



Case studies and workshop report

# Remedy in Business and Human Rights Cases

## The Role of National Human Rights Institutions

Report from the October 2018 Berlin NHRI Workshop

**April 2019**

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# 1 The 2018 Berlin Workshop

From 22–24 October 2018, the German Institute for Human Rights and the Danish Institute for Human Rights hosted a workshop in Berlin for national human rights institutions (NHRIs) on remedy in the area of business and human rights (BHR). This report documents the workshop discussions and includes case studies from eleven NHRIs that show the current successes of, and difficulties faced by, NHRIs seeking to provide remedy for business-related human rights problems.

## 1.1 Workshop background, objectives and participants

The workshop sought to provide a space for concrete action planning for NHRIs working on remedy of business-related human rights abuses. The programme built on previous events on NHRIs and remedy in BHR, including the 2015 *Conference on Legal Accountability of Business for Human Rights Impacts*, 2016 *Rabat Workshop on Guaranteeing access to remedies for business-related human rights abuses: Role of NHRIs* and the 2018 *Chatham House Dialogue on Access to Remedies in Business and Human Rights: The Role of National Human Rights Institutions*; as well as research on NHRIs in access to remedy, contributions of NHRIs to the work of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the Access to Remedy II Project (focused on non-judicial state-based grievance mechanisms) and contributions of the BHR Working Group of the Global Alliance of National Human Rights Institutions (GANHRI BHR WG) to the Intergovernmental Working Group on a binding instrument on BHR (IGWG). The overall objective of the Berlin workshop was to strengthen NHRI capacity and collaboration on access to remedy in BHR and develop concrete actions for individual NHRIs, North-South collaboration, and the upcoming work of the United Nations Working Group on Business and Human Rights (UNWG) on the role of NHRIs in access to remedy in BHR. Specific objectives included:

- Sharing experiences and lessons learnt on NHRIs' using their different mandate areas to provide/facilitate remedy of business-related human rights abuses
- Taking account of regional and national contexts and priorities and identify common themes and objectives for collaborative and collective action going forward
- Supporting elaboration of common NHRI approaches to international processes related to remedy in the area of BHR, including IGWG
- Exploring how to strengthen NHRI bilateral collaboration in concrete cases of business-related human rights abuses, as well as collaboration between NHRIs and other remedy mechanisms
- Identifying priority areas for attention to inform the upcoming work of the UNWG on the role of NHRIs in access to remedy and the future research agenda
- Enhancing visibility of NHRIs in the area of remedy and BHR

NHRIs from Germany, Denmark, Morocco, Kenya, Tanzania, Nigeria, Colombia, Chile, the Philippines, Malaysia, Australia, the Netherlands, and England and Wales participated in the event, to which external experts and the UNWG also contributed.

## 1.2 Observations and outcomes

The content of the workshop touched on a number of remedy-related themes in the work of NHRIs, especially in cross-border cases and in thematic areas where

transnational NHRI networks are of particular importance. Key conclusions from the workshop were:

### 1.2.1 NHRI remedy provision and collaboration

In the area of institutional cooperation, the workshop noted the following areas of particular importance:

- **Collaboration in individual cases and in concrete policy areas:** NHRIs should reach out to one another in their specific day-to-day work. Possibilities for cooperation include inter-NHRI inquiry panels; inquiries involving more than one NHRI; and coordination around individual cases, especially e.g. across home- and host-state borders, or among the various NHRIs whose countries are part of a single supply chain. Beyond individual cases, this can also include collaboration on research.
- **Formalization of cooperation:** Cooperation should, where possible, take place on the basis of memoranda of understanding, building institutional memory and anchoring practice beyond ad-hoc professional relationships between NHRI officers. NHRIs with experience of this can provide templates to sister institutions in their region. Agreements should cover concrete cases, regional cooperation, and the sharing of information and expertise.
- **National Action Plans on Business and Human Rights (NAPs):** NHRIs are routinely involved in the processes leading to the publication of their respective countries' NAPs. Sister institutions should share experiences around NAPs; share experiences of monitoring and evaluation methods of NAPs and the carrying out of such measures; and should, where possible, do so through regional networks and the GANHRI BHR WG.
- **BHR focal points:** The system of "Focal Points", publicly identified NHRI officers who are the key contact person for BHR in their institution, especially for requests from sister institutions, should be preserved and expanded. Each NHRI should ensure that the contact information for their focal point is kept current and accessible.

