SECTION I

INTERGOVERNMENTAL MECHANISMS

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

SECTION I

INTERGOVERNMENTAL MECHANISMS

PART I

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

Every year thousands of complaints of alleged human rights violations are processed by the United Nations system for the promotion and protection of human rights. The system is mainly based on two types of mechanism:

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

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

CHAPTER I

United Nations Treaty-Based Mechanisms

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Main United Nations human rights instruments and obligations of States Parties

The United Nations system for the promotion and protection of human rights is based on the Universal Declaration of Human Rights and the core international treaties that have given it legal form. The rights established by these instruments are **universal, indivisible, interdependent and interrelated** and they belong to each individual person.[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. Maastricht Principles on **Extraterritorial Obligations** of States in the area of Economic, Social and Cultural Rights were adopted in 2011 by a groupe of legal experts. The United Nations Charter[2] 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 Rights[3] (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, regardless of whether the private person can be prosecuted for the acts perpetrated.

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

The UN Draft Norms on the Responsibilities of Transnational Corporations and other Business Entreprises with regard to Human Rights, elabored in 2003 by the Sub-Commission on the Promotion and Protection of Human Rights, aimed at codifying the respective responsibilities of states and business entreprises. However, despite raising these important issues the Norms were never adopted. In 2005 a new special procedure, the UN Secretary General Special Representative on the issue of Human Rights and business was established to clarify the concepts and responsibilities of states and business entreprises. Mr John Ruggie, Special Representative, was charged with this question between 2005 and 2011. In his 2008 report entitled "Protect, Respect and Remedy: a framework for Business and Human Rights", John Ruggie proposes a framework based on three pillars: The obligation of the state to protect, the corporate responsibility to respect and access to remedies for victims of human rights violations.

In June 2011, at the end of the mandate of the Special Representative, the UN Human Rights Council unanimously adopted the Guiding Principles on Business and Human Rights for implementing the UN "Protect, Respect and Remedy" framework[4]. This text which is not legally binding aims at operationalizing the three pillars of the framework. Many NGOs including FIDH support the development of an international legal framework on business and human rights.

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 obligation, including the enactment of legislation. States are also expected to hold non-state actors accountable if they commit human rights violations. States

4 For a critical approach of the Guiding Principles : " Joint Civil Society Statement on the Draft Guiding Principles", 31 January 2011, http://www.fidh.org/Joint-Civil-Society-Statement-on-the-draft,9066

should take additional steps to make sure businesses that they control or with whom they contract respect human rights. States should ensure greater policy coherence of their trade and investment policies with their human rights obligations including when acting as members of multilateral institutions. **The main point of debate relates to states' extraterritorial obligations.** In other words, the obligation of states where 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, the Guiding Principles clearly establish that business enterprises should, at all times, respect all human rights. According to John Ruggie, this derives not only from legal obligations but also from the necessity for corporations to obtain a social licence to operate. This means businesses should avoid infringing on the human rights of others and should address adverse human rights impacts in which they are involved. In order to do so, companies should conduct due diligence[5] to identify, prevent, mitigate and account for how they address adverse impacts on human rights.

Access to remedy

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

Endorsing these Principles, the United Nations Human Rights Council mandated the creation of a working group on business entreprises and human rights (i.e box on the Special Representative in The Special Procedures of the Human Rights Council section).

The Human Rights Council also decided to create an annual multi-stakeholder Forum on human rights and business.

5 For an explanation of the due diligence concept, see Section II on judicial mechanisms.

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[6]

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."[7]

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,

6 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.

7 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."[8]

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."[9]

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."[10]

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."[11]

8 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.

9 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.

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

11 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 concerned[12].

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[13]

– 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

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

13 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.[14] 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,

14 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 years[15]).
– The **delay** with which the Committees examine them (15 to 22 months on average).
– The **overlapping** obligations states' have to report on (i.e. states often have several reports to submit to different Committees).
– The **lack of adequate resources** of both states and Committees.
– The **poor quality or inaccuracy of some of the state reports**, particularly in the absence of NGO reports.
– The lack of pertinence of the experts' examination, or the absence of any effective follow-up[16].

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."[17]

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)"[18] 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

15 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.
16 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.
17 CESCR, *Concluding observations: Honduras*, 21 May 2001, U.N. Doc. E/C.12/1/Add.57.
18 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."[19]

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."[20]

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."[21]

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.

19 CRC, *Ecuador, Concluding observations*, 13 September 2005, CRC/C/15/Add 262, § 21.
20 CESCR, *Concluding observations: Russian Federation*, 20 May 1997, U.N. Doc. E/C.12/1/Add.13.
21 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

Who can receive a complaint?

At present, **five of the nine Committees**[22] 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. In January 2012, 39 states had signed the Optional Protocol and 7 had ratified it.[23] 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.[24]

22 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.

23 UN, "UN Treaty Collection", http://treaties.un.org. Upon publication, the following states had ratified: Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia and Spain.

