist women and men from communities that are, or might be affected, by a mining operation to understand their rights under international law.
- Help ensure that the Australian mining industry operates in such a way that the rights of women and men from local communities affected by mining are better protected.
- Demonstrate the need for an official complaints mechanism within Australia.
- Demonstrate the need for enforceable, transparent and binding extraterritorial controls that would require Australian mining companies to adhere to universal human rights standards wherever they operate.

Process and outcome

The **MO receives complaints** through Oxfam Australia networks throughout the world. The MO checks all claims through site investigations, a process involving extensive interviews with local community men, women and youth, civil society organisations and where possible, government and company officials.

The MO then submits the results of an **investigation** that is sent to all stakeholders for comment and action, and undertakes on-site progress evaluations every 18 months to two years.

After appropriate consultation with the community and community support groups, the MO makes formal **contact with the mining company**, highlighting the concerns raised and requesting remedial action.

The MO initiates and monitors the **process between parties** to address community requests (dialogue process or accountability). If the company does not adequately address grievances, the MO contacts the international media and generates pressure via popular campaigning with the public and partner organisations.

¹⁴³ Oxfam Australia Mining Ombudsman Project: www.oxfam.org.au/explore/mining/our-work-with-communities

➔ **Marinduque Island (2002-2004)**¹⁴⁴

Marcopper Mining Corporation, a branch¹⁴⁵ of Placer Dome Inc., a Canadian company listed in Australia started mining copper on Marinduque Island in the Philippines in 1967. For the period up to 1996, Marcopper is accused of having dumped millions of tonnes of toxic mine waste into Marinduque's seas and polluted its rivers.

Oxfam Australia's Mining Ombudsman began investigating the Marinduque case in 2002 at the invitation of a local community support organisation, the Marinduque Council for Environmental Concerns (MACEC). In 2004, the Mining Ombudsman undertook two field investigations and funded scientific research. On 6 August 2004, Placer Dome advised the Mining Ombudsman that it was no longer the owner and operator of the Marcopper mine and that responsibility for any on-going problems at Marinduque should be directed to Marcopper Mining Corporation. In October 2005, Marcopper Mining Corp. had been bought by Barrick Gold Corporation.

While Placer Dome has left the country, the communities on Marinduque continue to live with the legacy of the Marcopper mine.

In 2005 the provincial government of Marinduque filed a complaint against Placer Dome before the State Court of Nevada (particularly given the fact that Placer Dome – then Barrick Gold - had activities in the United States and was listed on the New York Stock Exchange). The Court rejected the complainants' request on the basis of *forum non conveniens*, but in September 2009, the Court of Appeals for the District of Nevada reversed the decision of First instance.¹⁴⁶

The role of the MO in the process was to gather requests from affected communities, conduct investigations and scientific studies and, even if he failed to manage to find a definitive solution, he helped give visibility to this situation.

ADDITIONAL RESOURCES

- **Business and Society Exploring Solutions: A dispute resolution community**
<http://baseswiki.org>
-

¹⁴⁴ See *Mining Ombudsman Case Report: Marinduque Island*, Oxfam Australia 2005, www.oxfam.org.au/resources

¹⁴⁵ Placer Dome possessed 40% of Marcopper, (the maximum authorized by Filipina laws); the rest (50%) was possessed by Ferdinand Marcos from 1969 to 1986, and by successive Filipinos governments, until the privatisation of Marcopper in 1994.

¹⁴⁶ Provincial Gov't of Marinduque v. Placer Dome Inc., Case No. 07-16306 (C.A. 9, Sept. 29, 2009), www.ca9.uscourts.gov/datastore/opinions/2009/09/29/07-16306.pdf

SECTION IV

WHO IS FUNDING
THE PROJECT OR OWNS
THE COMPANY?
Using Financial
Institutions' Mechanisms
and Engaging
with Shareholders

* * *



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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. These 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)¹; 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 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;
- 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.

¹ There are various others regional banks that are not covered by this guide.

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, human rights concerns can now be raised before different complaints mechanisms that banks have put in place to assess whether a project is compliant with the institution's policies.** These mechanisms often 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. 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 cannot replace an adequate remedy for victims of 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.

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);
- the Multilateral Investment Guarantee Agency (MIGA), and
- the International Centre for Settlement of Investment Disputes (ICSID)

The World Bank Inspection Panel hears complaints regarding projects financed by the World Bank. The Compliance Advisor Ombudsman (CAO) hears complaints regarding projects financed 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 credit and grants to developing countries for education, health, infrastructure, communications, and many other purposes. The World Bank specifically refers to two development institutions owned by 185 member states: the IBRD (International Bank for Reconstruction and Development) and the IDA (International Development Association).

The World Bank Inspection Panel, created in 1993, is composed of three members who are appointed by the board for a non-renewable period of five years. The members are supposed to be selected on the basis of their ability to deal thoroughly and fairly with the requests brought to them, their integrity and independence from the bank's management and their exposure to developmental issues and living conditions in developing countries.

🔍 What are the issues that can be dealt with?

The World Bank Inspection Panel was created to address the concerns of people affected by the projects supported by the WB and to ensure that the WB adheres to its operational policies and procedures during the design, preparation and implementation phases of the various projects.² **The Panel does not prescribe remedies.**

The Panel has only rarely been asked to consider claims that have been framed explicitly in human rights terms. 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:**³

- 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.**

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 following:

- *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

2 The Inspection Panel, “About Us”, The World Bank, <http://web.worldbank.org>

3 Bank Information Center, “Inspection Panel and human rights”, Oct. 2009, www.bicusa.org

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 therefor 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 to property (indigenous peoples' land rights, free, prior and informed consent), etc.⁴

🕒 Who can file a complaint?

Individuals cannot file complaints; rather, a complainant must be a '**community of persons**'. However, as few as two people with common interests or concerns can qualify.

An affected party can file a complaint. Alternatively, the following entities may file a complaint on behalf of the affected party:

- another person who represents the complainant;
- a local NGO (non-governmental organisation);
- a foreign NGO, but only in exceptional circumstances where the complainant is unable to find local representation.⁵

The Inspection Panel has to keep the names of the complainants anonymous and confidential if they so wish.

⁴ See Steve Herz and Anne Perreault, "Bringing Human Rights Claims to the World Bank Inspection Panel", CIEL, BIC and International Accountability Project, October 2009.

⁵ The Inspection Panel, "We can make your voice be heard", The World Bank, www.inspectionpanel.org

🔗 Under what conditions?

- The complainant must live in the territory of the borrowing state and in the area affected by the project.⁶
- 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.⁷
- The complaint 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.⁸
- The project must be funded at least in part by the International Development Association (IDA) or the International Bank for Reconstruction and Development (IBRD).⁹
- **Before speaking to the Inspection Panel**, the complainant needs to raise his/her concerns with WB staff in his/her local area;
- 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 English¹⁰.
- The request must be in writing with original signatures. Any other document, such as correspondence and attachments to the request, may be sent electronically.¹¹

HOW TO FILE A COMPLAINT?

Content of the complaint must include:

- name 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 of how the complaint was made and its process.

The request must be sent to:

6 The World Bank, “Accountability at the World Bank: The Inspection Panel 10 Years On”, 2003, Report No. 26758, p.19.

7 *Ibid.*, p. 25.

8 *Ibid.*, p. 24.

9 *Ibid.*, p. 7.

10 The Inspection Panel, “The Inspection Panel – FAQ”, www.worldbank.org

11 *Ibid.*

Executive Secretary, the Inspection Panel
1818 H Street, NW, Washington, DC 20433, USA

Fax No. 202-522-0916;

or: c/o the appropriate World Bank Country Office

Link to download the complaint form: www.worldbank.org

4. Process and Outcome¹²

- When the Panel receives a request, it is registered and sent to the World Bank’s management which has 21 days to respond. If the case is ineligible, there is no further action.
- The Panel decides whether to recommend an investigation to the World Bank’s Board, and the Board decides whether to approve the Panel’s recommendation.
- If the Board approves an investigation, the Panel reviews relevant documents, interviews WB staff, and normally visits the project site to meet with the requesters.
- An investigation may take a few months or more in complex cases.
- The Panel sends a written report of its findings to the Board.
- 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.
- The Board makes a decision on the project based on the Panel’s report and management’s recommendations.¹³ These decisions are then made public and can be found on the Bank’s website.
- The Panel handles on average **3-4 complaints a year**.

The Inspection Panel in action

➔ Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity

Enhancement Project (2002)

In September 2002, the Centre for the Environment and Development (CED), Yaoundé, submitted a request for inspection to the World Bank Inspection Panel on behalf of several communities and individuals in Cameroon. The World Bank partially financed the Chad Cameroon oil project, exploiting the oil fields in the south of Chad and constructing an oil pipeline between Doba (Chad) and Kribi (Cameroon) to transport crude oil to its port of export.¹⁴ Three oil companies were the main funders of the project: **Exxon/Mobil, Petronas**

¹² The Inspection Panel, “Inspection Panel Process”, http://siteresources.worldbank.org/EXTINSPCTIONPANEL/Resources/Figure_1_flowchart.pdf; Business and Society Exploring Solutions, The World Bank Inspection Panel, www.baseswiki.org

¹³ The Inspection Panel, “We can make your voice be heard”, op.cit.

¹⁴ The Inspection Panel, “Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project - Request for Inspection”, 2002, www.worldbank.org

Malaysia, and Chevron.¹⁵ The project was widely criticised by civil society.¹⁶ The request for inspection stated that the requesters had suffered harm as a result of the World Bank's failure to follow several of its operating procedures with respect to the project, notably those relating to environmental impact studies, Indigenous peoples, and compensation for involuntary displacements.¹⁷ This case is one of only a few times that the World Bank Inspection Panel's did mention human rights. **The Inspection Panel** investigated the complaint and **found that the project was not in compliance** with the Bank's policies and procedures in the following areas:

- They did not have adequate participation from an independent panel of experts during the preparation and approval of the Environmental Assessment/Environmental Management Plan;
- they did not collect sufficient socio-economic baseline data to assess the sustainability and impact of the project;
- They did not complete a formal cumulative impact assessment of the project in Cameroon;
- They did not conduct a sufficient assessment of the regional health risks associated with the project, including the risk of HIV/AIDS in the construction area; and
- They did not conduct an adequate baseline survey of the potential effects of the project on Indigenous peoples.¹⁸

However, the Panel found that the project was in compliance with regards to compensation for involuntary displacements.¹⁹

In response, the Bank's Management developed an **action plan** to address the findings of the Inspection Panel. The plan included provisions for the collection of additional data, the creation of a comprehensive action plan for health facilities along the pipeline route to comprehensively address potential health issues, beyond the HIV/AIDS issue.²⁰

“On September 9, 2008, The World Bank announced that it was unable to continue supporting the Chad-Cameroon Pipeline project because key arrangements that had underpinned its involvement in and support for the project were not working, notably the agreement that the Government of Chad would allocate oil revenues for poverty-reducing projects

15 Dr. J. Paul Martin, SIPA and the Center for New Media Teaching and Learning, “The Project”, Chad Cameroon Oil Pipeline Project: a Study Tool and Case Study, www.columbia.edu/itc/sipa/martin/chad-cam/overview.html#project

16 See notably FIDH, “Tchad-Cameroun : Pour qui le pétrole coulera-t-il ?”, no.295, Juillet 2000, www.fidh.org

17 The Inspection Panel, “Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project - Request for Inspection”, op.cit.

18 The Inspection Panel, “Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project - Investigation Report”, 2002,

19 *Ibid.*

20 The Inspection Panel, “Cameroon Petroleum Development and Pipeline Project, and Petroleum Environment Capacity Enhancement Project - Management report”, 2002.

in education, health, infrastructure, rural development and improving governance. As of September 5, 2008, the Government of Chad had fully prepaid its loans for pipeline-related financing.”²¹ Although the World Bank withdrew, IFC continued to finance the project.

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**.²²

It relates to the:

- International Finance Corporation (IFC); and
- The Multilateral Investment Guarantee Agency (MIGA)

IFC provides investments and advisory services to build up the private sector in developing countries.²³ MIGA provides advisory services and political risk insurance (guarantees) to protect investors against **non-commercial** risks, such as war, expropriation, and currency inconvertibility.²⁴

🕒 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 areas²⁵:

- social and environmental assessment and management
- labour and working conditions
- pollution prevention and abatement
- community, health, safety and security
- land acquisition and involuntary resettlement
- biodiversity conservation and sustainable natural resources management
- Indigenous peoples
- cultural heritage

21 The World Bank, “Chad-Cameroon Petroleum Development and Pipeline Project”, 9 September 2008,

22 Compliance Advisor Ombudsman, www.cao-ombudsman.org/ All Compliance Advisor Ombudsman cases can be found at www.cao-ombudsman.org/cases/default.aspx

23 International Finance Corporation, “About IFC”, World Bank Group, www.ifc.org/about

24 The World Bank Group, *op. cit.*

25 Multilateral Investment Guarantee Agency, “Performance Standards”, World Bank Group, www.miga.org/policies/index_sv.cfm?stid=1652; International Finance Corporation, “Environmental and social standards”, World Bank Group, www.ifc.org/ifcext/sustainability.nsf/Content/SustainabilityPolicy

Criticisms from civil society

The PS have become a widely-accepted framework among international financiers. However, they present limitations in three critical areas²⁶:

- Substantive Standards: The PS do not address many critical human rights issues, and address others only partially or in ways that do not meet international norms and standards.
- Due Diligence Procedures: The PS do not provide an adequate procedural framework for conducting human rights due diligence. Although the PS require a comprehensive environmental and social assessment for high-impact projects, they do not require explicit assessment of potential impacts on human rights.²⁷
- Grievance Mechanisms: While the PS require project sponsors to implement project-level grievance mechanisms, these mechanisms are not required to meet any minimum due process standards.²⁸

Revision of IFC sustainability framework

At the time of writing, the IFC was reviewing its Sustainability Framework, which includes the Policy on Social & Environmental Sustainability, the Performance Standards and related Guidance Notes, and the IFC Disclosure Policy. NGOs actively participated in this process and have formulated various recommendations to improve the performance standards. The revision process is expected to be completed by January 2011.²⁹

🔗 Who can file a complaint?

Any individual, group, or community directly impacted or likely to be impacted by social or environmental impacts of an IFC or MIGA project can file a complaint.³⁰

²⁶ S. Herz, K. Genovese, K. Herbertson and A. Perrault, *The International Finance Corporation's Performance Standards and the Equator Principles: Respecting Human Rights and Remediating Violations?*, A submission to the U.N. Special Representative to the Secretary General in Human Rights and Transnational Corporations and other Business Enterprises, Center for International Law, Bank Information Center, Banktrack, Oxfam Australia, World resources Institute, August 2008.

²⁷ J. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, 7 April 2008, § 61 [hereinafter *Protect, Respect and Remedy*]: the Special Representative emphasizes the importance of robust due diligence procedures.

²⁸ *Ibid.*, §§ 92 and 100: the Special Representative discusses the critical role that rights compliant grievance mechanisms can play in remediating violations.

²⁹ For more information on NGOs' demands, please see Amnesty International, Submission to IFC Sustainability Framework Review, May 2010 available at: www.reports-and-materials.org/Amnesty-submission-to-IFC-Sustainability-Framework-review-May-2010.doc

³⁰ Compliance Advisor Ombudsman, *CAO Operational Guidelines*, p. 11, www.cao-ombudsman.org/howwework/compliance/documents/EnglishCAOGuidelines06.08.07Web.pdf

② Under what conditions?

- The complaint may **not** be **anonymous** but the complainant can ask for confidentiality³¹.
- Complainants may be represented by a third party, but the representative must demonstrate his/her authority to represent the complainants.³²
- The complaints may relate to any aspect of the planning, implementation, or impact of IFC/MIGA projects.
- The complaint may be 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 include³³:

- 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);
- 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.

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-compliance@ifc.org

② Process and Outcome

Within five days after submission of the complaint, the CAO will acknowledge its receipt³⁴. The CAO will then determine whether the complaint is receivable and will inform the complainant of either its acceptance or rejection. Next the CAO will investigate the complaint, which will include:

- a preliminary investigation
- a request to IFC/MIGA management for a response
- the notification of the sponsor of the project and other relevant parties.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ Compliance Advisor Ombudsman, “Make your voice heard”, www.cao-ombudsman.org/howwework/filecomplaint/documents/CAO_VoiceHeardBro08_A4-3_English.pdf

The CAO will determine how to proceed with the complaint. Possible options include³⁵:

- promoting dialogue
- mediation or conciliation
- releasing an interim report
- conducting an investigation into IFC's compliance with its own policies.

It takes on average **between one and four years** for a case to be examined and closed.

The CAO in action

Since 2009, the Ombudsman has received 110 complaints; 67 were deemed eligible.³⁶

➔ Palm oil production, Wilmar Group, Indonesia³⁷

Between 2003 and 2008, the IFC made several investments in the **Wilmar Group**, a multi-national 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"³⁸.

This case clearly relates to indigenous peoples' rights as well as the right to be protected against forced evictions.

³⁵ Compliance Advisor Ombudsman, *CAO Operational Guidelines, op. cit.*,

³⁶ Compliance Advisor Ombudsman, "Annual Report 2008-2009".

³⁷ CAO, Audit of IFC, C-I-R6-Y08-F096, Compliance Advisor Ombudsman, 19 June 2009, www.cao-ombudsman.org/uploads/case_documents/Combined%20Document%201_2_3_4_5_6_7.pdf

³⁸ *Ibid.*

“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.³⁹” 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.⁴⁰ **Yet, and although the WB group had agreed to review its agribusiness strategy, it seems the IFC continues to send contradictory signs and remains largely criticised by civil society organisations for its investment in agribusiness and its role in supporting the growing and worrying phenomenon of “land grabbing”.**⁴¹

ADDITIONAL RESOURCES

- **World Bank Inspection Panel**
www.worldbank.org/inspectionpanel
- **Compliance Advisor Ombudsman**
www.cao-ombudsman.org
- **CIEL, “International Financial Institutions Program”,**
www.ciel.org/lfi/programifi.html
- **Amis de la Terre, “Responsabilité des acteurs financiers”,**
www.amisdelaterre.org/-Responsabilite-des-acteurs-.html
- **Steve Herz and Anne Perreault, “Bringing Human Rights Claims to the World Bank Inspection Panel”, CIEL, BIC and International Accountability Project, October 2009**
- **N. L. Bridgeman, Accountability Resources Guide: Tools for Redressing Human Rights & Environmental Violations by International Financial Institutions, Export Promotion Agencies & Private Corporate Actors, Accountability Counsel**
www.accountabilitycounsel.org
- **Bank Information Center, “Tools for Activists: An Information and Advocacy Guide to the World Bank Group”**
www.bicusa.org/en/Page.Toolkits.aspx (available in English, Russian, Chinese, Bahasa, Hindi)

³⁹ Forest Peoples Programme, *IFC agrees to suspend funding for palm oil sector in response to NGO critique*, Press Release, 9th September 2009, www.forestpeoples.org/documents/prv_sector/bases/oil_palm.shtml

⁴⁰ *Ibid.*, Robert Zoellig, *Letter to Forest Peoples Programme*, World Bank, 28 August 2009, www.forestpeoples.org/documents/prv_sector/bases/oil_palm.shtml

⁴¹ Bretton Woods Project, “IFC lends a hand in great ‘land grab’”, 20 November 2009.