### 1.2.2 Regional NHRI networks

Each of the four NHRI regions hosts its own regional NHRI network, with an additional network in place covering the Southeast Asian NHRIs. These are important actors in the area of remedy policy.

- **Cross-network collaboration:** Regional NHRI networks in the Americas, Europe, Africa, and Asia/Pacific should ensure that they are in conversation with one another, bilaterally and through GANHRI. Cooperation should be fostered between GANHRI and the FIO (the international organization of ombudsmen offices).
- **Regional human rights mechanisms:** NHRIs should scale up their engagement with regional human rights courts in the Americas, Europe, and Africa.
- **Work on specific themes:** NHRIs should devote additional effort toward being able to take collective action on key BHR themes. Joint positions should be sought and joint actions agreed on specific issues such as climate change, migrant workers, etc.

### 1.2.3 GANHRI/GANHRI Working Group on Business and Human Rights

Turning its attention to the existing NHRI cooperation structures at the global level, the workshop identified the following ideas and recommendations:

- **Coordination and publication:** The time has come to adopt a structured approach to gathering good practice examples – e.g. a standardized “remedy report” which could then be published on the GANHRI website. NHRI work should be documented and made accessible to sister institutions and other stakeholders, with existing and new GANHRI data-sharing tools invested in for the benefit of all NHRIs working in this area.
- **EU.NHRI Phase II:** Efforts should be made by GANHRI with the help of European NHRIs and European governments to explicitly include BHR and the issue of remedy in Phase II of the EU.NHRI project.
- **UN Human Rights Council:** It would be desirable for a forthcoming NHRI resolution to focus specifically on the issue of remedy in business-related cases.

### 1.2.4 Engagement with the UN Working Group on BHR

The UNWG was identified by the workshop as an essential partner in NHRI policy work in the area of remedy for business-related human rights abuses.

- **Research input:** The UNWG’s research project should be supported with case studies, good practice examples, and the collection of existing research into transnational NHRI cooperation.
- **Engagement:** UNWG country visits should be invited and supported by NHRIs, with an effort made to focus attention on the issue of remedy in business-related cases.

### 1.2.5 Engagement with the Treaty process and the IGWG

At the same time, there is an opportunity for NHRIs to engage with the process working toward a binding treaty, and encourage their governments to do so as well.

- **Government engagement:** NHRIs should share strategies for increasing government engagement in the treaty process. Some NHRIs may want to work toward a common position on the treaty process, identifying key red lines, including for purpose of engaging individual governments, e.g. at the regional network level.
- **Information for NHRIs on IGWG:** Through the GANHRI BHR WG, information should be disseminated to NHRIs who are unable to attend sessions of IGWG themselves. It should facilitate internal discussion about the treaty process among all NHRIs, including through the use of innovative technical means, with the goal of increasing NHRIs’ proficiency on the strategic questions of the treaty process as well as the technical details of the draft instrument.
- **NHRIs as National Implementation Mechanisms (NIMs):** If the discussion around the Optional Protocol advances, it may be helpful to publish a paper on NHRIs as NIMs, drawing lessons from NHRIs functioning as NIMs for other treaties such as the CAT or CRPD.

### 1.2.6 OHCHR Access to Remedy Project

- **Utilize ARP I and II:** NHRIs should use the results of ARP phases I and II to inform NAP processes and follow-up and to engage remedy mechanisms on good practice and reform.

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- **Engage with ARP III:** There is also an opportunity for NHRIs to participate in Phase III of the ARP research, sharing lessons from NHRI complaints processes, and encouraging business participation from NHRIs' respective countries.

## 2 Case studies

The following studies document the work of eleven NHRIs currently engaged in the provision of various types of remedy for a number of different business-related human rights problems.

### 2.1 The Australian Human Rights Commission's National Inquiry into Sexual Harassment in the Workplace

By Sarah McGrath, Director International Engagement, Australian Human Rights Commission

#### 2.1.1 Overview

On 20 June 2018, Australia's Sex Discrimination Commissioner, Kate Jenkins, announced a national inquiry into sexual harassment in Australian workplaces.<sup>1</sup> This National Inquiry is an Australian and, we believe, a world first in responding to the issue of workplace sexual harassment.