24 For a further analysis, see M. Sepulveda and C. Courtis, "Are Extra-Territorial Obligations Reviewable Under the Optional Protocol to the ICESCR?", *Nordisk Tidsskrift for Menneskerettigheter, Universtitetsforlaget*, 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.[25]

– The state that is alleged to have violated the rights in question has accepted the competence of the Committee to accept individual complaints.[26]

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.[27] However, except in special cases, when a complaint is brought on behalf of a third party **written consent** must be obtained beforehand.[28]

Under what conditions?

With some variations, all the Committees operate in accordance with the following principles:[29]

– 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

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25 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/

26 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.

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

28 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 ".

29 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,[30] or if the legal arguments put forward are different.[31]

– 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.**[32] 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.**

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

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

32 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 possible[33].
The treaty bodies are mandated to examine alleged violations of certain rights, when the **events concerned took place after entry into force** of the intrument 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.[34]

HOW TO FILE COMPLAINT?

Although "model" complaint forms for communications are available online,[35] 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.

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33 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.

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

35 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[36]

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

The petitions are examined in **closed session**. Although some Committees have provisions for **hearing** parties or witnesses in exceptional cases[37], 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).[38]

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.[39]

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

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

38 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".

39 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 prejudge 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"**.[40]

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 Rights[41]. 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.

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

41 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."[42]

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 Etela-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.

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

"[The Committee] notes in particular that the interests of the Muotkatunturi Herdsmens' Committee and of the authors were considered during the proceedings leading to the delivery of the quarrying permit, that the authors were consulted during the proceedings, and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred."
However, the Committee warns that if these quarrying operations were to be expanded, the State Party is under a duty to bear in mind the cultural rights of minorities when either extending existing contracts or granting new ones.[43]

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.[44] 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.

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

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

5. Inquiries or visits

The **CAT, CEDAW, the Committee on the Rights of Persons with Disabilities (CRPD) - the CESCR 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.[45]

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.[46]

45 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.

46 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.**[47] 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:[48]
– 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.[49] 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.

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47 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.

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

49 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:[50]

– 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'.

50 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."[51]

Outcome

The UPR aims at dealing with all states equally, in an "objective, transparent, non-selective, constructive, non-confrontational and non-politicized"[52] 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.

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51 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.

52 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.[53]

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.**[54]
– The communication must not be based exclusively on reports disseminated by **mass media.**

53 *Ibid*., §§ 85 and following.

54 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.[55]

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).

55 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 Council[56] **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 to[57]:
– **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.

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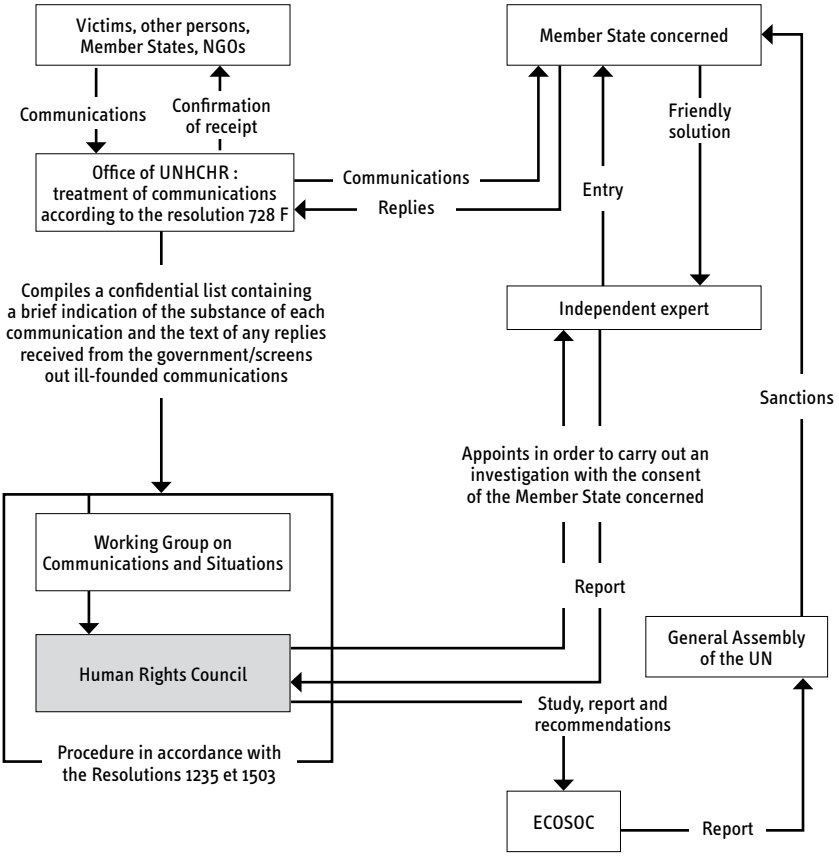
56 HRC, *Resolution 5/1. Institution-building of the United Nations Human Rights Council, op.cit.*, §§ 103-105.
57 *Ibid.*, § 109.

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 scheme[58]



58 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 Rights[59]. 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.

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59 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.

END OF THE SPECIAL REPRESENTATIVE'S MANDATE ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTREPRISES AND CREATION OF A WORKING GROUP

In 2005 the UN Commission on Human Rights adopted the 2005/69 resolution requesting the Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations and other business entreprises. The resolution mandated the Special Representative to identify and clarify standards of corporate responsibility for transnational corporations with regard to human rights, to elaborate on the role of states in effectively regulating and adjudicating the role of business entreprises in respecting human rights.