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. Approximately 170 countries have signed one or more bilateral investment treaties.⁴² As of today, the overwhelming majority of BITs contain a clause for recourse to the International Centre for the Settlement of Investment Disputes (ICSID).⁴³ Created in 1965 under the Convention on the Settlement of Investment Disputes between States and Nationals of other States [hereinafter “ICSID Convention”]⁴⁴, 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 complain about a state before the ICSID without having to exhaust domestic remedies.⁴⁵ 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 responsibilities of multinationals have generated wide criticisms in relation to investment tribunals such as ICSID. 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.** Furthermore, since the amendment of the rules of procedures in 2006, third parties can access hearings if both parties agree.⁴⁶

42 For a list of signed BITs, see the website of the United Nations Conference on Trade and Development (UNCTAD): www.unctad.org

43 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.

44 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.jus.uio.no/lm/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/toc.html

45 Besides the World Bank, there are other instances providing for arbitration tribunals such as the International Chamber of Commerce (ICC). 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.

46 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

It is therefore crucial for victims to have their voices heard during the arbitration proceedings of investment tribunals such as ICSID.

➔ **Vivendi case**

The Vivendi case⁴⁷ is a case related to water which followed a dispute surrounding a concession contract made between the French company, Compagnie Générale des Eaux (CGE) (subsequently Vivendi Universal) and its Argentine affiliate Compania de Aguas del Aconquija S.A.. Claimants accused Argentina of breaching the bilateral investment treaty it had signed with France. For its part, Argentina sustained that the need to change the water supplier and water management of used waters was necessary to ensure the access to water to its population, referring to its obligations under international human rights law. Parts of the state's arguments were built around the necessity to interpret investment clauses in light of a State's human rights obligations, such as the obligation to provide fair and equitable treatment to investors.

In 2007, the ICSID Tribunal decided to allow the submission of an *amicus curiae* brief written by a coalition of NGOs.⁴⁸ Argentina and NGOs likewise sustained that Argentina was under an obligation to guarantee the right to water under international law and therefore was constrained to undertake measures to ensure accessibility and affordability of water to its citizens.

The case was registered in 2003 and is still pending.⁴⁹ It will be important to follow-up and analyse the tribunal's decision as it is said that, considering the central place occupied by human rights arguments, arbitrators will have but no choice to consider human rights in their decision.⁵⁰

➔ **Bechtel vs. Bolivia the "Water revolt" in Cochabamba (Bolivia)**⁵¹

In 1997 the World Bank informed Bolivia that it was providing additional aid for water development conditioned upon the government privatising 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 process behind closed doors 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

⁴⁷ *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic*, International Centre for the Settlement of Investment Disputes, ICSID Case No. ARB/03/19, registered 2003

⁴⁸ ICSID tribunal accepts civil society organizations as *amici curiae*, CIEL, www.ciel.org/Tae/ICSID_AmicusCuriae_24Feb07.html

⁴⁹ ICSID, <http://icsid.worldbank.org/ICSID/FrontServlet>

⁵⁰ L.E. Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-state Arbitration*, Rights & Democracy, 2009, p.31.

⁵¹ Information on this case are extracted from the communications of the *Democracy Center* (www.democracyctr.org) and the *Business & Human Rights Resource Centre* website: www.business-humanrights.org/Links/Repository/981739/link_page_view

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 co-investor, *Abengoa* of Spain, 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 dogged by protest, damaging press, and public demands from five continents that they drop 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 such as this one as a direct result of public pressure.

ADDITIONAL RESOURCES

– ICSID

<http://icsid.worldbank.org> (all cases before the ICSID can be found online)

– International Institute for Sustainable Development (see international trade section)

<http://www.iisd.org/>

– Investment Arbitration Reporter

www.iareporter.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 Bank⁵²

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.⁵³” It lends money to projects that further EU policy objectives. These projects cover a number of geographical regions and a wide range of topics.⁵⁴

The EIB has a complaint mechanism composed of the **EIB Complaints Office** 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.

⁵² 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.

⁵³ EIB, *About the EIB*, www.eib.org/about/index.htm?lang=en

⁵⁴ EIB, *Projects*, www.eib.org/projects/index.htm

1. The EIB complaints mechanism

What are the issues that can be dealt with?

The EIB has organised a public consultation process on its environmental and social principles and standards. The new standards were published in February 2009⁵⁵. 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 practices⁵⁶. “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 Organization (ILO) and occupational and community health and safety.”⁵⁷
- *Cultural heritage* reflects a broad concept of cultural heritage as an instrument for human development and inter-cultural dialogue and an element in the achievement of balanced spatial development. Thus the Bank shall not finance a project which threatens the integrity of sites that have a high level of protection for reasons of cultural heritage, including UNESCO World Heritage Sites.

⁵⁵ EIB, *Public Consultation on EIB’s Environmental and Social Statement*, www.eib.org/about/news/eib-statement-of-environmental-and-social-principles-and-standards.htm

⁵⁶ 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

⁵⁷ *Ibid.*, p. 16, § 50.

- *Consultation, participation and disclosure standards*, referring to EIB’s complaint system.
- *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.

In practice, the EIB delegates many responsibilities to the project developers. Overall, 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.

🔍 Who can file a complaint?

Any person or group, including civil society organisations, “that is or feels affected by alleged environmental, developmental or social impacts of the EIB Group’s activities”⁵⁸ can file a complaint with the EIB complaints mechanism.

🔍 Under what conditions?

- The EIB does not accept anonymous complaints, but it does treat all complaints confidentially unless that right has been expressly waived by the complainant.⁵⁹
- Any person may write in one of the official languages of the European Union⁶⁰ and has the right to receive a reply in the same language.
- The complaint must concern any alleged maladministration of EIB Group in its action or omissions.
- The complaints must be lodged within one year after the respondent could be in a position to acknowledge the facts upon which the allegation is grounded.⁶¹

⁵⁸ EIB, *The EIB Complaints mechanism – Principles, terms of reference and rules of procedure*, 2 February 2010, Part IV, § 2.1.

⁵⁹ EIB, *The EIB Complaints mechanism – Principles, terms of reference and rules of procedure, op.cit.*, Part IV, § 2.6.

⁶⁰ See European Commission, *Multilingualism*: http://ec.europa.eu/education/languages/languages-of-europe/doc135_en.htm

⁶¹ *Ibid.*, Part IV, §5.

HOW TO FILE A COMPLAINT?

- Content of the complaint must include⁶²:
 - 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.
- The complaint can be lodged *via* a written communication addressed to:

European Investment Bank
Secretary General
100, boulevard Konrad Adenauer
L-2950 Luxembourg
Tel: (+352) 43 79 1
Fax: (+352) 43 77 04
- If you wish to send a complaint via email, you need to fill out the online form available on the EIB's website. www.eib.org/infocentre/complaints-form.htm?lang=-en
- The complaint can be also sent by fax or brought directly to the EIB Complaints Office, EIB local representation or any EIB staff.

🔗 Process and outcome

In reviewing the admissibility of each complaint, the office verifies whether the EIB followed its policies and regulatory obligations, including those outlined in the Bank's Environmental and Social Practices Handbook.

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).⁶³

In practice, it should be noted that, in 2010, the EIB complaint office was severely understaffed (according to Friends of the Earth-France there were only two persons in charge of reviewing the complaints at the EIB Complaints Office).

⁶² EIB, "How to lodge a complaint", www.eib.org/about/news/how-to-lodge-a-complaint.htm

⁶³ EIB, *The EIB Complaints mechanism – Principles*, terms of reference and rules of procedure, op.cit, Part IV, § 10.2.

Confirmatory complaints

If the complainant is not satisfied, the EIB Complaints 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.

Since 2008, the EIB Complaints Office has been receiving more and more complaints, **especially in relation to procurement issues or environmental and social impacts** of projects.⁶⁴ In 2008, four complainants decided to lodge a confirmatory complaint following the partial or total rejection of their complaints.⁶⁵

The **content of the complaint remains confidential** unless the complainant requests its publication, according to the rules of procedures of the revised mechanism.⁶⁶ In addition, **a new transparency policy** regarding all information held by the EIB was approved on February 2, 2010⁶⁷. A presumption of disclosure and transparency was settled, although many exceptions are stated. Access to documents relating to the complaint is from now on subjected to this policy and it remains to be seen whether it will be interpreted in favour or not of the complainants.

2. The European Ombudsman

Ⓧ Who can file a complaint?

- 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 from **outside the EU**. The Ombudsman will deal with them at his/her discretion.

Ⓧ Under what conditions?

- for concerns of maladministration on behalf of the EIB;
- must be lodged within two years of acknowledgement of the facts on which the complaint is based;
- cannot deal with matters that are being settled in court or have already been settled in court;

⁶⁴ EIB Complaints Office, *Activity Report 2008*, www.eib.org

⁶⁵ *Ibid.*

⁶⁶ EIB, *The EIB Complaints mechanism – Principles, terms of reference and rules of procedure*, *op.cit.*, Part IV, § 13.

⁶⁷ EIB, *EIB Transparency policy*, 2 February 2010, www.eib.org/attachments/strategies/transparency_policy_en.pdf

- exhaustion of the EIB internal complaint mechanisms; and
- the complaint should be written in one of the 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
email: complaints@eib.org

- a complaint form is available at the European Ombudsman's office at the following address:
www.ombudsman.europa.eu/atyourservice/complaintform/home.faces
-

➤ Process and outcome

Although it is preferable to turn to the Ombudsman only if unsatisfied by the EIB complaint **process**, it is also possible to directly appeal to the Ombudsman if the complainant is not satisfied with the **conclusions** report of the EIB complaints office.

The European Ombudsman will first look for mediation. If it fails, he/she will then make recommendations: for instance, the Ombudsman can request to take corrective action 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.⁶⁸

Finally, if a complaint by a non-EU resident is rejected on the sole basis of the “non-EU” origin of the complainant, a complaint can be lodged with the Bank to the EIB’s Inspectorate General under the Independent Recourse Mechanism (Inspector.General@eib.org). The reliability of this mechanism remains unclear.⁶⁹

⁶⁸ EIB, The EIB Complaints mechanism – Principles, terms of reference and rules of procedure, op.cit, Part V, § 6.

⁶⁹ Counter Balance, *Citizens' Guide to the European Investment Bank*, April 2008, www.counterbalance-eib.org



Following a report published by a “Wise Persons’ Panel” led by the French economist Michel Camdessus (former IMF head) on the analysis of the EIB development lending, Counter Balance, a coalition of NGOs including Amis de la Terre and Bretton Woods Project, published in February 2010, a shadow report supporting some of the recommendations made by the panel while highlighting other criticisms against the EIB.⁷⁰ The report which is the result of the work of various NGOs with field experience concludes that populations in developing countries do not benefit from the billions of Euros lent each year by the EIB. It maintains that EIB lending is incoherent with EU development policies and EIB legal obligations. Based on numerous projects financed by the EIB that generated disastrous consequences for the populations in developing countries, the report highlights the incompatibility between the EIB’s different mandates and the lack of human resources and human rights and environmental experts within the EIB complaint office. According to NGOs who have worked with the Bank’s complaint mechanism, there is still a long way to go to ensure that the bank’s internal culture and procedures comply with human rights standards. The Bank is criticised for focusing on the economic return of projects rather than sufficiently evaluating their social and environmental impacts. The EIB is also criticised for largely resorting to financial intermediaries which often benefit European subsidiaries or multinationals operating in the Global South rather than small and medium enterprises. Amongst other recommendations, NGOs are asking the EIB: put in place monitoring systems (including to monitor the impacts of the Bank’s recourse to financial intermediaries); assess the social and environmental impacts of funded projects; publish the list of its financial intermediaries; provide timely access to information in particular to affected people, and ensure that the complaint mechanism benefits from staff with environmental and human rights expertise. NGOs that are part of the Coalition remain very critical of the EIB shifting from a lending function to a development one and maintain that the EIB is currently not equipped to fulfil such a mandate.

In November 2008, a judgement by the European Court of Justice⁷¹ confirmed that the current mandate given by the European Council to the EIB does require the EIB to respect and meet the European development policy objectives. The Court cancelled the EIB’s mandate in EU accession countries, neighbouring countries, Asia and Latin America and gave 12 months for the European Parliament to adopt a new mandate. Under pressure, the EIB is expected to go through important changes in the coming years.⁷²

⁷⁰ Alex Wilks, “Corporate welfare and development deceptions: Why the European Investment Bank is failing to deliver outside the EU”, Counter Balance, February 2010, www.amisdelaterre.org/IMG/pdf/SReport-EN-web-1.pdf

⁷¹ ECJ Judgment in Case C 155/07 re Annulment for amendment Decision 2006/1016/EC, 6th November 2008.

⁷² Counter Balance, “ECJ ruling puts EU house bank on the spot: deliver on development role or stop lending outside Europe”, 12 November 2008, www.counterbalance-eib.org

In 2010, the EIB has planned to hold different seminars on business and human rights and the impacts of large-scale investment projects.

ADDITIONAL RESOURCES

- EIB
www.eib.org/
 - Terms of Reference of the EIB Complaints Office
www.eib.org/attachments/strategies/complaints_office_tor_en.pdf
 - Alex Wilks, “Corporate welfare and development deceptions: Why the European Investment Bank is failing to deliver outside the EU”, Counter Balance, February 2010
www.amisdelaeterre.org/IMG/pdf/SReport-EN-web-1.pdf
 - Counter Balance, Citizens’ Guide to the European Investment Bank, Avril 2008
www.counterbalance-eib.org
 - The Bretton Woods Project
www.brettonwoodsproject.org
-

B. European Bank for Reconstruction and Development

The European Bank for Reconstruction and Development (EBRD), established in 1991, is the largest single investor in the region and mobilises significant foreign direct investment beyond its own financing. It is owned by 61 countries and two intergovernmental institutions, namely the European Community and the EIB⁷³. 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 which 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 policies⁷⁴; 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 issues⁷⁵. The Bank chooses the projects it may finance according to three principles:

⁷³ EBRD, *About the EBRD*, www.ebrd.com/about/index.htm

⁷⁴ EBRD, *Strategies and policies*, www.ebrd.com/about/strategy/index.htm

⁷⁵ EBRD, *Environment homepage*, www.ebrd.com/enviro/index.htm

- “social and environmental sustainability;
- respect of the rights of workers and communities; and
- compliance with applicable regulatory requirements and good international practice”⁷⁶.

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 has been in use since 2004⁷⁷.

The PCM has two functions:

- Problem-solving Initiative: restoring dialogue between the Complainant and the Client⁷⁸.
- Compliance Review: seeks to determine whether the EBRD has complied with its policies in respect of an approved project⁷⁹.

► NOTE

As the EBRD is an international financial institution which is owned by 61 countries, the EC (European Community) and the EIB, it is not possible to lodge complaints concerning this bank with the European Ombudsman.

🕒 Who can file a complaint?

- With regard to the 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.
- With regard to the Compliance Review: one or more individual(s) or organisation(s). (It is interesting to note that NGOs do not need to represent people directly affected, as long as they can provide evidence that they are a registered NGO in a member country of the Bank.⁸⁰)

🕒 Under what conditions?

- Anonymous complaints will not be accepted. However, it is possible for complainants who are not organisations to ask for confidentiality⁸¹.

⁷⁶ *Ibid.*

⁷⁷ Complaints registered under the Bank’s Independent Recourse Mechanism (IRM) prior to the entry into force of the Project Complaint Mechanism (PCM) Rules will normally be dealt with in accordance with those rules. The IRM’s rules of procedure can be found at www.ebrd.com/about/integrity/irm/about/procedur.pdf

⁷⁸ Client: “The entity or entities that is/are responsible, directly or indirectly, for carrying out and implementing all or part of a Project”- PCM, *Rules of Procedure*, Project Complaint Mechanism, p. II, www.ebrd.com/about/integrity/irm/about/pcm.pdf

⁷⁹ EBRD, PCM, *Rules of Procedure*, Project Complaint Mechanism, www.ebrd.com/about/integrity/irm/about/pcm.pdf

⁸⁰ *Ibid.*

⁸¹ PCM, *Rules of Procedure*, *op.cit.*, para §4.

- In the case of the Problem-solving Initiative, the complaint must relate to a project in which⁸²:
 - the Bank has presented an interest in financing the project;
 - the Bank maintains a financial interest in the project, in which case the complaint must be received within 12 months of the last disbursement of funds from the Bank.
- In the case of Compliance Review, the complaint must relate to a Project that has been approved for financing by the Board or the Bank Committee⁸³.
- The complaint 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 operation⁸⁴.
- The complaint can be submitted in any written format⁸⁵.

HOW TO FILE A COMPLAINT?

Content of the complaint must include:

- the names of the complainants;
- the name of the authorised representative, if any, and proof of the authorisation;
- contact information of the complainant and 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 violated⁸⁶;
- in the case of a complainant requesting a Problem-solving Initiative, a description of the good faith efforts the complainant has taken to address the issue at stake either with the Bank or the client.
- which PCM function is expected to be used as well as the outcome expected (if possible);
- the correspondence between the Bank and relevant parties (if applicable)⁸⁷.

The complaint must be sent (post, fax, email, hand delivery) to:

Project Complaint Mechanism
Attn: PCM Officer
European Bank for Reconstruction and Development
One exchange Square
London EC2A 2JN
United Kingdom
Fax: +44 20 7338 7633
Email: pcm@ebrd.com

⁸² *Ibid*, para §18.

⁸³ *Ibid*, para §19.

⁸⁴ *Ibid*, para §6.

⁸⁵ *Ibid*, para §3.

⁸⁶ *Ibid*, para §10 and 20.

⁸⁷ *Ibid*, para §20.

➤ Process and Outcome

- Consideration of eligibility by the PCM Officer.
- Upon registration, the PCM will notify the relevant parties.
- Once eligibility has been determined and within 40 business days after the registration of the complaint, 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.
- Eligibility will not suspend the Bank's interest in the project. However, **interim recommendations to suspend the Bank's proceeding with the process can be made by the CPM Officer to prevent irreparable harm**⁸⁸.

In case of a Problem-solving Initiative:

The objective is to restore dialogue between an affected group and any relevant party to try to resolve the problems or issues underlying a complaint without attributing blame or fault to any party. It may be undertaken instead of, or as well as, 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 expert. Upon completion, the expert will issue a report available to all relevant parties, the President and the Board. The report and the decision are publicly released and posted on the PCM website.

In the case of a Compliance Review:

The objective is to establish whether any of the Bank's actions (or failures to act) may have violated a Bank policy in a material way. 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 visits.

If the expert concludes the Bank was not in compliance with the EBRD policies, she/he will issue a draft report to recommend that the Bank makes changes to its procedures (to prevent something similar from happening in the future), or to the scope and implementation of the relevant Bank-financed project, if possible. The PCM Officer monitors the implementation of the recommendations of the Compliance Review report by issuing a Compliance Review Monitoring Report at least twice a year or until implementation issues are concluded. These reports will be made publicly available on the PCM website.