The focus of the Inquiry is on:

- the nature and prevalence of sexual harassment in Australian workplaces;
- the drivers of this harassment; and
- measures to address sexual harassment in Australian workplaces.

Through the Inquiry, the Australian Human Rights Commission (the Commission) will identify examples of existing good practice, and will make recommendations for change, providing a way forward for preventing sexual harassment in the workplace. The Inquiry is being conducted pursuant to the Commission's functions under the Australian Human Rights Commission Act 1986 (Cth).

#### 2.1.2 The National Inquiry Process

To further our understanding of workplace sexual harassment, its causes, impacts and best practice responses, the Commission is conducting public consultations in all capital cities and a number of regional centres across Australia. The Commission is also accepting submissions. As of 15 January 2019, the Commission has received 170 submissions through the online submission process.<sup>2</sup>

On 12 September 2018, the Australian Sex Discrimination Commissioner Kate Jenkins released 'Everyone's business: Fourth national survey on sexual harassment in the workplace'.<sup>3</sup> The 2018 National Survey was conducted both online and by telephone with a sample of over 10,000 Australians. The survey findings will inform the National Inquiry, by providing a base against which the Commission can consider the extensive information that it will gather through research and consultations.

<sup>1</sup> *National Inquiry into Sexual Harassment in Australian Workplaces*, Australian Human Rights Commission, (Sep. 12, 2018), <https://www.humanrights.gov.au/our-work/sex-discrimination/projects/national-inquiry-sexual-harassment-australian-workplaces>

<sup>2</sup> *Have your say - National Inquiry into Sexual Harassment in Australian Workplaces*, Australian Human Rights Commission, n.d.: <https://www.humanrights.gov.au/have-your-say-national-inquiry-sexual-harassment-australian-workplaces>

<sup>3</sup> *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces*, Australian Human Rights Commission (2018), [https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC\\_WORKPLACE\\_SH\\_2018.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_WORKPLACE_SH_2018.pdf)

The results of the survey confirm that sexual harassment is widespread and pervasive in Australian workplaces and has increased significantly from the last survey six years ago. The survey revealed that one in three people (33%) have experienced sexual harassment at work in the last five years.<sup>4</sup> While sexual harassment is an issue across all industries, rates are particularly high in the information, media and telecommunications industry.<sup>5</sup>

In relation to remedial action, the survey reveals that formal reporting of workplace sexual harassment continues to be low, with only 17% of people making a report or complaint.<sup>6</sup> In one in five cases (19%) the formal report or complaint brought no consequences for the perpetrator.<sup>7</sup> The most common outcome of reports or complaints was a formal warning to the perpetrator (30% of cases).<sup>8</sup> Almost half (45%) of people who made a formal report said that no changes occurred at their organisation as a result of the complaint.<sup>9</sup>

### 2.1.3 Challenges and opportunities



A key strength of the national inquiry process is that it can generate media attention, increase public awareness and raise the profile of a particular human rights issue. Since the launch in June 2018, the National Inquiry has received significant media attention from national outlets and local newspapers/radio stations.

The national inquiry process is a consultative one and provides a unique platform for those that have experienced sexual harassment to share their story and views. Furthermore, it enables those that have experienced sexual harassment to explain barriers to bringing a complaint and provide insight into what is needed to prevent and remedy the pattern of harassment.

Rather than addressing individual complaints, the national inquiry process examines systemic human rights violations and provides recommendations for systemic

<sup>4</sup> Ibid, p. 8.

<sup>5</sup> Ibid, p. 9.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

responses and remedial action at a broader level.<sup>10</sup> As such, the National Inquiry will not be investigating or making findings about individual allegations of sexual harassment. Instead, it will make recommendations for broader change, providing a way forward for preventing and addressing sexual harassment in the workplace.