On 18 June 2008 the Human Rights Council welcomed the "Protect, Respect and Remedy" Framework proposed by the Special Representative and renewed his mandate until 2011. This policy framework comprises three pillars: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and the need for greater access by victims to effective remedies, judicial and non-judicial.

John Ruggie's final report, entitled Guiding Principles on Business and Human Rights for implementing the UN "Protect, Respect and Remedy" Framework was endorsed by the Human Rights Council on 15 June 2011. Considering this mandate was created following the controversy which resulted from the the Drafts 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 back the many stakeholders around the table. Although FIDH welcomed the adoption of an international framework reasserting States' and enterprises' responsibilities and affirming the right of victims to an effective remedy, FIDH believes that the Principles have important shortcomings, especially as they overlook the extra-territorial obligations of States.

As a follow-up to John Ruggie's mandate, the Human Rights Council decided to establish a working group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts appointed for three years following geographical representation. The Working Group is requested to:
– to promote the dissemination and implementation of the Guiding Principles through country visiting, supporting the new mechanisms launched by the implementation of the Guiding Principles, championing greater access to remedies for the victims and implementing national policies with regards to corporate activity and human rights.

– to enhance access to effective remedies for the victims, especially those living in vulnerable situations.[60]

The Working Group will not be able to receive individual communications from victims of human rights violations. However, the Working Group will be in a position to look at concrete cases, through site visits in particular. FIDH expects that the working group which members were appointed in September 2011, will tackle the gaps of the Guiding Principles and make recommendations to ensure access to effective remedies for victims.

The following are a list of the Special Representative's main reports:
– *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)
– Guiding principles on business and human rights for implementing the UN " Protect, Respect and Remedy" framework, 21 march 2011 (A/HCR/17/31)

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 r**elevance 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

60 See Human Rights Council, "Human Rights and Transnational Corporations and Other Business Entreprises", 15 June 2011, A/HRC/17/L.17/Rev.1, available at : http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G11/141/88/PDF/G1114188.pdf?OpenElement. See also: FIDH, "UN Human Rights Council Adopts Guiding Principles, yet Victims Still Awaiting for Effective Remedies", 17 June 2011, http://www.fidh.org/UN-Human-Rights-Council-adopts-Guiding-Principles

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.[61]

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**.

61 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 detail **issues concerning individuals**, groups or communities. They can focus on **general trends and patterns of human rights violations** in a particular country or across various countries. An existing or draft **legislation** can also be a matter of concern. Their purpose is to obtain **clarification** by the state concerned and to promote measures designed to protect human rights on its territory. In light of the government's response, the mandate-holder determines how best to proceed. This might include the initiation of enquiries, the elaboration of recommendations or other appropriate steps.
Communications and governments' responses are **confidential** until they are published in the mandate-holder's periodic report, or the latter determines that the specific circumstances require action to be taken before that time. The names of alleged victims are reflected in the periodic reports, except for children and other victims of violence in relation to whom publication of names would be problematic.

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

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.[62]

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**:

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

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

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

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 politically 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**.[63] It is left to the discretion of a mandate-holder to decide whether to act on a given situation.

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

Under what conditions?

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

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 waste[64] demands measures to counter the damaging effects of chemical substances in cleaning and food products - Press release

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

Many of the individual cases brought to the attention of the Special Rapporteur relating to hazardous chemicals deal with **allegations of irresponsible or illegal corporate behaviour** which has direct adverse effects on the enjoyment of human rights by individuals and communities. Such behaviour is too often met with impunity. International human rights law compels states to take effective steps to regulate corporate behaviour in relation to hazardous chemicals and **holds private companies accountable** for any actions taken in breach of such regulations."[65]

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.

64 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".

65 OHCHR, "Special Rapporteur on toxic wastes urges measures to counter harnful effects of chemicals contained in household and foods", Press release, 7 April 2006.

> Forced evictions constitute a grave breach of human rights. They can be carried out only in exceptional circumstances and with the full respect of international standards. Given the disastrous humanitarian situation faced by the victims of forced evictions, I urge the Cambodian authorities to establish a national moratorium on evictions until their policies and actions in this regard have been brought into full conformity with international human rights obligations."[66]

c) Country visits

Finally, Special Procedures mandate-holders may also undertake visits to countries in order to **investigate the human rights situation at the national level**. These visits are an essential means to obtain direct and first-hand information necessary to evaluate the situation. During these visits, experts may meet with:
– National and local authorities, including members of the judiciary and parliament
– Members of national human rights institutions
– Non-governmental organisations and other representatives of civil society
– Victims of human rights violations
– United Nations organisations and other intergovernmental organisations
– The press
Mandate-holders must request an **invitation** from the state they wish to visit. However, a government may take the initiative to invite mandate-holders.

After their visit, mandate-holders prepare a **mission report** containing their conclusions and recommendations.[67]

STATISTICS[68]

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.