⁸⁸ *Ibid*, para §30.

The IRM (replaced by the PCM) in action

The IRM mechanism (now replaced by the PCM) has been used five times since its creation in 2003.⁸⁹

→ BTC pipeline complaint

The latest complaint which was examined concerned the BTC (Baku-Tbilisi-Ceyhan) pipeline in Georgia, a project operated by **British Petroleum (BP)**. A complaint was submitted by seven residents of Atskuri village. The complaint was determined eligible for further processing towards a problem-solving initiative but not warranting a compliance review.

The individual complaints brought under the IRM covered the following issues:

- clearance work and 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 on an ongoing basis exceeds the area indicated in the proposal package for which compensation was available;
- loss due to vibration, and subsequently damage to houses and other buildings caused by heavy construction traffic and road improvements carried out during construction of the pipeline;
- loss of harvests due to damage caused to the irrigation channel of the village during construction of the pipeline;
- loss of harvests due to the lack of economic viability of 'orphan' land;
- undue delay and uneven treatment in the payment of compensation for damage to land and plants and for uncollected harvests; and
- lack of responsiveness and undue delay in the project grievance procedure and 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 a) GyraKh Kesemenli village in Azerbaijan and b) in Akhali Samgori village in Georgia had both been unsuccessful.

Following the review of the individual complaints against BP/BTC during March/April 2008, BP/BTC subsequently made an additional compensation payment to one complainant for crop loss relating to the years 2004/05, 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 of alleged damage to the irrigation channel serving one of the agricultural plots and subsequently agreed that construction had indeed impacted on it. BP/BTC has since advised 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

⁸⁹ EBRD, IRM, *IRM Register*, Independent Recourse Mechanism, www.ebrd.com/about/integrity/irm/register.htm

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 further⁹⁰.

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 poverty caused by the BTC pipeline project.⁹¹

* * *

The EBRD, like other banks, remains highly criticised by civil society groups and its approach (such as the use of country strategies mostly based on economic indicators) is judged contrary to its guiding policies. The former complaint mechanism has been subject to various criticisms and the new complaint mechanism has yet to prove its efficiency and capacity to address human rights related claims.

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. Of these, 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)⁹².

⁹⁰ IRM, Problem-solving completion report - Complaint: BTC Georgia/Atskuri Village, Georgia, Independent Recourse Mechanism, www.ebrd.com/about/integrity/irm/0809pscr.pdf

⁹¹ CEE Bankwatch Network, www.bankwatch.org/project.shtml?w=147579&s=1961749

⁹² IDB, *About Us*, Inter-American Development Bank, www.iadb.org/aboutus

The IDB Group is composed of the Inter-American Development Bank, the Inter-American Investment Corporation (IIC) and the Multilateral Investment Fund (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 for projects with potentially substantial environmental impacts⁹³. **In February 2010, the Board of the Bank approved the Independent Consultation and Investigation Mechanism (ICIM)**, which came into effect on 18 May 2010.⁹⁴ ICIM replaces the former Independent Investigation Mechanism (IIM)⁹⁵. ICIM 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 also has an the Office of Institutional Integrity (OII) which investigates allegations of fraud and corruption in activities financed by the Bank Group as well as cases of staff misconduct.

The Independent Consultation and Investigation Mechanism (ICIM)

🕒 What are the issues that can be dealt with?

The ICIM applies to all “Relevant Operational Policies” of the Bank.⁹⁶ The ICIM will initially be looking only at six operational policies:

- Information Disclosure Policies (approved in April 2010);
- Environmental and Safeguards Compliance Policy (including environmental assessment requirements, consultation with affected parties, supervision and compliance, natural habitats and cultural sites protection, pollution prevention);
- Disaster Risk Management Policy;
- Gender and development (operating policy under consultation for review in 2010);
- Indigenous People (there are two set of directives relating to support for development with identity of the indigenous peoples and safeguards for indigenous peoples and their rights against adverse impact and exclusion);
- Involuntary Resettlement (including terms for resettlement, community participation, gender issues, indigenous communities, rehabilitation and compensation).

The ICIM will be applicable to all other operational policies that are in effect three years from the effectiveness of the ICIM.

⁹³ IDB, *Environmental Impact Assessments*, Inter-American Development Bank, last viewed on 23/10/09, www.iadb.org/aboutus/III/environmental.cfm

⁹⁴ IDB, *Policy establishing the new Independent Consultation and Investigation Mechanism*, 17 February 2010.

⁹⁵ 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).

⁹⁶ IDB, *Policy establishing the new Independent Consultation and Investigation Mechanism*, op.cit.

② Who can file a request?

A request may be filed by⁹⁷:

- One or more persons, groups, associations, entities or organizations (including those that are community based, or that are formed by indigenous or Afro descendant peoples or entities that are organized as NGOs);
- The complainant must reside in the country (ies) where the Bank-financed operation is or will be implemented.

A request may be filed through a representative located in the project host country or elsewhere, but any such request must identify the person(s) on whose behalf the representative is acting and provide evidence of the representative's authority to represent them.

② Under what conditions?

There is no particular format to follow to file a request.

Anonymous requests will not be accepted. Confidentiality can nevertheless be respected if requested.

The Bank will not consider a request eligible if:

- the matter has already been reviewed by the ICIM,
- the matter relates to procurement decisions or processes,
- the matter relates to actions that are the responsibility of parties other than the Bank such as the borrower/recipient⁹⁸,
- the request raises issues under arbitral or judicial review by national, supranational or similar bodies,
- if the request is filed more than **24 months** after the last disbursement.

A request will be deemed eligible for the consultation phase if it includes⁹⁹:

- explanation of the harm alleged, including if the requester reasonably asserts that its rights or interests have been, or could be expected to be directly, materially adversely affected by the failure of the IDB to follow its Relevant Operational Policies in a Bank-Financed Operation,

The requester should reside in the country where the relevant Bank-financed Operation is or will be implemented (or a qualified Representative has been appointed) and parties should be ready to actively participate in the consultation phase.

⁹⁷ *Ibid.*, §30.

⁹⁸ *Ibid.*, §37.

⁹⁹ *Ibid.*, §31.

The execution of the funded **project will NOT be halted** (including disbursements) even if there is an ongoing consultation phase exercise.

► **NOTE**

Conditions are practically identical regarding the compliance review phase. See below.

HOW TO FILE A REQUEST?

The request should include:

- contact information for the requester,
- identity and location of the project funded by the Bank,
- clear explanation of the harm alleged,
- Identification of the Relevant Operational Policies the Bank has failed to apply,
- Steps previously taken to discuss the matter with management and its response,
- Statement of the outcome that the requester would like to see.

The request can be sent in writing, via electronic or regular mail, fax, or text message to the ICIM Office phone number.

Contrary to other regional banks, **oral requests will be accepted** (subject to subsequent receipt of a signed communication).

The official languages of the IDB are Spanish, English, Portuguese and French. Requests will be processed if received in other languages, although additional time for processing and translations may be necessary.

Requests should be to the attention of the ICIM office and may be sent to the IDB Office or to the ICIM 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.
Guidance on how to file a request is be made available online:
www.iadb.org

🕒 Process and Outcome¹⁰⁰

The mechanism provides for two distinct phases:

- Consultation phase
- Compliance review phase

¹⁰⁰ IADB, Policy establishing the new Independent Consultation and Investigation Mechanism, February 17, 2010, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35074768>

Consultation phase

The Executive Secretary first transmits the request to the Project Ombudsperson¹⁰¹ who – if the request is eligible- will seek to solve the problem through **mediation**. To undertake such a procedure, the consent of all parties is required.

The Project Ombudsperson shall conduct an assessment to clarify the issues and concerns raised by the requester. Any party that does not wish to proceed with a Consultation Phase exercise may unilaterally opt out at any time during the assessment.

The assessment may take various forms, including country visits (upon authorisation of the country).

Within 120 days from the registration of eligibility, the assessment will result either in:

- The production of an explicit agreement to proceed with a consultation phase exercise;
- The delivery of the request to the panel for compliance review assessment.

The Project Ombudsperson will submit a report, which will be sent to the President, Board (and the Donors Committee, in the case of an MIF-funded operation), and to requesters.

The terms of an eventual agreement will be made public.

The Project Ombudsperson is responsible for making arrangements to ensure the monitoring and the implementation of any agreement by the parties.

Compliance review phase

The purpose of the **Compliance Review Phase** is to establish a process that enables a Requester to request an **investigation of a Bank-Financed Operation by a Panel of independent experts** (if the above-mentioned conditions are respected).

The objective of a Compliance Review investigation shall be to establish whether (and if so, how and why) any Bank action or omission, in respect of a Bank-Financed Operation, has resulted in non compliance with a Relevant Operational Policy and direct, material adverse effects (potential or actual) to the Requester.

To proceed to the compliance review phase, the requester shall express a desire for a Compliance Review. Such request will be deemed eligible if:

- a) the Consultation Phase has been terminated or concluded for any reason, or

¹⁰¹ Bank full-time employee designated as Project Ombudsperson and appointed by the Board for a period of 3 to 5 years and independent of any other unit of the Bank.

b) the Request was deemed ineligible under the Consultation Phase.¹⁰²

The Project Ombudsperson will deliver to the Panel Chairperson all materials and analyses relating to the Request at the Consultation Phase, including the Project Ombudsperson's determination on the eligibility criteria. The Panel Chairperson will review the Request for eligibility, independently of the determination of the Project Ombudsperson.

If a Request is deemed eligible for purposes of the Compliance Review Phase, the Chairperson will identify two other members of the Panel to serve on the investigative team for such Request, based on their expertise and availability. The Chairperson and the two other members will then act as a Panel and will prepare terms of reference ("TOR") to guide the Compliance Review. The TOR shall include: the objectives of the investigation, the specific investigative criteria identified, a brief description of the Bank-Financed Operation, proposed schedule and budget for the investigation, anticipated use of consultants, and a statement of the deliverables. The Requester and Management each have twenty business days to provide comments in writing on the TOR (comments will not be considered binding).

In discharging its functions, the Panel must consult all concerned stakeholders, including Management, the Requester, the borrower/recipient or executing agency, and the relevant Executive Director. All will be given an opportunity to record their views in writing and written submissions will be annexed to the final Panel report. The Panel may make site visits, arrange to have outside expert technical advice and take any other action as may be required to complete the Compliance Review.

The Panel will prepare its **report** which should be designed to provide the factual and technical basis for a Board decision on **preventive or corrective action** in connection with the Bank-financed operation under investigation. **The Panel may not recommend the award of compensation or any other benefit.** This does not preclude, however, the possibility of compensation or other benefits that may be expressly contemplated in any relevant Bank policy and legal documentation.

The Board or the President receives the report and then makes the final decision and instructs management regarding any subsequent actions that may be deemed appropriate or necessary in light of the Panel's findings. The report will be posted on the Registry and delivered to the requester within 20 days.

At the request of the Board, the Panel will monitor the implementation of any remedial or corrective actions agreed upon as a result of a Compliance Review.

¹⁰² *Ibid.*, §54.

As of 2010, the ICIM had not yet treated any request. Between 1994 and 2010, the former IIM treated five requests (Yacyreta Hydroelectric Project (Argentina/Paraguay), Termoeléctrica del Golfo Project in Mexico, Cana Brava Hydroelectric Project in Brazil, Emergency Flood Rehabilitation Program in Argentina)¹⁰³.

* * *

Civil society organisations actively participated in the process leading towards the adoption of the ICIM to ensure the weaknesses of the IIM were addressed. One of the main criticisms directed to the Bank was the fact that little publicity around the existence of the complaint mechanism had been done. According to the new policy, the Project Ombudsman and the Panel have to put in place and implement an outreach strategy plan to disseminate information about the ICIM. NGOs are now demanding that the mechanism be given sufficient funds to comply with this aspect of its mandate and that the Bank’s clients publish and communicate information about the ICIM to affected communities when assessing the environmental and social impacts of their project.

Although civil society organizations have welcomed the adoption of the ICIM as a stronger mechanism with greater potential of accountability, they have raised several concerns: what will be the room given to civil society organisations in the selection process of the Executive Secretary and the five members of the panel? What types of measures are contemplated during the mediation phase to ensure that there is a balance of power (i.e. what kind of information will be made accessible? How will the Bank ensure the mediator is neutral? Who will define the meetings agenda?) Until the ICIM treats its first requests and such questions are answered, civil society organisations remain sceptical about the real changes brought by the new mechanism and many still perceive the mechanism as a public relations’ initiative by the Bank to secure additional funds.¹⁰⁴

ADDITIONAL RESOURCES

– ICIM

www.iadb.org/PublicConsultation/MICI/index.cfm?id=5603

– IDB Watch

www.bicusa.org/en/Article.3713.aspx

¹⁰³ Bank Information Center and al., “Environmental and Social Impacts of IDB Projects Since the Eighth Capital Replenishment”, January 2005, www.internationalrivers.org/files/IDBimpact_en.pdf
Reports can be accessed online at: www.iadb.org/aboutus/iii/independent_invest/notices.cfm

¹⁰⁴ See BID en la Mira, “Un Nuevo comienzo: el Bid aprueba un mecanismo fuerte de rendición de cuentas”, March 2010, 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 53 African countries and 24 non African countries¹⁰⁵.

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 Africa.¹⁰⁶

In 2004, the AfDB put in place an **Independent Review Mechanism (IRM)**¹⁰⁷, 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.

🔍 What are the issues that can be dealt with?

The Bank’s policies address several topics: food production, poverty reduction, quality assurance and results, regional integration, and financial crisis¹⁰⁸. These policies apply to several sectors, and in particular¹⁰⁹:

- Involuntary resettlement policy: the objective of this policy is to ensure that people who are relocated receive a share in the benefits of the project. The policy contains requirements for resettlement plans;
- Environment and social standards, including impact assessment, management plan, audits and environmental review procedures for private sector operations;
- Poverty reduction: This policy focuses on national capacity building, promotion of the participatory approach and development of new forms of partnerships. It contains requirements for consultation processes;
- Gender: this policy looks at women’s participation and focuses on education, poverty, health, agriculture and rural development, governance through a gender analysis.
- Integrated Water Resources Management: recognises the right to water and requires the AfDB to “promote integrated policies and options for water resources that

¹⁰⁵ AfDB, *Countries*, African Development Bank, www.afdb.org

¹⁰⁶ BIC, “Examining the African Development Bank: A Primer for NGOs”, May 2007, www.bicusa.org

¹⁰⁷ AfDB, *The Compliance Review and Mediation Unit*, www.afdb.org

¹⁰⁸ AfDB, *Topics and Sectors*, African Development Bank, www.afdb.org/en/topics-sectors/

¹⁰⁹ BIC, *Operational Policies*, www.bicusa.org/en/Institution.Policies.1.aspx

support water supply and sanitation, biodiversity protection, conservation, and minimise involuntary resettlement.”

- Other: agriculture, climate change and mitigation, economic and financial grievance, education, health, human and social development, information and communication technology, infrastructure, private sector development, transport, water supply and sanitation.

🔗 Who can file a complaint?

- **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.
- **Organisations**, associations, societies or other groupings of individuals adversely affected by a Bank Group financed project.
- A **duly appointed local representative** acting on explicit instructions 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 located¹¹⁰.

🔗 Under what conditions?

The complaint must be submitted:

- In writing, dated and signed;
- In the language of the Bank (English or French).

HOW TO FILE A COMPLAINT?

- 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 by registered or certified mail or delivered by hand in a sealed envelope against receipt to the CRMU or the Bank Group’s resident representative in the country where the project is located:

¹¹⁰ AfDB, Request for Compliance Review/Mediation, African Development Bank, www.afdb.org

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

🔗 Process and Outcome¹¹¹

The process before the CRMU can be divided into two main procedures: mediation (problem-solving) or compliance review.

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.

Mediation procedure

The objective is to restore an effective dialogue between the requester and any interested persons, in order to resolve the issue, but not with the perspective of allocating blame to one party or the other. The exercise shall be a meeting or an exchange of views between the Bank's management representatives, the requester, and other interested persons.

¹¹¹ AfDB, *IRM Operating rules and procedures*, AfDB, www.afdb.org/en/documents/compliance-reviews/irm-operating-rules-and-procedures/

If the exercise is successful, the director shall prepare a report within 30 days after the conclusion of the exercise, which shall include the considered facts, the considerations on which the conclusions are based and any relevant comments from the interested persons.

In case the exercise is unsuccessful, the director shall submit a report containing the reasons for the failure and make recommendations on steps to take to deal with the issue.

- The CRMU will monitor the implementation of the solution agreed upon.

Compliance review mechanism

A compliance review is the procedure used if there is *prima facie* evidence that the requesters are being harmed or are threatened of harm by a Bank-financed project and that the harm or threat was caused by the failure of the Bank's staff and management to comply with the Bank's policies and procedures. It can also take effect after the failure of a mediation process.

- The director shall establish a report recommending a compliance review of the project issue. The recommendation shall include draft terms of reference and identify two experts from the roster (a body composed of 3 external experts, appointed by the Board for a five-year non-renewable term), who shall constitute, with the director, a panel to conduct the review. The panel conducts the review in the required time frame and may in particular solicit additional information from the interested parties or undertake on-site visits.
- Within 30 days of the completion of the investigations, the panel shall submit to the President or the Board, a report presenting a summary of the facts. The summary has to contain the findings determining whether or not an action or failure to act has involved a violation of the Bank's policies. If violations are found then the report must also include suggestions on remedies and the steps to be taken to monitor their implementation.
- The President or the Board decide to accept or reject the findings and the recommendations included in the report. If they are accepted, the changes shall be monitored by the person recommended in the report.

To date, the CRMU has four registered cases (three of which were filed in 2009): two for independent compliance review and two cases currently undergoing problem solving (mediation).

The CRMU in action:

➔ The Bujagali Hydropower Project in Uganda

On May 8-, 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 affiliates of Sithe Global Power, LLC and the Aga Khan Fund for Economic Development.

The request alleged non-compliance with the Bank Group's policies applicable to the assessment of hydrological risks, environmental protection, the project's economics, including affordability and alternatives analysis, consultations with affected people on resettlement and compensation and cultural and spiritual issues.

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 September 7, 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 November 26 to December 8, 2007. In addition, the IRM Bujagali Review Panel conducted document research and interviews with the staff at the Bank.

On June 20, 2008, the IRM released its report on the Bujagali projects compliance review.¹¹² In March 2009, management published its action plan in response to the IRM's report, including actions to be taken to comply with the Bank's policies.¹¹³

An IRM Monitoring Team was authorised on July 9, 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 from May 24-29, 2009.

¹¹² AfDB, *Rapport de vérification de la conformité sur le projet d'hydroélectricité et le projet d'interconnexion de Bujagali*, AfriDB, 20 June 2004.

¹¹³ "AfDB Management Action Plan in response to the independent review panel's report on the Bujagali hydropower and interconnection projects", www.afdb.org

The mission found the project lacking in compliance in the following 3 areas: **resettlement and compensation, cultural and spiritual issues, and Kalaga off-set and Forest Reserves Mitigation Measures.**

Despite the fact that the AfDB maintains that the monitoring procedure is ongoing¹¹⁴, little progress seems to have been made and this project remains one of the world's most controversial and expensive hydro-power plant projects – where it is feared that users will be the ones having to pay the high price¹¹⁵, in addition to paying for potential environmental damages.