Sex Discrimination Commissioner Kate Jenkins launching the Fourth National Survey on Sexual harassment in Australian Workplaces at the National Press Club. Photo Credit: Australian Human Rights Commission

## 2.2 The Colombian Ombudsman's Office's role in providing access to remedy for rights-holders affected by the El Quimbo hydropower project

By Sandra Rodriguez, Ombudsman's Office of Colombia



El Quimbo Dam, Ombudsman's Office Photo Archive - Colombia (2016)

### 2.2.1 Overview

As Colombia's national human rights institution (NHRI), it is very important to advance the application of human rights to business activities. For that reason, the Colombian Ombudsman has engaged on one of the most controversial hydropower energy projects in Colombia, known as 'El Quimbo'. El Quimbo is located in southwest

<sup>10</sup> *Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation*, Asia Pacific Forum of National Human Rights Institutions and Raoul Wallenberg Institute of Human Rights and Humanitarian Law (Sep. 2012), <https://www.asiapacificforum.net/resources/manual-conducting-a-national-inquiry/>

Colombia in the District of Huila and it partially covers approximately seven municipalities of this area. It is near the Magdalena river (Colombia's longest river), in the Colombian Macizo, that was declared a biosphere reserve by UNESCO in 1979.<sup>11</sup> El Quimbo has an installed capacity of 400 megawatts, with an average energy production estimated at 2,216 GWh per year. The environmental licence for the project was given in 2009.<sup>12</sup> Construction started officially in the same year following which, the company commenced operational activities.



Community of Puerto Seco – Huila, Ombudsman's Office Photo Archive - Colombia (2016)

The most difficult process in moving forward with the project was the resettlement of people who had been displaced. That process began in 2014. According to the non-governmental organisation (NGO) ASOQUIMBO, about 17,000 people have been displaced by the project.<sup>13</sup>

The Ombudsman's Office was alerted to this case in three different ways: (1) Thanks to several complaints received on the NHRI's information system from communities and NGOs (36 individual and collective grievances); (2) media diffusion; (3) Complaints from the regional government and environmental authorities at meetings and roundtables, which led to an investigation into the hydropower business sector, especially from local and regional authorities, who asked the NHRI to intervene.

### 2.2.2 Relevant stakeholders

Stakeholders involved in the case include the Ministry of Energy, Ministry of Agriculture, Procuracy for Environmental Affairs, Ombudsman's Office, Environmental Authorities, Prosecutor's Office, General Comptroller's Office, District Government, Huila Parliamentarians, Communities (Farmers, fishers, indigenous groups), ASOQUIMBO (an NGO that emerged as a result of the environmental and social

<sup>11</sup> The Colombian Macizo is not only a strategic region to the country but has been declared a Biosphere Reserve since 1979 by UNESCO (Andean Belt Constellation). Furthermore, this area contains 26,8% of the national moorland ecosystem as known as the páramo (779.000 hectares), equating to 13,4% of the global páramo ecosystem. These strategic ecosystems are found high in the Andes mountains.

<sup>12</sup> The licence was granted pursuant to Act 899 of 2009 by the Ministry of Environmental and Sustainable Development of Colombia, (formerly known as the Ministry of Environment, Housing and Territory Development).

<sup>13</sup> See, e.g., *Proyecto Hidroeléctrica El Quimbo: un análisis frente al derecho a la propiedad en el sistema interamericano de derechos humanos*, F. Díaz-Polanco and H. Sandoval (2015) ; *El Quimbo: Megaproyectos, derechos económicos, sociales y culturales y protesta social en Colombia*, International Commission of Jurists (2016), <http://www.icj.org/wp-content/uploads/2016/03/Colombia-ElQuimbo-Megaprojects-ESCR-Publications-Facts-Finding-Mission-Report-2016-SPA.pdf>

conflict) and Emgesa-Enel (an Italian Private Company). In general terms, the project was supported mainly by the national government. There was a strong and deep opposition in the region, including from actors such as the regional and local government and environmental authorities.<sup>14</sup>

### 2.2.3 NHRI mandate

Because of the seriousness of the situation, the Delegate Ombudsman for environmental and collective rights of Colombia conducted research on the hydroelectric power sector. As a result, in 2017, it published a report titled ‘Socio-Environmental Impacts and Possible Affectation of Rights Due to The Hydroelectric Production in Colombia’. The report provides recommendations on public policy, regulations, and areas that involved entities should improve in order to guarantee the effective enjoyment of human rights.