66 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.
67 See OHCHR, "Country visits", www2.ohchr.org
68 See OHCHR, "Special procedures of the Human Rights Council", www2.ohchr.org

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.[69]

ADDITIONAL RESOURCES

– **Charter of the United Nations**
www.un.org/en/documents/charter/index.shtml

– **United Nations Treaties and their Protocols**
www2.ohchr.org/english/law/index.htm

– **Ratifications of human rights instruments**
http://treaties.un.org

– **Office of the High Commissioner for Human Rights**
www.ohchr.org

– **Human Rights Committee**
www2.ohchr.org/english/bodies/hrc

– **Committee on Economic, Social and Cultural Rights**
www2.ohchr.org/english/bodies/cescr

– **Human Rights Council**
www2.ohchr.org/english/bodies/hrcouncil

– **Universal Periodic Review**
www.ohchr.org/EN/HRBodies/UPR

– **Review of the "1503" procedure**
www2.ohchr.org/english/bodies/chr/complaints.htm

– **Special Procedures**
www2.ohchr.org/english/bodies/chr/special

– **Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises**
www2.ohchr.org/english/issues/trans_corporations/index.htm
www.business-humanrights.org/SpecialRepPortal/Home

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

– **Working Group on the issue of human rights and transnational corporations and other business enterprises**
  - http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx
  - http://www.business-humanrights.org/Documents/UNWorkingGrouponbusinesshumanrights

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

– **FIDH,** ***The Universal Periodic Review Handbook*****, August 2009**
www.fidh.org/IMG/pdf/UPR_HANDBOOK.pdf

↘ 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 DIS-CRIMINATION 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 *ad hoc* Conciliation Commission This procedure only applies to States that recognise this competence of the ICCPR Committee	Article 10 OP-ICESCR This procedure only applies to States that recognise this competence of the CESCR Committee	Art. 11-13 CERD Possibility of appointing an *ad hoc* 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 OP-ICESCR (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 OP-ICESCR	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 Christof Heyns, South Africa, (since august 2010)	- 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	

	RELEVANT DOCUMENTS AND LINKS ON NON-STATE ACTORS (REPORTS, GUIDELINES, PRINCIPLES)	WEBSITE
	A/HRC/4/18 Annex 1 Basic principles and guidelines on development-based evictions and displacement. **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." **A/65/261 (Report 2010)** §§ 25, 26: the Special Rapporteur focuses on the obligations of States to control the activities of private actors.	www2.ohchr.org/english/issues/housing/index.htm
	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. **A/65/321 (Report 2010)** § 47 : the Special Rapporteur seek to work with the private sector on the issue of "potential human rights applications of new technologies and the obstacles to their effective use".	www2.ohchr.org/english/issues/executions/index.htm
	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."**	www2.ohchr.org/english/issues/poverty/index.htm
	A/HRC/RES/7/14 (2008) 13. *Requests* 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**. **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**. **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**. **A/65/223 (Report 2010)** §41b), §43c) the role of private investors in favor of liberalization of the lands and the role of State in the supervision of their behavior.	www2.ohchr.org/english/issues/food/index.htm

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

TITLE	NAME OF CURRENT MANDATE HOLDER	PRACTICE OF COMMUNICATION TO GOVERNMENTS	COUNTRY VISITS	REFERENCES TO NON-STATE ACTORS IN THE MANDATE	COMPLAINT SUBMISSION AND CONTACT	
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental **health**	Mr. 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	
Special Rapporteur on the situation on **human rights defenders**	Ms. Margaret Sekaggya, 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 jtetard@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	

	DOCUMENTS ET LIENS FAISANT RÉFÉRENCE AUX ACTEURS NON-ÉTATIQUES (RAPPORTS, GUIDES, PRINCIPES ...)	WEBSITE
	A/63/263 (in report to GA 2008) Human rights guidelines to pharmaceutical companies in relation to access to medicines, former Special Rapporteur Paul Hunt. **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. [...]	www2.ohchr.org/english/issues/health/right/index.htm
	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. [...]** **A/65/223 (Report 2010)** The first part focuses on violations of Human rights committed by companies and their responsibilities.	www2.ohchr.org/english/issues/defenders
	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.** **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.** **A/HCR/15/37 (Report 2010)** The second part is devoted "to an analysis of corporate responsibility with respect to indigenous rights, in the framework of the international community's expectations in that regard".	www2.ohchr.org/english/issues/indigenous/index.htm
	A/63/325 (Report 2008) see §4 on **private companies that perform all types of security [...] in armed conflict areas and/or zones.** **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]** **A/63/325 (Report 2010)** The report focuses on the responsibility of the private military and security companies and contains draft principles "in view of the possible development of national and international regulation mechanisms". **A/HRC/18/32/Add.4 (Report 2011)** Mission in Iraq, §§50-53 and 66: the report notes the involvement of Blackwater, a private security company, in several human rights abuses in Iraq.	www2.ohchr.org/english/issues/mercenaries/index.htm