➔ **Complaint regarding the Gibe III Dam in Ethiopia**

In February 2009, a complaint was filed by the Friends of Lake Turkana, a community association formed in 2008 and representing people from the Lake Turkana region. FoLT formulated a request for investigation to the CRMU arguing that the current analysis and the exclusion of the Turkana people in the project's preparation violate many of the Bank policies. It is feared that the Gibe III Dam will have serious consequences on the flow and volume of the Omo River which provides 80% of the Turkana Lake inflow. It is considered that "an estimated 300,000 people [indigenous peoples] rely in some way on the lake for their livelihood and survival".¹¹⁶

A mediation process has been initiated. A meeting between Bank staff and Friends of Lake Turkana was scheduled for June 10, 2009. Another similar request was submitted to the Bank by a group of international NGOs. Due to the similarities of the two complaints, the Bank has decided to suspend the eligibility review pending the outcome of the current problem resolving process.¹¹⁷

In May 2010, the Industrial and Commercial Bank of China (ICBC) offered to step in with a \$500 million dollar loan, which would severely jeopardise the relatively little success achieved so far in keeping financial institutions (World Bank, EIB, AfDB) distant from this project.¹¹⁸

¹¹⁴ AfDB, The Independent Review Mechanism, Annual Report 2009, www.afdb.org

¹¹⁵ BIC, "Over Priced Bujagali Dam to Raise Power Costs", 30 October 2009, www.bicusa.org Eli Biryabarema, "Uganda's Bujagali Dam to Miss the 2011 Target", Reuters Africa, 30 October 2009, <http://af.reuters.com/article/topNews/idAFJJOE59T0IJ20091030?sp=true>

¹¹⁶ This extract was based on the following source. Full complaint request is available online. International Rivers, "Kenyan Request for Investigation of AfDB & Gibe III Dam", 5 February 2009, www.internationalrivers.org/en/africa/ethiopia/gibe-3-dam-ethiopia/request-crmu-review-afdb-gibe-iii-dam

¹¹⁷ AfDB, Annual Report, 2009, p.6. www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/IRM%20Annual%20Report%202009%20English.pdf

¹¹⁸ International Rivers, "China's Biggest Bank to Support Africa's Most Destructive Project", Press Release, May 10 2009, www.internationalrivers.org/en/2010513/china%E2%80%99s-biggest-bank-support-africa%E2%80%99s-most-destructive-dam

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 CRUM, like other similar mechanisms available within international and regional financial institutions, cannot provide victims with remedies. Yet, it presents interesting preventive potential and can be used, in conjunction with other means of action, as a way to draw attention on high risks projects.

ADDITIONAL RESOURCES

- **African Development Bank (AfDB)**
www.afdb.org
 - **Bank Information Center (BIC)**
www.bicusa.org
 - **International Rivers**
www.internationalrivers.org/
 - **BIC, "Examining the African Development Bank: A Primer for NGOs", May 2007,**
www.bicusa.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 citizens¹¹⁹. ADB provides assistance to governments and private enterprises in its developing member countries based on a member's priorities.

¹¹⁹ AfDB, "Regions and Countries", www.adb.org/Countries/

On May 29, 2003, the ADB approved a new accountability mechanism to address the concerns of persons affected by ADB-assisted projects. The ADB Accountability Mechanism consists of two separate but related functions:

- a consultation phase under the Office of Special Project Facilitator (OSPF); and
- a compliance review phase under the Office of the Compliance Review Panel (OCRP).

Together, they replaced ADB's Inspection Function which was the previous mechanism.

🕒 What are the issues that can be dealt with?

ADB activities are governed by its Operational Policies which also includes Operational Procedures that spell out procedural requirements and guidance on the implementation of policies. 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 areas¹²⁰:

- *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;
- 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.

¹²⁰ ADB, *Safeguard Policy Statement*, June 2009, www.adb.org/Documents/Policies/Safeguards/default.asp

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 obtain the consent of affected indigenous peoples' communities** in case these groups are vulnerable to projects that will use their cultural resources and knowledge; the use of natural resources on traditional lands impact their livelihoods and/or projects that can lead to physical relocation. 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 affected populations (non Indigenous peoples groups); the absence of reference to common property resources in the Operations Manual; 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 new safeguard policy).¹²¹ 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 concerns over 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.

🔗 Who can file a complaint?

- Any **group of two or more persons** (such as an organisation, association, society or other grouping of individuals) directly affected or likely to be affected by an ADB-assisted project located in a borrowing member country or a member country adjacent to their country.

¹²¹ 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.

- A **local representative** of the affected group, such as an NGO, on behalf of a directly affected community provided he/she has received the authorisation of the community.
- **In exceptional cases** where local representation is not available, a **non-local representative** can file a complaint on behalf of a directly affected community. The representative has to obtain proof that she/he has been authorised to file a complaint by the affected community and provided he or she has been approved by the Special Project Facilitator¹²². In such cases, representatives must clearly identify themselves and provide evidence of authority to represent the community¹²³.

②. Under what conditions?

- It is essential that the complainant is, or is likely to be, directly affected materially and adversely by an ADB-assisted project, irrespective of any allegation of non-compliance by ADB of its operational policies and procedures.
- The **direct and material harm must be the result of an act or omission of ADB** in the course of the formulation, processing, or implementation of the ADB-assisted project.
- 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.

HOW TO FILE A COMPLAINT?

- Complaints should preferably be submitted in English. However, complaints will be accepted in any of the official or national languages of ADB's developing member countries if the complainant is unable to provide an English translation. There will consequently be delays in the consideration of the complaint due to translation¹²⁴.
- Complaints must be in writing.
- Content of the complaint 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;

¹²² BIC, "Accountability at the ADB: how to file a claim with the Office of the Special Project Facilitator", www.bicusa.org/en/Issue.Concerns.15.aspx

¹²³ Office of the Special Project Facilitator, "Who can file a complaint?", ADB, www.adb.org/SPF/who.asp

¹²⁴ ADB, Office of the Special Project Facilitator, "Language", ADB, www.adb.org/SPF/What/language.asp

- the identity of the complainant (and 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.
- Sample complaints letters are available online:
- See also: Office of the Special Project Facilitator, Content of the complaint, Asian Development Bank, www.adb.org/SPF/What/contents.asp

Special Project Facilitator (SPF)

- Complaints will be accepted by mail, fax, electronic mail, and by hand delivery to ADB headquarters or to any ADB resident or regional mission or representative office, which will forward them unopened to the SPF¹²⁵.
- Complaints must initially be addressed specifically to the **Special Project Facilitator (SPF)**:

Special Project Facilitator
Asian Development Bank
6 ADB Avenue
Mandaluyong City
1550 Metro Manila, Philippines
Tel: (63-2) 632-4825 - Fax: (63-2) 636-2490
Email: spf@adb.org

Compliance Review Panel

- Requests for compliance review must be addressed to the Compliance Review Panel:

Secretary, Compliance Review Panel
Asian Development Bank
6 ADB Avenue
Mandaluyong City
1550 Metro Manila, Philippines
Tel: +632 632 4149 - Fax: +632 636 2088
Email: crp@adb.org

🕒 Process and Outcome

Special Project Facilitator (SPF)

Complaints must be filed, in the first instance, with the Special Project Facilitator (SPF), who reports directly to the President of the Bank. The SPF is for problem solving at the project level. A complaint is shifted to the Office of the CRP if it deals with the Bank's compliances with its policies (see section below).

¹²⁵ ADB, Office of the Special Project Facilitator, "How to file a complaint?", ADB, www.adb.org/SPF/how.asp

If the SPF determines that the request is eligible and if the SPF believes that his/her involvement could be useful, the SPF will undertake a review to determine how best to address the issues raised in the request through site visits, interviews, and meetings with the concerned parties.

After providing the review and assessment to the complainant, the SPF informs the complainant of the following two options:

- (i) The complainant can carry on with the consultation process and provide comments on the SPF's findings, or;
- (ii) the complainant can abandon the consultation process if the complainant finds the process not purposeful, and files a request for compliance review with the Compliance Review Panel (CRP) if the complainant so wishes. The SPF will give the complainant 7 days from receipt of the findings to respond.

Consultation process

The goal of the consultation process is to find a flexible, informal and cost-effective way to address the issues raised in the complaint and, where appropriate, agree on a "course of action" to address the complainant's concerns.

If the complainant decides to carry on with the consultation process, the SPF informs the complainant that the complainant has 14 days to provide comments on the SPF's findings. The SPF will then take these comments into account and make a recommendation to the President to either conclude the consultation process, or work out a proposed course of action. Each course of action will be tailored to the individual complaint. The SPF may choose different approaches, including continuing the consultative dialogue to find a mutually acceptable solution, using the SPF's good offices to create a forum between the complainant and the government of the state concerned, or establishing a mediation mechanism.

The SPF monitors the implementation of any agreement. If the consultation process ends without a resolution, the SPF submits a report to the President. The final report incorporating the President's decision on the recommendation will be furnished to the complainant, the government or private sector sponsor, and the Board for information. The final report will be made available to the public **if the complainant and the government or sponsor consent.**

It should be noted that filing a complaint will NOT suspend the project unless agreed otherwise by the ADB, by the borrowing country concerned or the private project sponsor¹²⁶.

¹²⁶ ADB, Office of the Special Project Facilitator, "Who can file a complaint?", op.cit.

Compliance Review Panel (CRP)

If the SPF finds the complaint ineligible, or a complainant considers the consultation process not purposeful, or a complainant is carrying on with the course of action but still has concerns about ADB's compliance, complainants may submit a request for compliance review to the CRP. In special cases, members of ADB's Board of Directors can also file requests for compliance review without first going through the SPF process. It should be noted that the CRP is *NOT* an appeal panel of the consultation phase. If complainants are not satisfied with the consultation phase and believe, for instance, that the compensation rate proposed is too low, their request to the CRP will most likely be found as not eligible. A request for compliance review may only be filed after consultation proceedings have been initiated with the SPF.

The CRP is an independent panel, composed of three panel members drawn from outside ADB and established by and reporting to the Board of Directors¹²⁷, it will review ADB's acts and any omissions in relation to an ADB-financed project to determine whether any actual or likely material and direct harm to affected persons has been caused by ADB's failure to comply with any of its operational policies and procedures. The CRP does not investigate the actions of the member country or its executing agencies.

A compliance request must be addressed to the CRP. The CRP shall determine the eligibility of the request. The eligibility criteria are similar to those applied by the SPF, but the request must focus on allegations of non-compliance by ADB. The Board may then authorize the compliance review, and the requester shall be notified of its decision.

The CRP clears the proposed terms of reference (TOR) and time frame with the Board Compliance Review Committee, posts the TOR and time frame on its website, and then commences the compliance review according to the TOR. **There is no time limit fixed for the conduct of the compliance review.**

At the completion of the review, the CRP issues a draft report on its findings and recommendations which it passes both to management and the requesters for comments. Within 30 days, management and the requesters can provide their responses concerning the draft report. The final report will include both the CRP's findings, the responses and the CRP's recommendations for any remedial actions necessary to bring the project back into compliance.

Within 21 days of receipt, the Board considers the final report and makes its final decision regarding the recommendations on remedial actions, if any, to achieve project compliance and/or harm mitigation. The report and the Board's decision are furnished to the requesters and posted on the CRP's website. The CRP may then monitor implementation of the remedial actions for up to five years, and publishes its annual monitoring reports.

¹²⁷ ADB, Compliance Review Panel, "Home", ADB, <http://lnadbg4.adb.org/dir0035p.nsf?Open>

The Accountability Mechanism in action¹²⁸

By December 2009, and since the approval of the new mechanism in 2003, the SPF had received 25 complaints. Among these, 9 were deemed to have met the eligibility requirements of the consultation phase. With the consent of the complainant and the government or sponsor, review and assessment reports are published on the SPF's website in the section "complaints registry", including details of agreements on remedial action. The section furthermore allows the complainants to follow the progression of the complaint prior to the official publication of the reports.

Most complaints relate to infrastructure projects and have referred to resettlement, including land acquisition, compensation, and disclosure of information. Some of the complaints are still in various stages of the consultation process, while others have led to the adoption of an action plan.¹²⁹

By December 2009, the CRP had monitored the remedial actions in one project that had previously been investigated by the former Board Inspection Committee and had received requests for compliance review in three other ADB-financed projects. Two were deemed eligible. The CRP has completed the compliance review on one of the remaining two cases and continues to monitor the remedial actions in that case. The CRP is continuing to conduct the compliance review in the second of those two eligible cases.

→ Community empowerment for rural development (CERD) in Indonesia

On 9 March 2005, the Special Project Facilitator (SPF) received the complaint of 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 villagers from 5 villages concerning the Community Empowerment for Rural Development Project (CERDP) in Indonesia. This project, which is supported by the Asian Development Bank (ADB), intended to improve the standards of living in rural communities. 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 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. The project started on 15 March 2001.

The issues raised in the complaint were the lack of villagers' participation in planning and design before construction of rural roads, bridges and water supply began which turned out to be unsatisfactory and which subsequently impacted on the agricultural productivity. The complaint was declared eligible on 23 March 2005.

¹²⁸ ADB, "Consultation Phase of the ADB Accountability Mechanism – Annual report 2007", 2008.

¹²⁹ ADB, "Final Report of the Special Project Facilitator on the Southern Transport Development project in Sri Lanka", March 2005, www.adb.org/Documents/SPF-Reports/SRI/26522/SF-SRI-1711.pdf

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 and human rights ("the right to a feeling of security and the right to freedom from fear") and good governance principles.

An agreement was reached on 26-28 September 2005, and an action plan was agreed¹³⁰. According to the SPF, most of the villagers' requests were accepted: involvement of villagers in planning, implementing and supervising the project, training for maintaining the infrastructures, repairs to the damaged buildings, guarantee on the right allocation of funds.¹³¹

* * *

After a large consultation process with civil society organizations and with the recent release of the Operations Manual, it remains to be seen how the implementation of the Bank's safeguard policy statement will evolve. Civil society organizations 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's management or Board.

As highlighted above, the Bank's grievances mechanisms remain criticized for various reasons, and particularly for not taking into account long-term and indirect harm caused by funded projects.

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 organizations 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.

On the occasion of the 43rd Annual Meeting of the Board of Governors, the ADB President announced the review of the ADB Accountability Mechanism. The review process will be initiated in 2010.

¹³⁰ ADB, "Final Report of the Special Project Facilitator on the Community Empowerment for Rural Development project in Indonesia", December 2005, www.adb.org/Documents/SPF-Reports/INO/32367/CERDP-FINAL-REPORT-dec05.pdf

¹³¹ NGO Forum on ADB, "Community Empowerment for Rural Development", www.forum-adb.org

ADDITIONAL RESOURCES

- Asian Development Bank
www.adb.org
 - Office of the SFP website
www.adb.org/spf/default.asp
 - Compliance Review Panel website
www.compliance.adb.org
 - Accountability Project, “ADB Safeguard Policy Update”
www.accountabilityproject.org
 - ASrIA (Asia)
www.asria.org/
 - NGO Forum on ADB
www.forum-adb.org
 - NGO Forum on ADB, “Comments by the NGO Forum on the ADB on the Operations Manual of the new Safeguards Policy Statement of the Asian Development Bank”, February 2010
www.forum-adb.org/docs/OMSPScomments021010.pdf
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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, they do not have adjudicative power and 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 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 lack of confidence in these mechanisms' ability to provide a remedy will prevent affected people from taking advantage of the complaint mechanisms. Although these mechanisms present 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.



➤ Demonstration on the occasion of the World Social Forum in Nairobi, 2008.

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➤ Comparative table of the IFIs' mechanisms

MECHANISM	WORLD BANK INSPECTION PANEL	WORLD BANK COMPLIANCE ADVISOR OMBUDSMAN	EUROPEAN INVESTMENT BANK COMPLAINTS OFFICE 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 who represents the complainant: <ul style="list-style-type: none"> - 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 	<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.	Non-compliance with the performance standards (PS) including social and environmental assessment, labour and working conditions, land acquisition and involuntary resettlement, biodiversity conservation, indigenous peoples.	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.	
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.	

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT'S INDEPENDENT RECOURSE MECHANISM	INTER-AMERICAN DEVELOPMENT BANK INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM	AFRICAN DEVELOPMENT BANK - COMPLIANCE REVIEW AND MEDIATION UNIT	ASIAN DEVELOPMENT BANK OFFICE OF SPECIAL PROJECT FACILITATOR (OSPF) AND OFFICE OF COMPLIANCE REVIEW PANEL (OCRPF)
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 organization(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 organizations 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 organizations, 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. 	<ul style="list-style-type: none"> - Any group of two or more persons (such as an organization) 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 the bank principles such as environmental sustainability, health, safety and community issues.	Non-compliance with its operational policies or norms in the design, analysis or implementation of proposed or ongoing operations (5 policies for the first three years of effectiveness of the ICIM)	Violation of policies/ procedures including non-compliance with its environmental and social impact, poverty reduction, gender and involuntary resettlement	Non-compliance with its operational policies or procedures
Within 12 months of the physical completion of the project being financed by the Bank, or 12 months from the last disbursement of funds by the Bank.	Within 24 months after the last disbursement of funds by the Bank.	No stated time limit for complaints, however, complaints regarding completed projects are unlikely to result in action.	No stated time limit for complaints, however, complaints regarding completed projects are unlikely to result in action.

➤ Comparative table of the IFIs' mechanisms (continued)

MECHANISM	WORLD BANK INSPECTION PANEL	WORLD BANK COMPLIANCE ADVISOR OMBUDSMAN	EUROPEAN INVESTMENT BANK COMPLAINTS OFFICE AND THE EUROPEAN OMBUDSMAN
<p>Type of mechanism and outcome</p>	<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.</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. Possible options include: promoting dialogue, mediation or conciliation, releasing an interim report, or conducting an investigation. Possible outcome include a final report with conclusions of the investigation into IFC's compliance of its policies and recommendations.</p>	<p>The complaint office verifies whether the EIB followed its policies and regulatory obligations. Possible outcomes include mediation or request for correction actions.</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 INDEPENDENT RECOURSE MECHANISM	INTER-AMERICAN DEVELOPMENT BANK INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM	AFRICAN DEVELOPMENT BANK - COMPLIANCE REVIEW AND MEDIATION UNIT	ASIAN DEVELOPMENT BANK OFFICE OF SPECIAL PROJECT FACILITATOR (OSPF) AND OFFICE OF COMPLIANCE REVIEW PANEL (OCRPF)
<p>The PCM can act on two fronts , depending on the facts under investigation:</p> <p>(1) compliance review to restore dialogue between the complainant and the client</p> <p>(2) problem-solving initiative to determine if the ERBD 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>The ICIM may result in:</p> <ul style="list-style-type: none"> - Consultation Phase <p>The Project Ombudsman conducts an assessment to clarify the issues and concerns raised by the requester. It can result in an agreement which will be made public or in a request to the panel for compliance review assessment.</p> <ul style="list-style-type: none"> - Panel for Compliance Review <p>The panel will consult with all stakeholders and prepare a report for a Board decision on preventive and correction action.</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>Consultation process: possible outcomes include mediation and agreement between the parties.</p> <p>Compliance review process: The CRP will review ADB's acts and any omissions in relation to an ADB-financed project. The CRP will issue a report and the Board will make a final decision, including recommendations on remedial actions.</p>

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, credit insurance and /or guarantees. 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 who work 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 support¹³².