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

TITLE	NAME OF CURRENT MANDATE HOLDER	PRACTICE OF COMMUNICATION TO GOVERNMENTS	COUNTRY VISITS	REFERENCES TO NON-STATE ACTORS IN THE MANDATE	COMPLAINT SUBMISSION AND CONTACT	
Special Rapporteur on the human **rights of migrants**	Mr François Crépeau, Canada/ France, (since august 2010)	- Urgent appeals - Letters of allegation	Yes	Not specifically mentioned	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	
Special Rapporteur on **torture** and other cruel, inhuman or degrading treatment or punishment	Mr. Juan Enersto Mendez, Argentine, (since 2010)	- Urgent appeals - Letters of allegation	Yes	Yes, **E/CN/4/ RES/2005/47,** §16	E-mail: sr-torture@ohchr.org urgent-action@ohchr.or 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	M. Calin Geogescu, Romania, (since august 2010)	- 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	

	DOCUMENTS ET LIENS FAISANT RÉFÉRENCE AUX ACTEURS NON-ÉTATIQUES (RAPPORTS, GUIDES, PRINCIPES ...)	WEBSITE
	A/HRC/4/24 (Report 2007) The Special Representative points out notably the rôle of non-State actors (private individuals) in immigration control.	www2.ohchr.org/english/issues/migration/rapporteur/index.htm
	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.** **A/HRC/9/20 (report 2008)** See §36. **A/HRC/18/30 (Report 2011)** §§107 and108 : "Corporate responsibility"	www2.ohchr.org/english/issues/slavery/rapporteur/index.htm
	Preliminary findings on the Mission to Papua New Guinea (25 mai 2010).	www2.ohchr.org/english/issues/torture/rapporteur/index.htm
	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 coutry. **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. **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 owned by Trafigura. **A/HRC/15/22 (Report 2010)** §§18, 36, 58: cases brought to his attention of companies which moved their production to developing countries to continue to produce pesticides and pharmaceuticals, and dialogue with corporations.	www2.ohchr.org/english/issues/health/waste/index.htm

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

TITLE	NAME OF CURRENT MANDATE HOLDER	PRACTICE OF COMMUNICATION TO GOVERNMENTS	COUNTRY VISITS	REFERENCES TO NON-STATE ACTORS IN THE MANDATE	COMPLAINT SUBMISSION AND CONTACT	
Special Rapporteur on **trafficking in persons**, especially women and children	Ms. 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	
Working Group on **human rights and transnational corporations**	5 members (Three years from September 2011)	Not specifically mentioned	Yes			
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	A/HRC/17/L.17/Rev.1 Yes	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	

	DOCUMENTS ET LIENS FAISANT RÉFÉRENCE AUX ACTEURS NON-ÉTATIQUES (RAPPORTS, GUIDES, PRINCIPES ...)	WEBSITE
	E/2002/68/Add.1 Recommended Principles on Human rights and human trafficking **A/HRC/10/16 (Report 2009)** Recommendations on public-private partnerships to combat human trafficking. **A/65/288 (Report 2010)** § 30 d), §§54-58: focuses on forms of business involvement in the sale of services produced by victims of human trafficking and innovative public-private partnerships for the prevention of trafficking in persons.	www2.ohchr.org/english/issues/trafficking/index.htm
	Previous reports of the Special Representative (2005 – 2011) include: **A/HRC/8/5 (Report 2008)** Protect, Respect and Remedy: a Framework for Business and Human Rights. **A/HRC/14/27 (Report 2010)** Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework.	http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness. aspx http://www.businesshumanrights.org/Documents/UNWorkingGrouponbusinesshumanrights wg-business@ohchr.org
	In 2010, the Independent Expert will prepare a report on private sector participation in the provision of water and sanitation services. **A/HRC/12/24 (report 2009)** "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** - States should establish **effective, transparent and accessible monitoring and accountability mechanisms, with power to monitor and hold accountable all relevant public and private actors** "	www2.ohchr.org/english/issues/water/Iexpert/consultation.htm
	A/HRC/11/6 (report 2009) "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;" **A/HRC/14/L.9/Rev.1 (Report 2010)** §8: "States have to support initiatives undertaken by (...) the private sector (...) aimed at promoting gender equality (...) and preventing violence against women and girls". **A/ HRC/17/26 (Report 2011)** §§ 48, 55, 63, 88, 103, 105, 107, 108: the report states that violence against women can be found in both the public and private sectors. **A/ HRC/17/26/Add.5 (Report 2011)** Mission to the United States of America § 70: Obligations of State to take reasonable measures to protect and ensure a citizen's rights against violations by private actors.	www2.ohchr.org/french/issues/women/rapporteur/index.htm

↘ 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 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	

	DOCUMENTS ET LIENS FAISANT RÉFÉRENCE AUX ACTEURS NON-ÉTATIQUES (RAPPORTS, GUIDES, PRINCIPES ...)	WEBSITE
	A/HRC/7/42 (report 2008) 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. **A/HRC/7/42 (report 2008)** 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. **A/HRC/15/46 (Report 2010)** §§ 31, 32, 46: the report focuses on economic land concessions, companies et others real estate operations that cause serious consequences for the poor population in rural and urban areas and for indigenous population. **A/HRC/18/46 (Report 2011)** §§ 13, 15, 21: report of evictions without compensation by the KDC International company of persons from the province of Kampong Chhnang in 2008.	www2.ohchr.org/english/countries/kh/mandate/index.htm
	A/62/354 **"55. The displacement of populations as a result of the activities of oil companies has also been reported.** 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."**	www2.ohchr.org/english/countries/sd/mandate/index.htm

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

For more information please refer to the websites of the special procedures.

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)	- 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)	- 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)	- 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)	- 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.[70]

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".[71]

No article 26 complaints (see section on Article 26 below) have been filed with the ILO under Conventions Nos. 107 or 169.[72] However, the Convention has been the subject of several representations.[73]

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,

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

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

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

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

political organization and internal forms of exerting authority.[74] 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 dialogueue with individuals, FIPSE Centers, or Associations without prior authorization from FIPSE's Meeting of Members.[75]

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.[76] The Declaration sets out principles that governments, employers' and workers' organizations and multinational enterprises are recommended to observe on a **voluntary basis**.[77]

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 sinultaneously with other mechanisms. Many potential applications overlap with other complaints mechanisms and hence **this recourse has become virtually obsolete**.[78] 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.

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74 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.

75 *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

76 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.

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

78 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.[79]

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".[80]

79 *Ibid*., § 37 and § 38.
80 *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".[81] The Committee can then decide what action, if any, to take regarding the complaint.

Under what conditions?

1. Ratification status[82]

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

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

2. Deadline

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

3. (Non) Exhaustion of domestic remedies[83]

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

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81 *Ibid*., § 40.

82 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.itcilo.it/ils/foa/2002/a92894_es/library/digestdecisions_en/23176.htm

83 *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.[84]

4. Time limits for complaints[85]

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".[86] 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,[87] complaints can also be filed with the United Nations, which will forward by the Economic and Social Council to the ILO.[88] 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;

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

85 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

86 *Ibid*.

87 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/relm/country.htm. UN, "United Nations Member States", www.un.org/members/list.shtml

88 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.[89]

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.[90]

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

All of the Committee's reports are published on the Committee on Freedom of Association website[91]. 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.[92]

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

90 B. Vacotto, *op. cit.*

91 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

92 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.[93]

2. Fact-Finding and Conciliation Commission on Freedom of Association[94]

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.

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93 *Ibid*., § 66.

94 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",[95] 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.[96]

➔ 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)[97]

The case concerned a Supreme Court decision (Hoffman Plastic Compounds v. National Labor Relations Board) which led to millions of migrant workers loosing 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.

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95 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).

96 *Ibid*.

97 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, Serie 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)."[98]

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.

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The Committee on Freedom of Association has several advantages for victims of violations of trade union rights. First, the Committee appears to give a thorough evaluation to all eligible cases it receives. As mentioned, it has examined over 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.

98 *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".[99] 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.[100]

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".[101]

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".[102]

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. [103]

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

100 *Ibid*.

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

102 *Ibid*., art. 25.

103 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.[104]

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".[105]

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".

104 *Ibid*.
105 *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.[106]

* * *

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.[107]

106 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.
107 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".[108] "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".[109]

So far around 30 complaints have been filed and 12 complaints lodged have led to the establishment of Commissions.[110] 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 complaint[111]?

Under Article 26 of the ILO Constitution, only the following entities may file a complaint:
– A Member State that has ratified the relevant convention (the complaint must allege that the state has violated a convention it has ratified)
– A delegate to the International Labour Conference: each Member State has four delegates to the International Labour Conference: two delegates representing the government, one representing workers, and one representing employers[112]
– The Governing Body of the ILO

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

109 ILO, "Complaints", *op. cit.*

110 B. Vacotto, *op. cit.*

111 ILO, "Complaints", *op. cit.*

112 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.[113]

Process and outcome[114]

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.[115]

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.[116] Article 33 has been used only once – in 2002, against Myanmar/Burma.[117]
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.[118]

113 B. Vacotto, *op. cit.*
114 ILO, *Constitution, op. cit.*, art. 26-34.
115 ILO, *Constitution, op. cit.*, art. 29, 31.
116 *Ibid.*, art. 33.
117 ILO, "Complaints", *op. cit.*
118 B.Vacotto, *op. cit.*

Commissions of Inquiry in action

➔ Case of forced labour in Myanmar/Burma[119]

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".[120] 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".[121]

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

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119 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/sapfl/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.

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

121 *Ibid*.

convention, that they cease the use of forced labour in practice, and that they enforce penalties against those who exact forced labour.[122]
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".[123]

In February 2007, the ILO concluded a supplementary understanding[124] 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".[125]

* * *

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

122 *Ibid*., Part V, Conclusions and recommendations.
123 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
124 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
125 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.[126] 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?[127]

– 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**

126 B. Vacotto, *op. cit.*
127 *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.[128] 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

[128] 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).[129] 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).[130] On 1 June 2010 the Additional Protocol No. 14 "amending the control system of the Convention" entered into force[131]. 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.[132]

What rights are protected?[133]

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

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

130 *Ibid*.

131 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.

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

133 *Ibid*.

European Convention and those protected by the European Social Charter.[134/135] 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:[136]
– 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?[137]

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).