In 1963, the OECD established the “Working Party on Export Credits and Credit Guarantees” (ECG) which is charged with 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 social and environmental standards in their decision making processes. Since these agencies are state organs, the states may be violating their obligations under international law if they do not make sure that the ECAs act in conformity with human rights standards. According to Transparency International¹³³, 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). Furthermore, according to OECD’s statistics, the overall export credits amount to 30-40% of national foreign debt of the beneficiary countries.

¹³² ECA Watch - International NGO Campaign on Export Credit Agencies, www.eca-watch.org

¹³³ Transparency International – The Global Coalition against Corruption, www.transparency.org/

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; the pace at which they are changing their policies and attitudes is unfortunately 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 May 13th 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)¹³⁴ and then followed by the Canadian export credit agency. In 2003, the Coface (France) 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.⁴ Some agencies have established complaints 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**¹³⁵ directed at the OECD member countries with the aim at 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, in 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 regulations.¹³⁶ 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.⁶ Through the adoption of the Recommendation, the OECD members have accepted to apply the International Finance Corporation's (IFC) social and environmental standards (themselves criticized by NGOs, see Part I, Chapter I) to their ECAs.¹³⁷

¹³⁴ The Equator Principles, *Eksport Kredit Fonden adopts the international "Equator Principles" guidelines*, The Equator Principles, 13 May 2004, www.equator-principles.com/ekf.shtml

¹³⁵ Jakarta Declaration, May 2000, www.eca-watch.org/goals/jakartadec.html

¹³⁶ OECD, *OECD Adopts Stronger Environmental Common Approaches for Export Credits*, www.oecd.org

¹³⁷ 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.

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 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 government.¹³⁸ The EDC financially supports companies with the aim to develop the Canadian export market and to profit from the possibilities and opportunities offered by the international marketplace.¹³⁹ The EDC has implemented a complaints mechanism which is run by the **Compliance officer**.

🕒 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 responsibilities¹⁴⁰. The five main principles governing social responsibility are embedded in the organisation's policies and, in a nutshell, 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 impacts of prospective projects; and
- *Transparency*;
- *Organisational climate*; and
- *Community Investment*.

Every year since 2004, the agency has publishes annual reports 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.

¹³⁸ EDC, *Introduction to Corporate Information*, Supporting Canadian Exports and Foreign Direct Investments, www.edc.ca/english/corporate.htm

¹³⁹ EDC, *Mandate and Role*, EDC's mandate, www.edc.ca/english/corporate_mandate.htm

¹⁴⁰ EDC, *Introduction to Social Responsibility*, EDC's CSR statement of commitment, www.edc.ca/english/social.htm

In April 2008, 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 rights.¹⁴¹ The agency furthermore confirms that it will undertake impact assessments to evaluate the impact of its projects on human rights. Unfortunately the EDC does not make its methodology or results public.¹⁴²

🔗 Who can file a complaint?

Any individual, group, community, entity or other party affected or likely to be affected by EDC’s activities can submit a complaint. If a complaint is being made on behalf of another party, that group should be identified and evidence of authority to represent that group provided.

🔗 Under what conditions?

There is no particular deadline for filing a complaint.
The complaint must be in writing in either English or French.

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:

**151 O’Connor Street,
Ottawa ON K1A 1K3
fax ((613) 594-3782)
email: complianceofficer@edc.ca**

¹⁴¹ EDC, *EDC statement on human rights*, Export development Canada, www.edc.ca/english/social_15113.htm

¹⁴² K. Keenan, *Export Credit Agencies and the International Law of Human Rights*, Halifax Initiative Coalition, January 2008.

or delivered to the office of the Compliance Officer at:

**151 O'Connor Street
Ottawa, Ontario
Canada**

You can also fill in an electronic Request for Review Form.

An online complaint form can be used and submitted electronically:

www.edc.ca/edcsecure/eforms/csr/request_review_e.asp.

Process and outcome

- “Much like an ombudsman, the Compliance Officer operates independently from EDC management, receiving and reviewing complaints from stakeholders. The Officer also fields inquiries about EDC’s fulfilment of its Corporate Social Responsibility (CSR) policies and initiatives”.¹⁴³
- 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 be charged with the follow up.

NOTE

the mechanism has no judicial standing. EDC specifically emphasises that “the ombudsman-like role works in such a way that the confidentiality of information needed to run an effective process is given priority over the actual product or outcome”.¹⁴⁴

ADDITIONAL RESOURCES

- **N.L. Bridgeman, “Export Development Canada’s (EDC) Compliance Officer” in N. L. Bridgeman, *Accountability Resource Guide, Version 5.3, Accountability Counsel, November 2009***
www.accountabilitycounsel.org
 - **Halifax Initiative**
www.halifaxinitiative.org
-

¹⁴³ EDC, *Compliance Officer, Export development Canada*, www.edc.ca/english/compliance.htm

¹⁴⁴ *Ibid.*

USA – Overseas Private Investment Corporation (OPIC)

The **Overseas Private Investment Corporation (OPIC)**¹⁴⁵ 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 review.¹⁴⁶ 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.

🕒 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 Foreign Assistance Act of 1961, as amended, and OPIC's Environmental Handbook - February 2004.¹⁴⁷ Most of OPIC's policies are based on the policies and standards of financial institutions such as the IFC – International Financial Corporation - which is part of the World Bank Group. Recently, legislation was enacted which requires 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 (22 U.S.C., para 229b).¹⁴⁸

According to the policies, OPIC must ensure respect of:

- *Strict Environmental and Social Norms* as described in the OPIC Environmental Handbook. The Handbook¹⁴⁹ is intended to provide guidance to OPIC's investors, as well as the interested public, with respect to the environmental and social standards and also assessments and monitoring procedures that 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.). OPIC is currently revising its environmental and social policy. Comments made by civil society organisations can be accessed online: www.opic.gov/doing-business/investment/environment/policy_revision

¹⁴⁵ OPIC – Overseas Private Investment Corporation, www.opic.gov/

¹⁴⁶ OPIC, *Office of Accountability*, Overseas Private Investment Corporation, www.opic.gov/doing-business/accountability

¹⁴⁷ OPIC, *Compliance Review*, Overseas Private Investment Corporation, www.opic.gov/doing-business/accountability/compliance-review

¹⁴⁸ 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.

¹⁴⁹ OPIC, *Opic Environmental Handbook 2004*, www.opic.gov/sites/default/files/docs/opic_env_handbook.pdf

– *Worker’s Rights*

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. OPIC cannot provide assistance for any program, project, or activity that contributes to the violation of “internationally recognized workers rights”, including the right of association and collective bargaining, prohibition of forced labour, minimum age for employment and acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety.¹⁵⁰ OPIC includes a clause on the respect for workers’ rights in every contract it signs. Exceptions can be made by invoking articles 231A (3) and 231A (4) of the *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, as required by the Foreign Assistance Act of 1961. 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 endangered.¹⁵¹

– *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*

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 that are sensitive, diverse, or have unprecedented mitigating circumstances are disclosed to the public for a comment period of 60 days.¹⁵²

¹⁵⁰ OPIC, *Worker and Human Rights*, Overseas Private Investment Corporation, www.opic.gov/doing-business/investment/rights

¹⁵¹ Children’s rights are also mentioned. See the *Foreign Assistance Act*, section 116 as amended, 1994.

¹⁵² They are available for consultation in the section “Investment Policy / Environment”: www.opic.gov/doing-business/investment/environment

🔗 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
- OPIC’s President & CEO
- OPIC’s Board of Directors

🔗 Under what conditions?

The request must relate to a project for which OPIC has concluded a financial agreement or insurance contract with the contractor responsible for the project and OPIC maintains a contractual relationship with the sponsor.

HOW TO FILE A COMPLAINT?

Contents 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.
- Whether the requester wishes his/her identity and/or information provided to the Office of Accountability to be kept confidential, giving reasons.
- 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 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, identification of the OPIC statutes, policies, guidelines or procedures related to environmental, social, worker rights or human rights impacts that is the subject of the compliance review request.
- A complaint, problem-solving or compliance review, can be sent via email 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 had treated two compliance reviews**. The reports and the cases are available on the website.¹⁵³

The Office of Accountability in action

➔ **Baku-Tbilissi-Ceyhan Pipeline Project (BTC)**

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 audit.¹⁵⁴

➔ **Cœur d’Alene Mines Corporation, Bolivia**

In April 2008, an indigenous community affected by the Coeur 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 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 population.¹⁵⁵

UK – Export Credits Guarantee Department (ECGD)¹⁵⁶

The **Export Credits Guarantee Department (ECGD)** is the UK’s official Export Credit Agency (ECA). It is a non -ministerial governmental department and an executive agency, reporting to the Minister of State to the Secretary of State for Business, Enterprise and Regulatory Reform.

The largest part of ECGD’s activities involves underwriting long-term loans to support the sale of capital goods, principally for the export of military equipment, but also for aircraft, bridges, machinery and services; it helps UK companies take

¹⁵³ For further information on the compliance review, please visit www.opic.gov/doing-business/accountability/compliance-review

¹⁵⁴ Office of Accountability, *Compliance Review of OPIC’s Environmental Due Diligence and Monitoring of the Baku-Tbilissi-Ceyhan Oil Pipeline Project*, Overseas Private Investment Corporation, 12 February 2007

¹⁵⁵ Office of Accountability, *Bolivia Coeur d’Alene Mines/ San Barolome Reports*, Overseas Private Investment Corporation, 24 February 2009.

¹⁵⁶ ECGD, www.ecgd.gov.uk

part in major overseas projects such as the construction of oil and gas pipelines and the upgrading of hospitals, airports and power stations.

In December 2000, ECDG adopted a Statement of Business Principles, which included a commitment to Sustainable Development, and introduced environmental and social assessment procedures. Following a public consultation on proposed revisions to the business principles, ECDG announced in April 2010 that it “will follow the OECD agreements about the environment, sustainable lending and bribery, and not create policies which go beyond those agreements”.¹⁵⁷

In its Guidance to applicants¹⁵⁸, ECDG says that it will **apply standards dealing with environmental, social and human rights impacts for certain projects only** (repayment term of 2 years and more for the export credit, total amount of ECDG support greater than 10 million GBP or the project is in or near a sensitive area). In the case category A cases (potential to have significant adverse environmental impacts as defined by the OECD), ECDG will request from the project sponsor information contained in an Environmental Impact Assessment and/or Social Impact Assessment and/or Resettlement Action Plan. For these projects, ECDG will publish on its website a brief account of the project at least 30 days before a decision is made in order to allow interested parties to submit comments. For category B projects (medium impact), ECDG will in principle only require the completion of an Impact Questionnaire.

② Who can file a complaint?

Any individual, group, community, entity or other party affected or likely to be affected by ECDG’s activities can submit a complaint.

HOW TO COMPLAIN?

– Complaints submitted by a client of ECDG are firstly internal to the agency.

ECGD
PO Box 2200
2 Exchange Tower
Harbour Exchange Square
London E14 9GS
Telephone: +44 (0)20 7512 7000
Fax: +44 (0)20 7512 7649

Online complaint form: www.ecgd.gov.uk/cont_us/making-a-complaint-at-ecgd

¹⁵⁷ ECGD, Final response published on the business principles consultation, 1 April 2010.

¹⁵⁸ ECGD, Guidance to applicants: processes and factors in ECGD Consideration of Applications, 16 April 2010.

- If the person is still not satisfied, or is not a client of the agency, he or she can contact the Minister for Trade, Investment and Business.
- If still not satisfied, the person can ask his/her Member of Parliament to refer the case to the Parliamentary Ombudsman. For more advice from the Ombudsman's office.
- For more information on how to file a complaint, contact ECGD www.ecgd.gov.uk/cont_us/complaints

The ECGD in action

➔ The Baku-Tbilissi-Ceyhan Pipeline Project (Azerbaijan – Georgia – Turkey)

The ECGD, financing the project, recently published documents containing information on the environmental and social impact assessment. These documents had not been publicly accessible at the time of the consultation period. Although BP is supposed to apply the highest environmental standards, these documents confirmed that this was not the case and that BP had been made exempt from environmental laws in the region throughout the duration of the contract. ECGD had been aware of this from the start of the project.¹⁵⁹ A complaint was submitted in 2006 before the US Office of Accountability. However, ECGD didn't retire from the project.

At the time of writing, the ECGD was facing serious criticisms by some NGOs¹⁶⁰ for its recent announcement of change in policy: projects requesting short-term (two years) export credits or projects in which the UK exporters' share is worth less than approximately £10 million would in future be approved without any screening (concerning their potential environmental and human rights impacts). The justification for the policy change is to reduce a supposed burden on business.

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 (now part of Siemens), banks and export credit agencies (Germany, Austria and Swiss) helped finance the project. Initially the governments made assurances

¹⁵⁹ ECA Environmental Subgroup, *Memorandum - BTC: Potential Breaches of Local Environmental Law*, www.eca-watch.org/problems/oil_gas_mining/btc/ECGD_BPU_Doc_3.pdf, www.thecornerhouse.org.uk/item.shtml?x=566297

¹⁶⁰ The Corner House, "Court action to stop UK government department lifting ban on child and forced labour", www.thecornerhouse.org.uk/item.shtml?x=566297

that the project respected international standards. However an expert report published in July 2008 claimed the contrary (Forced migration threatens 78000 Kurds, archaeological sites are being buried etc.)

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 for the project.¹⁶¹ Although the withdrawal does not symbolise a general tendency, it does show the increasing consideration for social and environmental standards on behalf of export credit agencies. 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.¹⁶²

ADDITIONAL RESOURCES

- **Centre for International Environmental Law, A Citizen's Guide to the Accountability Mechanism at the OPIC, Perrault, October 2007**
www.ciel.org/Publications/OPIC_Oct2007.pdf
-

* * *

As of today, only a few ECAs consider the human rights impacts of the projects they support.¹⁶³ Most export credit agencies such as Coface in France, Ducroire in Belgium and Euler Hermes Kreditversicherungs-AG in Germany, still do not have complaints' mechanisms in place. Furthermore, the existing mechanisms have no legally binding powers. Victims can only hope that the recommendations in their favor are seriously taken into consideration by the agencies. Since the mechanisms are based on dialogue, they cannot offer the victims any compensation or reparation. Yet export credit agencies can be used as a powerful tool to exert public pressure. The withdrawal of the export credit agencies from the Ilisu Dam project demonstrates the impact that civil society.

¹⁶¹ ECA, *German, Swiss and Austrian ECAs confirm cancellation of Ilisu credits, What's New?*, ECA, vol. 8, n°7, July 2009

¹⁶² Stop Ilisu Campaign, www.stopilisu.com

¹⁶³ 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.

The ECAs are facing increased pressure from the international community. The UN Special representative on business and human rights has started looking into the behaviour of the ECAs as part of states' duty to protect.

ADDITIONAL RESOURCES

– **ECA Watch (International NGO campaign on export-credit agencies)**
www.eca-watch.com



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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 Principles¹⁶⁴ (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 only applied to projects exceeding 50 million dollars US and concerned only around a dozen international banks. The new version which has been in place since July 2006 is based on criteria developed by the IFC (International Finance Corporation) which is the institution of the World Bank Group in charge of the private sector. The new Principles apply to all projects exceeding 10 million dollars US. To date, 68 banks in 28 countries have adopted the Principles (see table below).

🕒 What is the scope of the Principles?

The banks which adopted the Principles are called the Equator Principles Financial Institutions (EPFI) and they are committed to only providing loans to projects which support sustainable development, the protection of health, the protection of cultural heritage and biological diversity, the prevention and control of pollution and to consider the impact the projects may have on indigenous populations and communities. The 10 Equator Principles are guidelines which are intended to assist the banks decide on which projects to finance. The environmental and social impact assessment requirements vary depending on the potential impact of each project.

The principles only apply to project financing which only represents about 1% to 2% of corporate and investment banks' activities.

¹⁶⁴ The Equator Principles, *A financial industry benchmark for determining, assessing and managing social & environmental risk in project financing*, www.equator-principles.com/principles.shtml

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: Social and Environmental Assessment

For each project assessed, the borrower is required to conduct a Social and Environmental Assessment to address the relevant social and environmental impacts and risks of the proposed project. The Assessment should also propose mitigation and management measures relevant and appropriate to the nature and scale of the proposed project.

Principle 3: Applicable Social and Environmental Standards

The Assessment will refer to the applicable IFC Performance Standards and the applicable Industry Specific Environmental, Health and Safety Guidelines (“EHS Guidelines”) as well as to the host country environmental and social laws and regulations.

Principle 4: Action Plan and Management System

The borrower must prepare an Action Plan (AP) which addresses the relevant findings, and draws on the conclusions of the Assessment. The AP will describe and prioritise the actions needed to implement mitigation measures, corrective actions and monitoring measures necessary to manage the impacts and risks identified in the Assessment. Borrowers will build on, maintain or establish a Social and Environmental Management System that addresses the management of these impacts, risks, and corrective actions.

Principle 5: Consultation and Disclosure

The government, borrower or third party expert must consult with project affected communities in a structured and culturally appropriate manner. For projects with significant adverse impacts on affected communities, the process will ensure their free, prior and informed consultation and facilitate their informed participation as a means to establish whether a project has adequately incorporated affected communities’ concerns.

Principle 6: Grievance Mechanism

The borrower will, scaled to the risks and adverse impacts of the project, **establish a grievance mechanism** 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.

Principle 7: Independent Review

An independent social or environmental expert not directly associated with the borrower will review the Assessment, AP and consultation process documentation in order to assist EPFI's due diligence, and assess Equator Principles compliance.

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

To ensure ongoing monitoring and reporting over the life of the project, EPFI will require appointment of an independent environmental and/or social expert, or require that the borrower retain qualified and experienced external experts to verify its monitoring information which would be shared with EPFI.

Principle 10: EPFI Reporting

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 standards.¹⁶⁵

Limitations to the Equator Principles

The new principles are considered as an improvement of the old ones. This is mainly due to the fact that the principles encompass more projects (10 million versus 50 million dollar projects) and as well as stricter environmental and social standards. However, the principles remain widely criticised.¹⁶⁶

¹⁶⁵ Equator Principles, *Guidance to EPFIs on Incorporating Environmental and Social Considerations into Loan Documentation*, August 2009, www.equator-principles.com/bestpractices.shtml

¹⁶⁶ See part I, criticism of the *Performance Standards* of the IFC which are also applicable to the Equator Principles.

The principles remain vague

Many NGOs demand a review of the principles and their application and denounce the imprecision and vagueness of their formulation.¹⁶⁷ Banktrack¹⁶⁸ 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.