134 ECHR, Airey v. Ireland, App. No. 6289/73, (1979) Serie A32, 2 *EHRR* 305.
135 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 del'Homme / sous la dir. de L. Boy, J-B. Racine, F. Siiriainen, 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.
136 CoE, "Simplified Chart of signatures and ratifications", 25 January 2010, http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG
137 *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".[138] 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.[139] 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.

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

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

Cyprus v. Turkey[140]

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[141]

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".[142]

Ilascu and Others v. Moldova and Russia[143]

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 r**emained "under the effective authority, or at the very least the decisive influence, of the Russian Federation"**.[144] There was "a **continuous link of responsibility** for the applicants' fate".[145] The applicants therefore fell **within the jurisdiction of the Russian Federation**, whose responsibility was engaged.

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140 ECHR, *Cyrpus v. Turkey,* App. Nos. 6780/74 & 6950/75, (1975) 4 EHRR 482.
141 ECHR, *Loizidou v. Turkey*, App. No. 15318/89, (1996) 20 EHRR 99, (1997) 23 EHRR 513, §52.
142 *Ibid*.
143 ECHR, *Ilascu and others v. Moldova and Russia*, App. No. 48787/99, (2004) *40 EHRR 1030*.
144 *Ibid*., § 392.
145 *Ibid*., § 393.

➔ Al Saadoon and Mufdhi v. the UK[146]

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".[147] 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**".[148]

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[149]

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 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**".[150] 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.**"[151]

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

146 ECHR, *Al Saadoon and Mufdhi v. the UK*, App. No. 61498/08, 30 June 2009.
147 *Ibid*., §85.
148 *Ibid*., §88.
149 ECHR, Bankovic and Others v. Belgium and 16 other Contracting States, App. No. 52207/99, (2001) 7 EHHR 775.
150 *Ibid*., §47.
151 *Ibid*., §56.

State for the purpose of Article 1".[152] 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.[153] 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.[154] 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.

Al-Skeini and Others v. the United Kingdom

On July 7, 2011, the ECHR found that the UK's human rights obligations apply to its acts outside of its borders, in Iraq, and that the UK had violated the articles 1 and 2 of the European Convention on Human Rights by failing to investigate the circumstances of killings of the civilians in Basra.

The case concerned the deaths of six Iraqi civilians in Basra in 2003, where the UK was an occupying power. Five of them, were killed during military operations involving British soldiers. The sixth was arrested and died at the hands of British troops in a military base. The victims' families had received a low compensation from the British government. However they complained to the Strasbourg Court that the British authorities had refused to conduct an independent investigation into the circumstances of the killings. FIDH submitted a third party intervention jointly with the Bar Human Rights Committee, the European Human Rights Advocacy Centre, Human Rights Watch, INTERIGHTS, the Law Society and Liberty, on on the issue of extraterritorial application of human rights law, and in particular of the European Convention for Human Rights.

The Court rejected the arguments put forward by the British government, who argued, as the deaths occurred outside British territory, the requirement under the European Convention for Human Rights to conduct an independent and thorough investigation did not apply.

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152 ECHR, "Bankovic and Others v. Belgium and 16 other Contracting States declared inadmissible", Press release issued by the Registar, 970, 19 December 2001.

153 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.

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

The Court considered that given that the United Kingdom exercised effective public powers there was a jurisdictional link between the UK and the individuals killed. The Court also reaffirmed the UK's obligation to lead independent and effective investigation into killings.

This ruling is of paramount importance as this reasoning may also apply to other states acting abroad in similar situations.

➔ **Behrami & Behrami v. France; Saramati v. France, Germany & Norway**[155]
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".[156] The Court declared the applications inadmissible, considering its **inability to subject the UN to its judgement**.

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.[157]

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

156 *Ibid*., §67.

157 ECHR, *Medvedyev 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.

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.[158]

158 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 complaints[159] and must offer reasonable prospects of success in order to be considered both effective and available.[160] 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.[161] 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

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

160 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".

161 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".[162]

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."[163]

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;

162 ECHR, *Selmouni v. France*, App No. 25803/94 (1999), 29 EHRR 403, § 79.
163 *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[164]

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).

164 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.**[165] 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

165 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.[166]

Lopez Ostra v. Spain[167]

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

166 The ECHR has considered environmental issues in relation to different provisions of the European Convention: art.2 (right to life), art.3 (*righ*t 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).

167 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**".[168]

Fadeyeva v. Russia[169]

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**".[170] The Court concluded that the State had f**ailed "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.[171]

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".[172]

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

168 *Ibid*., § 51-58.

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

170 *Ibid*., §89.

171 *Ibid*., §134.

172 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 Agnieszak 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.[173] 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.

173 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.[174] 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.[175] 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.[176] Each State is bound by the provisions it previously accepted. Among them, 6 must be taken out of the "hard-core" provisions of ESC.[177] "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

174 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

175 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.

176 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.

177 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".[178]
– 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.[179]

The European Social Charter **applies only to the "metropolitan territory of each Party"**.[180] 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*.[181]

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)

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178 CoE, "The European Social Charter", www.coe.int/t/dghl/monitoring/socialcharter/Presentation/AboutCharter_en.asp

179 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

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

181 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?[182]

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.

182 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".[183] These recommendations are available on the Committee of Ministers website.[184]

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.[185]

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 condi-

183 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

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

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

tions). 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:

– 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."[186]
– Greece "is in breach of its obligation to monitor the enforcement of regulations on health and safety at work properly".[187]
– The Greek government "has taken no subsequent steps to enforce the right embodied in Article 2§4".[188]

* * *

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.

186 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.
187 *Ibid*., (iii).
188 *Ibid*., (iv).

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/COLENmanuels.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

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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' Rights[1] 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 Child[5] and the African Court to consider the case.

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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 rights[8].

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

7 ACHPR, Resolution On Economic, Social and Cultural Rigths 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 guidelines[9] 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' 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 admissible[14].

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).

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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.

Process and outcome[19]

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 Nigeria[24]

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.

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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.escr-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.

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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' Rights[30] 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]

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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. Yet as of today, among the 25 States having ratified the Protocol of 1988, only **Burkina Faso, Ghana, Malawi, Mali** and **Tanzania** have made a declaration under Article 34.6. It is therefore important that NGOs without the observer status before the Commission apply to obtain the status for

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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.

future submissions to the Court, as this could represent a potential obstacle to access the Court. Obtaining the observer status can take up to a year or two.[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

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);
– Judgement[36] (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 underresourced. 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 five 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 l 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 law[40], 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.

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39 SADC, *Mike Campbell (Pvt) Ltd. v. Zimbabwe*, November 28, 2008, n° 2/2007 [2008] SADC (T) 2, SADC (T) n° 8/2008, www.saflii.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.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, Pratices and Institution*s, 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

– **COMESA Court of Justice**
http://about.comesa.int/lang-fr/lnstitutions-du-comesa/cour-de-justice

– **AMU Court of Justice**
www.maghrebarabe.org/fr/institutions.cfm

– **AICT (African International Courts and Tribunals)**
www.aict-ctia.org

– **SAFLII (Southern African Legal Information Institute), Regional Courts of Justice**
www.saflii.org

– UNESCO, Claiming Human Rights: Guide to International Procedures Available in Cases of Human Rights Violations in Africa, Regional Economic Communities in Africa,Deutsche UNESCO-Kommission e.V., Bonn, et Commission française pour l'UNESCO, Paris, www.claiminghumanrights.org/african_recs.html

– S. T. Ebobrah, "Litigating Human Rights before Sub-regional Courts in Africa: Prospects and Challenges", *African Journal of International and Comparative Law*, vol. 17, 2009

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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, Niger, Nigeria, Senegal, Sierra Leone, and Togo	Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe	
Jurisdiction	- 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)	- 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): - a Member Stare 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	- 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)	- A Member State - **A natural person or a legal entity against a Member State** (Art. 15 of Protocol)	
Requirements for an individual complaint	- Exhaustion of local remedies **not required** - The case must not have been considered by another international Court	- 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	- 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	- 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).	- 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
	- 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)	- Interpretation and application of the Treaty (Art. 19 of Treaty)	- 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
	- A Member State - The EACJ Secretary general - Any natural person or legal entity **residing on the territory of Member States**	- A Member State - The Secretary general - **Any natural person or a legal entity**	- Presidential Council - Member State involved in the dispute
	- Exhaustion of all local remedies	- Exhaustion of all local remedies (Art.26)	
	Written and oral	Written and oral	
	- Judgements final, not open to appeal - Procedure for review of a decision (Art. 35 of Treaty)	- 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)	- Judgements enforceable and final
	Binding	Binding	Binding
	- 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".

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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 reactivated 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 Charter[46] and the American Convention on Human Rights[47]. **The main function of the IACHR is to promote and defend human rights in the Americas**. In carrying out its mandate, the Commission may in particular[48]:

– 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)

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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 Man[51]
– Chapter I sets forth Civil and Political Rights as well as Economic Social and Cultural Rights
– Chapter II sets forth a list of corresponding Duties

Not all Member States have ratified the American Convention on Human Rights. Those who have not[52] 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 Commission[54].

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.

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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.

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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 hold 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.

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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 territority 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.

RAPPORTEURS 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 Yanamomi indigenous peoples. This state run project allegedly violated their rights to land contained in article XXIII of the American Declaration[70], 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.

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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. v. 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, N*göbe 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 Arena, 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. In March 2010, the Commission hold a hearing on the implementation of the precautionary measures. On this occasion, NGOs reiterated the gravity of the situation and the lack of respect of the precautionary measures on the part of the state.

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

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

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).

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,

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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_victimas/victimas_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. Suriname[87]

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.

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101 Mario Melo (abogado del Pueblo de Sarayaku), "Sarayaku : un caso emblematico de defensa territorial".
102 I/A Court H.R., *Mayagna (Sumo) Awas Tingni community v. Nicaragua*, 31August 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 activities[106]. 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.

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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**

↗ **Amongst this group, the first plaintiff in the case against Chevron/Texaco in Ecuador. Now invovling 30 000 plaintiffs, this historic class action related to diseases caused by water contamination has been going on for 18 years.**

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↗ **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