No independent review or recourse mechanism:

Any bank can adopt the Principles but it should be noted that the EPFI has 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 complaints' mechanism **it is possible to alert the Equator Principles' Board of violations.**

Extend the scope

The fact that the principles only apply to project financing which only represents about 1% to 2% of corporate and investment banks' activities remains largely criticized. It is hardly justified that banks consider certain social and environmental issues important and "material" in one part of their business but not in other activities. Civil society organisations maintain that the Principles should be extended to all "projects" funded regardless of the share they represent in the bank's overall activities.

The Equator Principles in Action

→ Nine NGOs press charges against Calyon

On May 18, 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

¹⁶⁷ Novethic, *Le financement des industries extractives: les principes d'Equateur mis à mal*, Novethic, (only available in French) www.novethic.fr/novethic/finance/engagement/financement_industries_extractives_principes_equateur_mis_mal/75138.jsp

¹⁶⁸ BankTrack, About BankTrack, www.banktrack.org

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.

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/
-



➤ Syama mining site, Mali
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➤ Banks members of the Equator Principles

Argentina	Banco Galicia
Australia	ANZ National Australia Bank Westpac Banking Corporation Export Finance and Insurance Corporation (EFIC)*
Belgium	Dexia Group Fortis KBC Bank N.V.
Brazil	Banco Bradesco Banco do Brasil 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.
Costa Rica	CIFI
Egypt	Arab African International Bank
France	BNP Paribas Calyon Corporate and Investment Bank Societe Generale
Denmark	Eksport Kredit Fonden*
Germany	HypoVereinsbank KfW IPEX-Bank* WestLB AG
Italy	Intesa Sanpaolo MCC
Japan	Mizuho Corporate Bank, Ltd. SMBC The Bank of Tokyo-Mitsubishi UFJ, Ltd

The Netherlands	FMO Fortis Bank Nederland ING Group Rabobank Group
Morocco	Banque Marocaine Du Commerce Extérieur (BMCE Bank)
Nigeria	Acces Bank PLC
Norway	DnB Nor
Oman	BankMuscat
Portugal	Banco Espírito Santo Group Millennium bcp
South Africa	Nedbank Group Standard Bank Group
Spain	BBVA S.A. Caja Navarra la Caixa Banco Santander
Sweden	Nordea SEB
Switzerland	Credit Suisse Group
Togo	Financial Bank
United Kingdom	Barclays plc HBOS HSBC Group Lloyds TSB Standard Chartered Bank The Royal Bank of Scotland
United States	Bank of America Citigroup Inc. E+Co JPMorgan Chase Wachovia Wells Fargo
Uruguay	Banco de la República Oriental del Uruguay

*Official export-credit agencies

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 proacting in questioning 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 funds.¹⁶⁹

SRI can take on different forms:

– the adoption of principles and codes of conduct which favour responsible investing;

¹⁶⁹ Umlas, *Investing in the workforce: social investors and international labour standards*, ILO, Geneva, 2009.

- 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 aimed at encouraging the private sector to engage and take 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. The PRI are based on six main principles which require investors to consider environment, social and corporate governance issues (ESG) in their management of investment portfolios. They require:

- incorporation 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
- reporting activities and progress towards implementing the Principles.

There are 3 categories of signatories: asset owners, investment managers and professional service partners. In 2010, there were around 700 signatories 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 Holdings and Trinity Holdings), as they did not fulfil this one and only condition.

Private Equity Council's Guidelines

On 10th February 2009, a year after having signed the PRI, the Private Equity Council, an advocacy, communications, research organization 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.

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), Innovest (US and Canada), Ethiscan (Canada), Eiris (UK) and SiRi Company (international network based in Switzerland).¹⁷⁰

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 March 2010, assets of the pension fund were around 443 billion dollars.

This fund belongs to the government and is managed by Norway's Central Bank, Norges Bank. In November 2004, the Norwegian government developed ethical guidelines which the fund management has to abide by concerning its investments. The fund promotes ethical trading by following three main strategies:

¹⁷⁰ FIDH has for its part develop its own methodology which it applies to its ethical fund "Libertés & Solidarité", www.fidh.org

- Exercise of ownership rights in order to promote long-term financial returns, based on the UN Global Compact and the OECD Guidelines for Corporate Governance and for Multinational Enterprises;
- Negative screening of companies from the investment universe that either themselves, or through entities they control, produce weapons that through normal use may violate fundamental humanitarian principles;
- **Exclusion of companies** from the investment universe where there is considered to be an unacceptable risk of **contributing to**:
 - **Serious or systematic human rights violations**, such as 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 damages;
 - Gross corruption;
 - Other particularly serious violations of fundamental ethical norms.

In 2009, the Ministry of Finance conducted a broad evaluation of the ethical guidelines, receiving more than 50 consultative comments. In March 2010, the Norwegian Ministry of Finance adopted two new guidelines for responsible investment practices in the Government Pension Fund Global: one linked to exclusion and observation of companies and one for Norges Bank’s work on responsible management and exercise of ownership rights. Production of tobacco has been introduced as a new criterion for exclusion, and the fund has sold its holdings in tobacco producing companies. The new guidelines enable a slightly broader assessment of the situation before a company is excluded on grounds of grossly unethical behaviour. Prior to excluding a company from the fund, the Norges’ Bank is paying increased attention to what they refer to as “active ownership”, that is engaging with the company to address violations identified and to bring changes in the company’s behaviour, such as considerations of good corporate governance and environmental and social issues into investment activities.¹⁷¹

This ethical management, active since 2004, gave rise to various decisions to disinvest (see examples below).

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. According to Eiris, provider of independent investment research into environmental, social, governance and

¹⁷¹ Norwegian Ministry of Finance, “New guidelines for responsible investment practices in the Government Pension Fund Global (GPGF)”, www.regjeringen.no/en

ethical practices, Norway is considered to be one of the three top countries that has implemented ethical code standards and monitoring of companies as a part of its investment strategy.

Currently the fund hold shares in approximately 8,500 companies worldwide.¹⁷²

HOW TO GET IN TOUCH WITH THE FUND?

– Any individual can put forward his or her opinion concerning 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), Hanwha Corporate (South Korea).

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.

¹⁷² The list of holdings of the fund as of 31 December 2009 is available, www.regjeringen.no/Upload/FIN/Statens%20pensjonsfond/nbim/eq_holdings_spu_sorted_09.pdf

Mining companies excluded due to their environmental degradation:

In April 2008, the fund decided to exclude the group Rio Tinto (UK) due to its activities in its mine Grasberd in Freeport in Indonesia due to the risk of earth and water contamination. In January 2009, the company Barrick Gold (Canada) was also excluded due to the pollution generated by its mining activities in Papua New Guinea.¹⁷³

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) et UBS Equity Fund-Global Innovators (UBS GAM).¹⁷⁴

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 by 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, 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 exert 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

¹⁷³ Ministry of Finance, *Companies excluded from the Investment Universe*, www.regjeringen.no/en/dep/fin/Selected-topics/The-Government-Pension-Fund/Ethical-Guidelines-for-the-Government-Pension-Fund--Global/-companies-excluded-from-the-investment-u.html?id=447122

¹⁷⁴ Novethic, *Le Media Expert du Développement Durable*, www.novethic.fr

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 exert influence on a company will often depend in which country the company has its headquarters.

In France for example, a shareholder has five legal ways of bringing issues to the attention of company directors and other shareholders¹⁷⁵:

- Directing a question to the president Chairman of the general meeting verbally: during the AGM of a company, the Chief Executive Officer (CEO) or his representative gives shareholders the possibility to take the floor during "question period".
- Directing a written question to the Board of Directors: this initiative is more difficult for the general management to deal with because they have to make a formal written reply. The impact of this can be very detrimental to a company especially if it receives media attention.
- Amendment of a resolution proposed by the Board of Directors: every shareholder can propose one or more amendments to the resolutions made by the Board of Directors provided that a formal written application has been made to the company prior to the AGM. The shareholder is obliged to communicate his or her proposals, including relevant documentation giving reasons for the proposal, to all other shareholders a few days prior to the AGM.
- 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 resolution by the AGM will automatically exclude the vote on the contradictory resolution. As a result, a contradictory amendment will only be examined in case the first resolution is rejected.
- Proposal for a new resolution: according to the law governing companies, a shareholder who owns a certain percentage of the capital (between 5% and 0,5% of the shares depending on the size of the capital of the company) can, in certain circumstances, propose a resolution; as above proposals must be submitted to the company for inclusion in the Agenda for the AGM.

In Canada, as in France, 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 (L.R., 1985, ch. C-44, art. 137 and following). To be eligible to submit a proposal, a person¹⁷⁶:
(a) 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

¹⁷⁵ Code du commerce, Article L225-102 and following.

¹⁷⁶ Canada Business Corporations Act, (R.S., 1985, c. C-44), art 137(1), http://laws.justice.gc.ca/en/showdoc/cs/C-44/bo-ga:l_XII/20090818/fr#anchorbo-ga:l_XII

(b) 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 provided¹⁷⁷ and the proof required have been given¹⁷⁸, the company must include the proposal either as an appendix or a separate document in the notice of the meeting according to article 150.¹⁷⁹

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 "Securities and Exchange Commission"¹⁸⁰.

Shareholders activism in action

Investors

The NGO Investors Against Genocide (IAG) recently attempted to introduce a proposal to the Board of directors of investment funds who had been accused of investing in companies which have business interests in Sudan.

In March 2009, as a result of the activism of IAG, TIAA-CREF, a US mutual fund announced it would set up a dialogue with the targeted companies, including PetroChina. On January 4, 2010, TIAA-CREF announced that it had sold all of its holdings, worth \$58 million as of September 30, in four companies.¹⁸¹

Companies

In 2006, two US trade unions (Service Employees International Union and International Brotherhood of Teamsters) came to the UK to convince the investors of the group FirstGroup Plc to lodge a proposal in respect of the anti-union practices of its subsidiary FirstStudent. The support of the institutional investor Cooperative Insurance Society was decisive, as its vote constituted 15 % at the annual general meeting of the group. In the follow up, the company accepted to take measures to improve the situation. One such measure was to put in place a confidential hotline to call in case of anti-union practices.¹⁸²

¹⁷⁷ *Ibid.*, §1.2.

¹⁷⁸ *Ibid.*, §1.4.

¹⁷⁹ *Ibid.*, §2.

¹⁸⁰ US Security and Exchange Commission, *Shareholder Proposals*, www.sec.gov/answers/shareholderprop.htm

¹⁸¹ TIAA-CREF, *TIAA-CREF Statement on former Holdings in Companies with ties to Sudan*, TIAA-CREF – Financial Services for the Greater Good, 26 March 2009, <http://investorsagainstgenocide.net/tiaa-cref>

¹⁸² E. Umlas, *op. cit.*, p.18.

The NGO Amnesty International UK also put pressure on companies through shareholder participation. For example, Amnesty lodged a proposal with Yahoo! at its annual general meeting requiring the company to oppose the censorship on freedom of information and expression in China.

FIDH and other NGOs have at several occasions raised oral and written questions during the General Assembly of TOTAL regarding its activities in Burma, requesting the company to publicly communicate on the payments made to the Burmese regime. This has certainly contributed to the publication by TOTAL of some information regarding these payments.¹⁸³

* * *

Shareholder participation can prove to be a useful and influential tool.

Although it is not an easy task¹⁸⁴, companies can be forced to react and modify their policies with respect to human rights as a result of the financial pressures that shareholders can exert. 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.

ADDITIONAL RESOURCES

- **ASrIA (Asia)**
www.asria.org
- **AI Canada: Share Power 2009**
www.amnesty.ca/blog2.php?blog=share_power_2009
- **Interfaith Centre on Corporate Responsibility**
www.iccr.org
- **Siran**
www.siran.org

¹⁸³ FIDH, "Assemblée générale de Total: les ONG se mobilisent", Press Release, www.fidh.org/Assemblee-generale-de-TOTAL-les-ONG-se-mobilisent / FIDH, "Des ONG interpellent le Groupe Total sur sa présence en Birmanie", Press Release, www.fidh.org/Des-ONG-interpellent-le-Groupe-sur-sa-presence-en

¹⁸⁴ Some companies have tried to avoid the introduction of resolutions on human rights by invoking the existence of a policy which renders any such resolution obsolete. In July 2009 this was the case concerning the Vanguard fund – IAG, Vanguard, IAG- Investors against Genocide, <http://investorsagainstgenocide.net/vanguard>

- **Social Investment Organization (Canada)**
www.socialinvestment.ca
 - **US SIF (USA)**
www.socialinvest.org
 - **Eurosif (Europe)**
www.eurosif.org
 - **FairPensions (the Campaign for Responsible Investment)**
www.fairpensions.org.uk/
 - **Forum pour l'Investissement Responsable**
www.frenchsif.org
 - **Investors Against Genocide (IAG)**
<http://investorsagainstgenocide.net>
 - **Northwest Coalition for Responsible Investment (USA)**
www.ipjc.org/programs/nwcri.htm
 - **Responsible Investment Association Australasia**
www.responsibleinvestment.org/html/s01_home/home.asp
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SECTION V

**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

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For over a decade, a number of voluntary initiatives on corporate social responsibility (CSR) have been established in response to the growing concerns of stakeholders 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 for some of them human rights and/or labour rights principles, that participating companies voluntarily commit to respect 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 UN initiated the Global Compact); others were launched by governments (EITI, Kimberley Process) some bring together a number of stakeholders (so-called “multi-stakeholder initiative” gathering businesses, governments, NGOs, trade unions); some are business-led, while others are sector-oriented.

Aside from joining these initiatives, most of the world’s largest companies have adopted their own CSR policies, code of ethics, ethical charters or code of conduct. Some of these policies are based on the companies’ own values while others explicitly refer to internationally recognised human rights standards. The business and human rights website has listed 256 companies with a formal human rights policy.¹

Another interesting trend is the conclusion of international framework agreements (IFA) within multinational companies negotiated between the company and a global union federation (GUF), through which the parties commit to respect labour rights standards in all the company’s operations throughout the world. These types of agreements usually include a monitoring procedure.

To respond to criticisms of CSR initiatives that are deemed too “soft” because there are deprived of any power to sanction companies not respecting the principles they have committed to follow, some initiatives have recently established procedures to review companies’ policies and ultimately remove from the list of participants those not complying with the principles put forward by the initiative. This conse-

¹ Business and Human Rights Resource Centre, www.business-humanrights.org

quence can certainly be considered as 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 “blame and shame” companies that use CSR initiatives for so-called “green-washing.” Some initiatives disclose information on complaints that were filed against the companies and their outcome while others remain silent. It is thus difficult to assess the usefulness of some of these complaints mechanisms. Where available and relevant, this section provides an insight into concrete cases handled by grievance procedures. It can be helpful to engage parallel actions to filing a case before such a grievance mechanism, including public campaigning to publicise the complaint in order to apply some pressure on the company and the CSR initiative to solve the matter.

Furthermore, a company’s public commitments to respect human rights and environmental standards, even if considered as “voluntary”, may be used in legal procedures against it, for example by using competition law or consumer protection laws.

The current chapter briefly reviews a number of the existing initiatives that include some kind of procedure for complaint; describes international framework agreements and, finally, proposes some ways in which to use voluntary commitments in legal procedures.

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 “seeks to align business operations and strategies everywhere with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption”.²

With over 7 500 corporate participants and other stakeholders from over 130 countries, the UN Global Compact has become the largest corporate responsibility initiative.

THE TEN PRINCIPLES OF THE GLOBAL COMPACT

Human Rights

- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights.
- Principle 2: Make sure that they are not complicit 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: The elimination of all forms of forced and compulsory labour.
- Principle 5: The effective abolition of child labour.
- Principle 6: The elimination of discrimination with regard to employment and occupation.

² UNGC, “Overview of the UN Global Compact”, www.unglobalcompact.org/AboutTheGC

Environment

Principle 7: Businesses should support a precautionary approach to environmental challenges.

Principle 8: Undertake initiatives to promote greater environmental responsibility.

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.

🕒 Who participates in the Global Compact?

- **Companies from any industry sector**, except those companies involved in the manufacture, sale etc. 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 their CEO to the UN Secretary General in which it expresses its commitment to (i) the UN 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 United Nations 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.

The list of participants can be accessed at the following address: www.unglobalcompact.org/participants/search

Although these will not be looked into in detail in this guide, the Global Compact (notably) counts on different multi-stakeholder working groups, comprised of NGOs, companies and other representatives, that have been established to provide advice and 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 at developing practical tools for businesses.

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,” as participants are listed on the UN website, can request permission to use a version of the GC logo and can represent their company as respecting the 10 principles without having to prove that they act in accordance with these principles.³ In 2004 and as a result of numerous criticisms against the Global Compact allowing companies which blatantly violate the principles to participate in the initiative, and to restore its credibility, the GC adopted “integrity measures”. 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 UNGC emphasises that the initiative focuses on learning, dialogue and partnerships as a complementary regulatory approach to helping address knowledge gaps and management system failures.⁴

Participation may now be questioned in cases of companies’ misuse of the UN or of the GC logo. Further, 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”.

🕒 Serious allegations of Human Rights violations⁵

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, and 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; gross corruption or other particularly serious violations of fundamental ethical norms.

³ For more information on the limits of the Global Compact, visit: <http://globalcompactcritics.blogspot.com>

⁴ See UNGC, Note on “The Importance of Voluntarism”, www.unglobalcompact.org/AboutTheGC/the_importance_of_voluntarism.html

⁵ UNGC, “Note on Integrity Measures”, www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html

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”⁶.

► **NOTE**

The GC 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.

🔗 **Process and Outcome**

HOW TO SUBMIT AN ALLEGATION?

Anyone may send the matter in writing to the office of the Global Compact

Contact: globalcompact@un.org/

[Ursula Wynhoven \(wynhoven@un.org\)](mailto:Ursula.Wynhoven@un.org)

The matter can also be directly sent to the chair of the Global Compact Board, Ban Ki-Moon, UN Secretary General, which can contribute to drawing media attention to the complaint.

Process

Upon receipt of a matter, the 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 on the matter 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 participating 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 participating company concerned, in taking actions to remedy the situation.

6 UNGC, “Integrity Measures, Frequently Asked Questions”, www.unglobalcompact.org

- 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 until such time as 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 it 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 the 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 complaint to the UN Global Compact office requesting the UNGC to 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 3 months. The groups alleged that PetroChina, through

its investments in Sudan, contributed to grave human rights violations in Darfur, amounting to genocide.

On 12 January 2009, the UNGC finally 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 UN 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” and 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 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 Compact’s Integrity Measures⁷.

In July 2009, the Board finally decided to maintain PetroChina as a participant in the 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.”

⁷ Letters can be accessed here: <http://investorsagainstgenocide.net/2009-0201%20UNGC%20Board%20letter.pdf>, www.unglobalcompact.org/docs/news_events/9.1_news_archives/2009_01_12b/Sir_Mark_Letter_to_Mr_Cohen_and_Mr_Slob.pdf

➔ Call for Nestlé to be expelled from the UN Global Compact⁸

In June 2009, a report was submitted to the UNGC 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 can continue. Concerns raised by the International Labour Rights Fund, trade union activists from the Philippines, Accountability International and Baby Milk Action include:

- 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;
- environmental degradation, particularly of water resources.

The report claims that Nestlé used the UN 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 the company in question and both the company and person raising the matter exchanged correspondence. According to the Global Compact Office, the company has indicated that it remains willing to engage in further dialogue about the matters raised and therefore Nestlé has not been designated as “non-communicative”. No decision has been made public as to whether Nestlé will be removed from the Global Compact. In the meantime, activists denounced that Nestlé remain one of the main sponsors of the Global Compact Summit have 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 note and elaborated in the FAQ document, 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 GC Office, which may seek advice and guidance from a variety of sources including UNGC 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.

⁸ 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)⁹

A COP is a disclosure on progress made in implementing the ten principles of the UN Global Compact, and in supporting broad UN development goals.

Since 2005, business participants are required to annually submit a COP on the UN Global Compact's website and to share the COP widely with their stakeholders. The absence of a COP will result in the change in a participant's status which can be considered as "non-communicating" and eventually after a lapse of a year in the de-listing of the participant.

In February 2010, the Global Compact Office announced that 859 companies had been removed (de-listed) from the initiative's database of participants between 1 October 2009 and 1 January 2010¹⁰. The total number of businesses which were removed for failure to meet the Global Compact's mandatory annual reporting requirement now stands at 1840. 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 now 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 its chief executive officer to UN Secretary-General Ban Ki-Moon and submit a COP to the Global Compact database.

However, on 24 March 2010, the Global Compact Board introduced a one-year moratorium – until 31 December 2010 - on de-listing companies from non-OECD/G20 countries, following the recent removal of a high number of companies in these countries¹¹. This can be justified by the fact that non – OECD and non – G20 countries did not have robust local networks in place. According to the Global Compact Office, the purpose of the moratorium is to give the Global Compact Office time to undertake further capacity building efforts so that participants can fully understand what is required by the COP. As a result, 347 companies that had been de-listed between January 1, 2010 and March 1, 2010 have been reinstated.

➔ Investors write to companies not living up to UNGC Commitments

An international coalition of investors including funds 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 have failed to produce an annual COP on

⁹ UNGC, "Communicating Progress", www.unglobalcompact.org/COP/index.html

¹⁰ UNGC, News and Events, "859 Companies Delisted for Failure to Communicate on Progress", www.unglobalcompact.org/news/8-02-01-2010

¹¹ UNGC, News and Events, "Global Compact Board Addresses Delistings, Calls for Review of COP Procedures", www.unglobalcompact.org/news/20-03-25-2010

the implementation of the ten principles of the 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)¹².

* * *

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 and although some progress has been made since 2004 to give teeth to the Global Compact, the requirements participating companies have remain – from a civil society perspective – extremely weak.

Submitting a COP is the only requirement for companies and the content of these reports is not monitored nor verified by the Global Compact 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 GC. Civil society organisations have suggested that it would be preferable for companies to be accepted into the GC only when they are ready to publish their first COP. While the UNGC 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.

ADDITIONAL INFORMATION

– UNGC

www.unglobalcompact.org/index.html

– Global Compact Critics

<http://globalcompactcritics.blogspot.com>

¹² UNGC, News and Events, “Investors Give New Twist to Good COP/Bad COP”, www.unglobalcompact.org/NewsAndEvents/news_archives/2009_01_12.html

CHAPTER II

ISO – International Organization for Standardization

* * *

ISO is the world’s largest developer and publisher of International Standards.¹³ 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 thousands of standards on a variety of subjects, including risk management, quality management systems (ISO 9001), environmental management systems (ISO 14 001) and on 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. 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. 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 and will be finalised and adopted in 2010. **ISO 26 000 in contrast with most ISO standards does not aim at certification.**

The objective of ISO 26000 is to “provide harmonised, globally relevant guidance based on international consensus among expert representatives of the main stakeholder groups and so encourage the implementation of social responsibility worldwide. The guidance in ISO 26000 draws on best practice developed by existing public and private sector initiatives and is intended to be useful to organisations large and small in both these sectors”.

ISO 26 000 defines social responsibility as the “responsibility of an organisation for the impacts of its decisions and activities on society and the environment, through

¹³ ISO, www.iso.org

transparent and ethical behaviour that contributes to sustainable development, including health and the welfare of society; takes into account the expectations of stakeholders, is in compliance with applicable law and consistent with international norms of behaviour and is integrated throughout the organisation and practised in its relationships”.¹⁴

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.**

A look into 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 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.

¹⁴ ISO, Draft international standard ISO/Dis/26000, 2009.

Complaints

ISO is a standard developing organisation and, as such, is not involved with the implementation of the 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**.

There are many steps to follow before it is possible to submit a complaint directly to ISO:

- 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.
- 4) Only if all of these steps have been fulfilled can a complaint be made to ISO.

HOW TO MAKE A COMPLAINT?¹⁵

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.);
- 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).

Send the complaint to: MSSComplaints@iso.org

* * *

¹⁵ ISO, *Complaints*, International Organization for Standardization, www.iso.org/iso/iso_catalogue/management_standards/certification/mss_complaints.htm

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 26000 only provides guidance to organisations, both its content and **potential usage remain too vague and uncertain** to assess its usefulness. No complaint mechanism is therefore available.

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.¹⁶ While Denmark and Austria have undertaken such processes, 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 still has to go through a vote by the ISO members and should be published as an International Standard in late 2010. Employers remain very reluctant vis-à-vis the draft text and it is expected that influential countries such as China and India will vote against the text. Its future use, therefore, 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 and the text itself can be accessed here:
www.iso.org/wgsr
 - IISD (research organisation), webpage on ISO 26 000
www.iisd.org/standards/csr.asp
-

¹⁶ ISO, *Ibid.*

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 of 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 EITI¹⁷ and the Kimberly Process¹⁸. Some companies in the extractive sector have established company-based grievance mechanisms that affected communities or company' employees may turn to.¹⁹ 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 respect for human rights, they are, by their very nature, inherently flawed due to their lack of independence. While these initiatives can potentially contribute to preventing human rights abuses, they cannot provide reparation for victims seeking remedies.

The current guide only addresses two 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

¹⁷ The Extractive Industry Transparency Initiative, EITI is a coalition of governments, companies, civil society groups, investors and international organizations 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. 49 of the world's largest oil, gas and mining companies support and participate in the EITI process. Although this initiative has gained recognition, there is no specific mechanism by which to evaluate or question the compliance of a company with the principles and criteria set out by EITI therefore this initiative will not be looked into in detail in this chapter. See <http://eitransparency.org>

¹⁸ The Kimberley Process is a joint government initiative with participation of industry and civil society to stem 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 Kimberley 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. Sanctions banning diamond procurement from specific areas are respected. See www.kimberleyprocess.com

¹⁹ This is the case of companies such as Anglo-American, BHP Billiton, and Newmont. For more information: Human Rights in the Mining & Metals Sector, Handling and Resolving Local Level Concerns & Grievances, http://baseswiki.org/w/images/en/4/46/ICMM_HR-Concerns-and-Grievances.pdf

The Voluntary Principles on Security and Human Rights

In 2000, governments (initially the UK and US), NGOs and companies initiated the Voluntary Principles on Security and Human Rights (“the Voluntary Principles” or VPs)²⁰. 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?²¹

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 involved.

Participants commit to conducting **risk assessments**; to taking steps to ensure actions taken by governments, particularly the actions of **public security providers** are consistent with human rights; and 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:	Companies + Public Security:	Companies + Private Security
- Identification of Security Risks	- Security Arrangements	- Law Enforcement
- Potential for Violence	- Deployment and Conduct	- Coordination with State Forces
- Human Rights Records	- Consultation and Advice	- Weapons Carriage
- Rule of Law	- Responses to Human Rights Abuses	- Responsive Local Use of force
- Conflict Analysis		
- Equipment Transfers		

²⁰ Voluntary Principles on Security and Human Rights, www.voluntaryprinciples.org

²¹ Voluntary Principles on Security and Human Rights, The Principles, www.voluntaryprinciples.org

🔗 Who participates in this initiative?²²

- Governments: Canada, the Netherlands, Norway, Colombia, Switzerland, The UK, and the US;
- Non-Governmental Organisations: Amnesty International, The Fund for Peace, Human Rights Watch, Human Rights First, International Alert, IKV Pax Christi, Oxfam, Pact Inc., Search for Common Ground.
- Observers: International Committee of the Red Cross, International Council on Mining & Metals, International Petroleum Industry Environmental Conservation Association).
- 17 companies: AngloGold Ashanti, Anglo American, BG Group, BHP Billiton, BP, Chevron, ConocoPhillips, ExxonMobil, Freeport McMoRan Copper and Gold, Hess Corporation, Marathon Oil, Newmont Mining Corporation, Occidental Petroleum Corporation, Rio Tinto, Shell, Statoil, Talisman Energy

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:²³

- Publicly promote the Voluntary Principles.
- Pro actively 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.
- Subject to legal, confidentiality, safety, and operational concerns, **provide timely responses** to reasonable requests for information from other Participants with 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. However, it is noteworthy that there is no system for evaluating how closely the

²² Voluntary Principles on Security and Human Rights, Who's involved?, www.voluntaryprinciples.org/participants/

²³ Voluntary Principles on Security and Human Rights, Resources, Amendments May 2009, http://voluntaryprinciples.org/files/vp_amendments_200905.pdf

principles are followed by individual companies or governments, as only general reports are published.

🕒 Who can raise concerns about participants?

Participants only 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**.

🕒 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.

► NOTE

Although little information on the use of the mechanism is available, it has been used 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 concerns exist of “sustained lack of efforts” on the part of a participating company as an additional tool to raise awareness on a situation of human rights abuse.

Overall, the principles remain criticized for their voluntary nature, their lack of enforcement mechanism and the lack of transparency of the process. 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 it into its internal guidelines.²⁴ While their language is easily understandable, it remains unclear what is expected from companies and States to put them into practice. 10 years after their creation, the VPs face important challenges to ensure they can contribute to improving situations for victims in particularly complex settings.

International Council on Mining and Metals (ICMM)

The International Council on Mining and Metals²⁵ was established in 2001 to address the core sustainable development challenges faced by the mining and metals industry. It brings together 20 national, regional and global mining associations and 19 companies including: African Rainbow Minerals, Anglo-American, AngloGold Ashanti, Barrick, BHPbilliton, Freeport McMoran Copper and Gold, GoldCorp, GoldFields, Minerals and Metals Group, Lihir Gold, Lonmin, Mitsubishi Materials, Newmont, Nippon Mining and Metals co. Ltd, Rio Tinto, Sumitomo Metal Mining, Teck, Vale and Xstrata.²⁶

🕒 What are the rights protected?

Membership of ICMM requires a commitment to implement the ICMM Sustainable Development Framework. It is mandatory for corporate members to meet:

- The implementation of 10 principles²⁷ throughout the business, one of them being to **uphold fundamental human rights** and respect cultures, customs and values in dealings with employees and **others who are affected by their activities**.
- **Report** in accordance with the Global Reporting Initiative (GRI) G3 framework.
- **Provide independent assurance** that ICMM commitments are met.

²⁴ Salil Tripathi, “Have the Voluntary Principles Realised their Full Potential?”, Institute for Human Rights and Business, 17 March 2010.

²⁵ ICMM, www.icmm.com

²⁶ ICMM, *About Us*, International Council on Mining and Metals, www.icmm.com/page/4/about-us/about-us

²⁷ ICMM, *ICMM Principles*, International Council on Mining and Metals, www.icmm.com/our-work/sustainable-development-framework/10-principles. This website and ICMM documents do not appear to be available in other languages.

The ICMM Assurance Procedure was agreed upon in May 2008 and must be implemented by all ICMM members (in relation to their sustainability reports for the financial year ending December 2009 or March 2010).²⁸ This procedure clearly provides for greater credibility of the reporting.

④ Who can file a complaint?

Any person who believes that a company is in breach of their membership commitments, and wishes to make representations may do so.²⁹

④ 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 organization committed to fostering good practice in sustainable development.”³⁰

④ Process and Outcome³¹

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 by 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 by 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

²⁸ ICMM, *Assurance*, International Council on Mining and Metals, www.icmm.com/our-work/sustainable-development-framework/assurance

²⁹ ICMM, *Sustainable Development Framework*, International Council on Mining and Metals, www.icmm.com/our-work/sustainable-development-framework

³⁰ ICMM, *ICCM complaint(s) hearing procedure*, International Council on Mining and Metals, www.icmm.com/our-work/sustainable-development-framework

³¹ ICMM, *ICMM complaint(s) hearing procedure*, www.icmm.com/document/199

receiving the complaint, the President contacts the complainant and the company concerned to request additional details. ICMM only considers complaints when there is sufficient information “to establish, prima facie, that a breach of an ICMM standard could have occurred.”

At this stage, the President³² 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 and 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 able to 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 could 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 as to whether complaints have been filed by ICMM and about their outcome.

³² At its discretion the Council may appoint an appropriately qualified independent person to act as an ombudsman to hear the complaint and report to Council.

ADDITIONAL RESOURCES

- ICMM Position Statements (providing further clarification / interpretation of ICMM's 10 Principles)
www.icmm.com/our-work/sustainable-development-framework/position-statements
 - ICMM Position Statement on Mining and Indigenous People, May 2008
www.icmm.com/documents/29
 - For more information on grievance mechanisms in the mining industry, see research undertaken by the Centre for Social Responsibility in Mining, The University of Queensland
www.csr.m.uq.edu.au.
-



➤ Children working on shipbreaking yards in Bangladesh.

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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.³³ This is notably explained by the fact that corporations felt the need to create a level-playing field.

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 (SAI) publish the list of factories certified while others say they are happy to provide the information whether a factory is supplying one of its members (FLA).

The current section reviews some of these complaints mechanisms.

³³ See for example the Global Social Compliance Program (a platform centered around the issue of remediation, including the reform of purchasing practices) www.gscpnet.com

ETI – Ethical Trading Initiative

The Ethical Trading Initiative³⁴ is a tripartite collaboration between companies, trade unions and NGOs³⁵.

There are about 50 member companies. Each of them must:

- Adopt the Base Code³⁶, which is drawn from ILO conventions and includes provisions about freedom of labour, freedom of association and the right to collective bargaining, safe and hygienic working conditions, prohibition of child labour, payment of living wages, working hours, non-discrimination, and prohibition of harsh and inhumane treatment.
- Sign up to ETI’s Principles of Implementation³⁷ to progressively implement the code.
- Submit annual reports to the ETI Board: 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, their membership is terminated.**

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.

ETI member companies are: BBS Granite Concepts Ltd, DNS Stones Ltd (UK), Foster Refrigerator, Keltbray Ltd, Natural Paving Products, Tchibo GmbH, Unique Building Products Ltd, Sportswear International Ltd, 888 Solutions, Adolfo Dominguez, Arco, Asda, ASOS.com, Boden, Brett Landscaping, BTC Group, Co-operative Retail, Debenhams Retail, Dewhirst Group, Dimensions Clothing, Flamingo Holdings, Fyffes Group, Gap Inc, Grabal Alok UK, Greencell, Icon Live, Inditex, Jaeger / Aquascutum, Jenclare Brands, Kammac Plc, London Stone Paving Ltd, London Underground, Mackays, Madison Hosiery, Marks & Spencer, Marshalls, Monsoon Accessorize, Mothercare, New Look Retailers, Next Retail, Pacific Brands, Pavestone, Pentland Group, Premier Foods, Primark (ABF Limited), Ringtons, River Island, Rohan Designs, Ruia Group, Sainsbury’s, Stone Masters

³⁴ EITI, www.ethicaltrade.org

³⁵ ETI, *Our Members*, Ethical Trade Initiative – Respect for workers worldwide, www.ethicaltrade.org/about-eti/our-members

³⁶ ETI, *The ETI Base Code*, Ethical Trade Initiative – Respect for workers worldwide, www.ethicaltrade.org/resources/key-eti-resources/eti-base-code

³⁷ ETI, *Principles of Implementation*, Ethical Trade Initiative – Respect for workers worldwide, www.ethicaltrade.org/resources/key-eti-resources/principles-implementation

Ltd, Supremia, Tesco, The Body Shop International, Typhoo Tea, Union Hand-Roasted, WH Smith, William Lamb Footwear, Winfresh (UK) Ltd.

Complaints mechanism

The ETI says it can serve as a forum to negotiate and to further the protection of the workers in situations where their rights have been violated. ETI has set up guidelines to deal with alleged code violation³⁸. These guidelines are currently under review.

1. Who can file a complaint?

An individual, an NGO or a trade union not member of ETI willing to use this mechanism should contact one of the NGO's or trade union member's.³⁹

HOW TO FILE A COMPLAINT?

- Basically, if an ETI member (NGO or trade union) is aware of a violation of the code by a supplier of an ETI corporate member, it may notify by writing the relevant ETI member company with a copy to the ETI secretariat (eti@eti.org.uk)
- For further information, contact the ETI secretariat: eti@eti.org.uk

2. Process and outcome

The parties meet to discuss the allegation and adopt a Memorandum of Understanding on how to deal with it. An investigation is launched by the company. The parties meet to discuss the investigation report and decide on the next steps. If the investigation report finds that the Code has been breached, a remediation plan is developed with the supplier concerned.

If the parties disagree over the conclusions of the investigation report, the opinion of the Secretariat may be sought and the option of an independent investigator is considered. If the disagreement cannot be resolved, the issue is referred to a sub-committee of the ETI Board for further action.

If the issue is not solved in 6 months the ETI member has to report.

Unfortunately, no information is available on ETI's website on cases handled and their outcome.

³⁸ ETI, Alleged Code Violation investigation guidelines, November 2001, www.ethicaltrade.org/sites/default/files/resources/Alleged%20Code%20Violations%20Guidelines%202009_0.pdf

³⁹ A list of civil society organizations working with EITI is available on: EITI, "civil society": <http://eiti.org/supporters/civilsociety>

SAI - Social Accountability International

SAI⁴⁰ is a multi-stakeholder organisation, that established SA8000, a set of standards that companies and factories use to measure their social performance, and 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.

SAI member companies can be found online.⁴¹

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.⁴²

Complaint Mechanisms⁴³

SAAS manages the complaints filed on the performance of a certified organisation (type 3 complaint).

🕒 Who can file a complaint?

Any interested party may file a complaint.

🕒 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.

⁴⁰ SAI, www.sa-intl.org

⁴¹ SAI, www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=906&parentID=478&nodeID=1

⁴² SAI, *About us*, Social Accountability International, www.sa-intl.org

⁴³ SAAS, *Complaints and Appeals Process*, Social Accountability Accreditation Services, www.saasaccreditation.org/complaints.htm

HOW TO FILE A COMPLAINT?

The complaint should be fully detailed, and objective evidence to the complaint must be provided. The complaint should be made in writing and addressed to:

Executive Director, SAAS
15 West 44th Street, Floor 6, New York, NY 10036
fax: +212-684-1515
Email: saas@saasaccreditation.org

To date, 21 complaints have been filed under this procedure. A full list of the complaints and their outcome can be found at: www.saasaccreditation.org/complaintlist.htm.

➔ In Action – Kenya Human Rights Commission (KHRC) complaints against Del Monte Kenya Ltd.⁴⁴

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.

⁴⁴ Complaint #009: Certification Complaint Del Monte Kenya Ltd. – Management Systems; www.saasaccreditation.org/complaint009.htm

However, these turned out to be short term impacts that were unfortunately not sustained in the long term. There are currently 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 would be victims of threats and intimidation from management and unfair dismissal of union leaders (for retrenchment reasons according to the company).

There is a case pending between Del Monte and union workers before the Industrial Court in Kenya. The case is expected to be concluded in August 2010.

This kind of situation reflects the limits of such remedial mechanisms and the need for the host State to undertake measures to ensure adequate inspection systems are in place.

ADDITIONAL INFORMATION

- The list of certified facilities can be accessed here:
www.saasaccreditation.org/certifacilitieslist.htm
-

Fair Wear Foundation

The Fair Wear Foundation⁴⁵ is an international verification initiative dedicated to enhancing garment workers' lives all over the world.

🔗 Improving working conditions?

Members must comply with the 8 labour standards⁴⁶ 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 decent 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.⁴⁷

⁴⁵ FWF, <http://fairwear.org>

⁴⁶ FWF, *Labour Standards*, Fair Wear Foundation, <http://fairwear.org/labour-standards>

⁴⁷ FWF, *Brands*, <http://fairwear.org/?w=fair-wear-brands>

Compliance with the Code of Labour Practices is checked by FWF⁴⁸ through factory audits and a complaints procedure, through management system audits at the affiliates and through extensive stakeholder consultation in production countries.

🕒 Who can file a complaint?

FWF's complaints procedure can be accessed by a factory worker 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.

🕒 Process and Outcome⁴⁹

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.

HOW TO FILE A COMPLAINT?

Complaints should be addressed to:

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

⁴⁸ FWF, *Verification*, Fair Wear Foundation, <http://fairwear.org/page/verification>. Fair Wear Foundation, *Complaints Procedure*, June 2009, http://fairwear.org/images/2010-01/fwf_complaints_procedure_june_2009.pdf

⁴⁹ *Ibid*

FWF complaint mechanism in action

→ **Metraco (2006)**⁵⁰

In April 2006, a complaint was filed concerning the Metraco factory in Turkey where FWF affiliate O'Neill was at the time sourcing. 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 Metraco.

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.

→ **FFI (2006-2007)**⁵¹

In 2006, a complaint was filed concerning the FFI factory in India from which Mexx (Liz Claiborne) was sourcing. The complaint included a number of major issues, such as severe physical harassment of workers, unlawful dismissal and forced unpaid overtime. Mexx informed FWF in April 2007 that, being in the process of reconsidering its supply chain strategies in general, Mexx wished to stop its commercial relationships with FFI for several reasons. FWF has assessed the member company's attempts to come to remediation, and concluded that Mexx had seriously tried to solve issues and could not be qualified as a “cut & run” policy.

⁵⁰ FairWear, “Final Report on the complaint against Metraco”, <http://fairwear.org/images/2010-01/report-on-metraco-complaint.pdf>

⁵¹ Report of Complaint Against FFI, <http://fairwear.org/images/2010-01/report-on-ffi-complaint.pdf>

Fair Labor Association (FLA)

The Fair Labor Association is a multistakeholder initiative established in 1999.

A Workplace Code of Conduct has been developed which is based on the International Labour Organisation standards. The Code of Conduct deals with the following issues: forced labour, child labour, harassment or abuse, non-discrimination, health and safety, freedom of association and collective bargaining, wages and benefits, hours of work, overtime compensation.⁵²

The list of participating companies can be accessed on FLA website.⁵³ Among them, well known companies such as: Adidas Group, Asics Corp., Nike Inc., and H&M.

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.

🔍 Who can file a complaint?⁵⁴

Any person, group or organization 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 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.

🔍 Process and Outcome

Step 1: FLA reviews complaint and decides on its admissibility.

Step 2: FLA notifies and seeks explanations from 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.

⁵² The Code of Conduct can be found in many languages at: www.fairlabor.org/about_us_code_conduct_e1.html#languages

⁵³ FLA, Participation Companies, www.fairlabor.org/fla_affiliates_a1.html

⁵⁴ FLA, Third Party Complaints, www.fairlabor.org/thirdparty_complaints.html

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.

HOW TO FILE A COMPLAINT?

– A Third Party Complaint Form is available in several languages

www.fairlabor.org/images/WhatWeDo/3pcenglish_form.pdf

– A complaint should contain as much detail and specific information as possible. The identity of the plaintiff may be kept confidential on request.

– You can send your complaint by post, e-mail or fax to:

Jorge Perez-Lopez, Executive Director
Fair Labor Association
 1707 L Street, NW,
 Suite 200 Washington
 DC 20036 USA
 Email: jperez-lopez@fairlabor.org
 Fax: +1-202-898-9050

– A list and summary of complaints can be found at:

www.fairlabor.org/what_we_do_third_party_complaints_e1.html

Worker Rights Consortium (WRC)

The Workers Rights Consortium⁵⁵ is an independent organisation which conducts investigations in factories specialised in sewing apparel and making other products which are then sold in the United States and Canada. WRC focuses especially on apparel and other goods bearing university logos.

Over 175 universities, colleges and high schools are affiliated to WRC⁵⁶. 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, freedom of association, workplace safety and health, women's rights, child labour and forced labor, harassment and abuse in the workplace, 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 the WRC with information on the names and locations of all

⁵⁵ WRC, www.workersrights.org

⁵⁶ *Ibid.*

factories involved in the production of their logo goods. WRC makes a factory database available on its website.⁵⁷

WRC conducts factory inspections. These investigations may be initiated in response to complaints.

Complaints mechanism⁵⁸

➤ 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?

- The complaint should contain specific allegations.
- An online complaint form may be used:
www.workersrights.org/contact/complaints.asp.
- 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.

Worker Rights Consortium
5 Thomas Circle NW, Fifth Floor
Washington, DC 20005
United States of America
Tel: +(202) 387-4884 - Fax: +(202) 387-3292
wrc@workersrights.org

➤ Process and Outcome

The Executive Director assesses each complaint submitted to the 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 the 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, the WRC will report this to affiliated schools and the public.

⁵⁷ *Ibid.*

⁵⁸ WRC, Investigative Protocols, www.workersrights.org/Reports/investigative_protocols.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/Freports/index.asp#freports

FLA & WRC Third Party Complaint Mechanism in Action

→ Estofel (2005-2009)⁵⁹

In November 2007, Estofel Apparel Factory in Guatemala closed without legally mandated severance and other termination compensation for workers.

Shortly after the closure of Estofel's factories, COVERCO (Commission for the Verification of Corporate Codes of Conduct), a Guatemalan labor 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; they also pressed for the payment of full severance to Estofel workers with Singaporean company Ghim Li, a business partner of Estofel.

In February 2008, the 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 the 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 the WRC, the company subsequently provided a range of documents.

On the basis of the evidence gathered, the 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 the 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 2008⁶⁰. UW administration helped convene an ad hoc group consisting of repre-

⁵⁹ See Worker Rights Consortium, *Case summary: Estofel S.A. (Guatemala), April 1, 2009*: www.workersrights.org/Freports/Estofel%20Case%20Summary%20-%204-1-09.pdf

See FLA, "Coverco Final report", March 2009, www.fairlabor.org/images/NewsandPublications/NewsReleasesandStatements2009/coverco_finalreport_eng.pdf

See FLA Summary Report, March 25, 2009, www.fairlabor.org/images/WhatWeDo/ThirdPartyComplaintReports/Estofel/estofel_summary_report.pdf

⁶⁰ Emily Lee, "Making History in Honduras", *The Daily of the University of Washington*, <http://dailyuw.com/2010/2/23/making-history-honduras>

sentatives of the 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 by telephone in May 2008 and **continued to do so until payments to the workers in question were made in late 2008 and early 2009.**

COVERCO started its field investigation on June 27, 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 October 15, 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 while the factory had already paid benefits which amounted 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 on (1) workers who received the additional payments executing a *desistimiento* (withdrawal) terminating legal claims against the factory; (2) those workers who had filed law suits dropping them; and (3) setting February 20, 2009 as the end of the period for making the payments.

The WRC worked with Coverco and the FLA to design an outreach program to contact to the workers owed and inform them of the offer of payment. Because of the significant time that had elapsed since their dismissals, a significant 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.⁶¹ 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 \$534,236.37.

⁶¹ FLA, "Coverco Final Audit Report", August 2008, www.fairlabor.org/images/NewsandPublications/NewsReleasesandStatements2009/coverco_investigativereport_eng.pdf

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)⁶².

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 fairtrade products also abide by standards mainly with regard to prices paid to and contracts paid to producers. FT standards are available here: www.fairtrade.net/generic_standards.html

Complaint's Procedure

🕒 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.

⁶² FLO, www.fairtrade.net

🔗 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.

🔗 Process and Outcome⁶³

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.

⁶³ FLO, Allegation Standard Operating Procedure, www.flo-cert.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.⁶⁴

🕒 What is the scope and content of Global Framework Agreements?

Despite sector and company specificities, the IFAs share some common ground⁶⁵:

- 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

⁶⁴ See notably: <http://www.imfmetal.org>

⁶⁵ 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.

Additional features include:

- Reference to the Universal Declaration of Human Rights
- Anti-corruption
- Environmental commitments
- 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 vary. 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.⁶⁶ 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.⁶⁷

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 rights⁶⁸

2. 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

⁶⁶ European Foundation for the Improvement of Living and Working Conditions, *idem*.

⁶⁷ Isabelle Daugareilh, “La dimension internationale de la responsabilité sociale des entreprises européennes: Observations sur une normativité à vocation transnationale”, dans M.A. Moreau, F. Caffagi, F. Francioni, *La dimension pluridisciplinaire de la responsabilité sociale d’entreprise*, éd. PUAM, Aix-Marseille, 2007.

⁶⁸ 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, <http://id.erudit.org/iderudit/016489ar>

implementation and monitoring that aim at making them effective”⁶⁹. Most IFAs institute a committee of employees and company representatives in charge of the implementation of the agreement.

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.⁷⁰
- 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**⁷¹

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 longerterm 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**⁷²

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.

⁶⁹ Sobczak, *op.cit.*, 2007.

⁷⁰ See IFA with EDF, article 22 : www.icem.org/files/PDF/EDFaccord_RSE09b_EN.pdf

⁷¹ Extract taken from: Stevis Dimitris, “International Framework Agreements and Global Social Dialogue: Lessons from the Daimler case”, Employment Sector Working Paper no. 46, 2009.

⁷² PSA Peugeot Citroën, PSA Peugeot Citroën Global Framework Agreement on Social Responsibility, 2006 www.imfmetal.org:80/files/06041112011079/ifa_psa_english2006.pdf

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 Organization's Declaration on Fundamental Principles and Rights at Work, The Rio Declaration on Environment and Development and The United Nations Convention Against Corruption.

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.

* * *

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 campaigns⁷³. However, the International Organisation of Employers in particular question how a court would regard this type of agreement and how it might affect any other national agreements signed by the company⁷⁴. 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”⁷⁵.

⁷³ Bourque, *op.cit.*, 2008.

⁷⁴ International Organisation of Employers, *International Framework Agreements, An Employer’s Guide*, Update version, August 2007.

⁷⁵ 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.

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**

www.global-unions.org/spip.php?rubrique70

– ORSE (Observatoire sur la Responsabilité Sociétale des Entreprises), *Répertoire sur les pratiques des entreprises en matière de négociation des accords-cadres internationaux*, 2006. Paris: www.orse.org

– Bourque, Reynald. 2008. International Framework Agreements and the Future of Collective Bargaining in Multinational Companies. *Just Labour* 12: 30-47.

– Dimitris Stevis, International framework agreements and global social dialogue: Parameters and prospects, Employment Sector Employment Working Paper No. 47, ILO, 2010.

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 practice⁷⁶:

⁷⁶ 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>

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 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, 2009⁷⁷, 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).

⁷⁷ Cass.Crim., December 15, 2009, n° 09-89.059

➔ **Monsanto v. Eaux et Rivières de Bretagne and UFC-Que choisir? (2006)**⁷⁸

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”.⁷⁹

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”.

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 facts material 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.”

➔ **Nike v. Kasky (2003)**

In 1998 Marc Kasky, an American Citizen, filed a lawsuit against the Nike Corporation for false advertising in connexion with a public relations campaign on working conditions in subcontractors’ factories. The case stirred up considerable interest among corporations because it posed a fundamental question: can information about the social and environ-

⁷⁸ 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

⁷⁹ Free translation

mental policy of a company be considered as advertising, and therefore be attacked as such? The Californian courts first ruled in favour of Nike, but the Supreme Court of California ruled in favour of Marc Kasky, recognising the legitimacy of his action. Nike then appealed to the United States Supreme Court, invoking the protection of the freedom of speech of business enterprises. In July 2003 the Supreme Court declared itself incompetent.

On September 12, 2003 both sides agreed in a friendly settlement, that “investing in factory worker programs and furthering collaboration on corporate reporting are far better uses of funds and energy than continued litigation,”

Nike undertook to invest 1.5 million dollars to help set up audit programmes, and to finance educational and credit programmes to the tune of at least 500,000 dollars over the next two years. The whole of the 1.5 million dollars was paid to the Fair Labor Association (see Section V, Chapter IV of this guide).

Germany

The German law on unfair competition (UWG)⁸⁰ 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

⁸⁰ Act Ugainst Unfair Competition of 7 June 1909 (amended on 22 June 1998) www.wipo.int/clea/en/details.jsp?id=1013&tab=

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)⁸¹

The European Center for Constitutional and Human Rights (ECCHR), jointly with the Clean Clothes Campaign, 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." 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. Lidl also accepted to engage in a dialogue with the organisations at the origin of the complaint.

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.

⁸¹ For more information: ECCHR, "Lidl Retracts Advertisements", www.ecchr.de/lidl-case/articles/lidl-retracts-advertisements.html

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 development⁸². 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 cassation⁸³, 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.

⁸² 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/media/article/s1/id27/juliette_29102009.pdf

⁸³ Cass. Soc. December 8, 2009, n°08-17.091

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).

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 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 it highlights 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 dimensions. 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 use extraterritorial obligations of States, as illustrated in the section dealing with civil and criminal liability, remain numerous, complex and should not be underestimated. Legal Acts such as the Alien Tort Claims Act of the EU Regulation 44/2001 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 (*forum non conveniens*) can represent years of litigation with lawyers having to deal with reluctant judges and where the probabilities of dismissal are high. 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 lawyers often do not have and which is further impeded by legal strategies that corporations use 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, in vast majority, are often 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 which conformity with human rights standards is questionable and which in turn impede the development of a much needed jurisprudence.

With respect to non-judicial and voluntary mechanisms, their access is undoubtedly easier than 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 victims in search for justice can turn to. Yet, the financial means with which these bodies operate remain ridiculously 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, in the absence of a legally binding instrument which specifically addresses business and human rights, they remain ill-equipped to directly address the responsibility of non-state actors.

For their part, mediation mechanisms are currently attracting a lot of attention. The ongoing revision of the OECD Guidelines bears the potential to include stronger language on human rights (including in the supply chain) and to lead to reforms for greater independence and efficiency of the National Contact Points. However, even if rendered more efficient, they will still lack the capacity to enforce their decisions. Mediation mechanisms should be improved by drawing from a victim's perspective. 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 development could serve to reinforce 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 do intergovernmental mechanisms and most of them are still not vested with the mandate to receive individual communications on these issues.

For their part, 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 this case, access to complaint mechanisms turns out to be hampered not by heavy procedural requirements, but rather because they remain largely unknown by groups that qualify as requesters. In addition, they have faced wide

criticism for their apparent lack of good faith (notably characterized by the lack of resources with 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 very weak and limited to the banks who have agreed to the Equator Principles.

Finally, mechanisms voluntarily set up by States and companies present promising potential to contribute to the prevention of future violations by looking into changing corporate behaviour and addressing some of the dilemmas companies face in particular in conflict situations and in relation to 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 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 developing countries. Yet, economic actors from emerging countries are playing an increasingly important role in the global economy, be they State-owned enterprises or multinationals 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 reinforce the need for adequate universal mechanisms so that all economic actors may be held accountable.

At the moment, the current process taking place within the United Nations intends to address some of these issues. John Ruggie, the UN Secretary-General Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises, will submit his final report in June 2011. While he has achieved a great deal in bringing together all stakeholders around the same table, the outcome of his mandate remains uncertain. The guiding principles that the Special Representative intends to present, although necessary may lose much of their meaning if not accompanied by strong and operational recommendations to ensure that the process continues at the international level. Throughout his mandate, the UN Special Representative has repeatedly insisted on the need for a pragmatic approach to business and human rights issues.

In our view, such an approach calls for the necessity to go beyond guiding principles.

On the one hand, a pragmatic approach means recognising the difficulties companies face in ensuring the respect for human rights and environmental standards when conducting their operations. On the other hand, it also means acknowledging the current state of affairs and the huge difficulties victims still face in accessing and obtaining justice for 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 multinationals, 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. In the short term, various NGOs are raising the need to create a body within the United Nations to further operationalize the “Protect, Respect and Remedy” framework set forth by John Ruggie by receiving and examining communications from victims on 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. As well, they 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 depict 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 in both the North and the South 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 Convention on Human and Peoples Rights / African Commission on Human and Peoples Rights
ACHR	American Convention on Human Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ADB	Asian Development Bank
ADRDM	American Declaration on the Rights and Duties of Man
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 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

ECJEuropean Court of Justice
 ECOSOC.....Economic and Social Council
 ECOWASEconomic Community of West African States
 ECSREuropean Committee on Social Rights
 EDC.....Export Development Canada
 EIBEuropean Investment Bank
 EITI.....Extractive Industries Transparency Initiative
 EITI.....Extractive Industries Transparency Initiative
 EPFIEquator 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
 FLAFair Labour Association
 FLOFair Trade Labeling Organization
 FSIAForeign Sovereignty immunities Act
 FTFair Trade
 FTCA.....Federal Tort Claim Act
 FWFFair Wear Foundation
 GFA(s)Global Framework Agreement(s)
 GONGO(s).....Governmental Non Governmental Organization(s)
 GRIGlobal Reporting Initiative
 GUFGlobal Union Federation
 HRCHuman Rights Council
 IACHRInter-American Commission on Human Rights / Inter-American
 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
 ICESCRInternational Covenant on Social and Cultural Rights
 ICJInternational Court of Justice
 ICMMInternational 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
 IDAInternational Development Association
 IDBInter-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 Organization
 IMF.....International Monetary Fund

INGO(s)International Non Governmental Organization(s)
 IOEInternational Organization of Employers
 ISOInternational Organization 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 Organization(s)
 NHRI(s).....National Human Rights Institution(s)
 OAS.....Organization of American States
 OAUOrganization of the African Unity
 OECDOrganization 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
 PSPerformance Standards
 REC.....Regional Economic Communities
 RICO.....Racketeer Influenced and Corrupt Organizations
 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 Organization 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
 VPsVoluntary Principles
 WBWorld Bank
 WRC.....Worker Rights Consortium