The report was on hydroelectric production in Colombia generally. The Colombian NHRI was empowered to produce it pursuant to legal and constitutional mandates, as well as under Colombia’s international human rights commitments. These mandates allow for the adoption of different approaches, such as: mediation; research; complaints handling; and both judicial and non-judicial avenues to remedy.

The research process took a year (2016) and involved field visits, interviews with companies, communities, environmental authorities, and NGOs. Approximately eight hydro projects were studied, including el Quimbo and Hidroituango. The report includes a context analysis of the business activities, social and environmental impact analysis, conflict analysis, vulnerability analysis of rights, results, and recommendations to stakeholders.

### 2.2.4 Process

The Ombudsman in Colombia does not have the power to guarantee rights on its own accord, under its constitutional and legal mandate.<sup>15</sup> Instead, the best way it can influence the guarantee of rights is by making the appropriate recommendations to government entities such as national, local, and environmental authorities, following up on its recommendations, and monitoring the competent authorities’ actions. It is worth noting that these recommendations are not binding. However, as long as they are official reports from INDH, the courts have taken them for the analysis in several opportunities as a legal input in order to define rights-holders or other stakeholders situations.<sup>16</sup>

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<sup>14</sup> Opposition came especially from the Regional Environmental Authority “Corporación Autónoma del Alto Magdalena” and from the Secretary of Agriculture and Mining of Regional Government, who also wrote the report: Informe Técnico y de Gestión - Programa de Productividad y Competitividad Agropecuaria del Huila (2011), <http://www.huila.gov.co/documentos/agricultura/EL%20QUIMBO/INFORME%20DE%20GESTION%20ACOMP%A%C3%91AMIENTO%20QUIMBO%202011.pdf>

<sup>15</sup> In Colombia, the Ombudsman was created by the Political Constitution and by Law 24/1992, to promote, support and spread Human Rights across the country. The Ombudsman does not have legal, fiscal or disciplinary functions, but was vested with a no-penalty authority and moral judiciary power to achieve its mission. Accordingly, the strength of its authority derives from its prestige, moral qualities, the high dignity of its position and the strength given by the Constitution, the law and society itself. The procedure of moral judiciary starts with the identification of topics and situations liable for pronouncement, and includes the analysis and monitoring the results of the pronouncement, based on investigations, visits in situ, reports and requests of state entities and non-governmental organizations, risk assessments, statistical analysis and current normative analysis, among others.

<sup>16</sup> See, e.g., Corte Constitucional de Colombia Sentencias T 622 (2016), T 302 (2018).

### 2.2.5 Outcomes

As a result of the research, analysis and monitoring deployed in this case, the Ombudsman's Office produced the report named above. This helped to emphasise that the resettlement of people affected by the hydro dam is the main problem and the issue posing the greatest difficulties in terms of guaranteeing rights. The results showed that factors such as the lack of resettlement regulations, deficiencies in national and regional authorities' coordination with respect to land planning, low institutional capacities to monitor and control, and the companies' particular interests, were crucial in establishing the guarantee of rights.<sup>17</sup> These factors are also directly related to the social and environmental efficiency of these kinds of projects. In this sense, the report also includes an analysis of the social and environmental efficiency indicators of the projects studied.

Although some communities have received compensation, to this date, they are not able to effectively enjoy their rights due to several persistent breaches by the company. The communities were relocated to four resettlements, but do not have property titles, and experience difficulties with respect to personal finances, water supply, education, healthcare services, and so forth.

### 2.2.6 Challenges and opportunities

The main challenges stemming from this case include: the absence of specific regulations on the issue of involuntary resettlement; the lack of capacity of the state authorities; and the communities' loss of confidence in the business actor, the latter of which has demonstrated its power to influence government entities and their decisions. However, this case also represents a very valuable opportunity for the Ombudsman's office, as Colombia's national human rights institution, to act as an interlocutor to facilitate dialogue between different stakeholders in order to generate trust.

The Colombian NHRI has brought stakeholders together by organising roundtables, delivering questions and concerns from communities to authorities, explaining and teaching about human rights (participation, environmental rights, responsibilities, etc.), and preventing private actors and authorities from committing activities that could harm human rights. Therefore, other NHRIs can emulate these activities so long as the communities and stakeholders in general recognise the NHRI's work as legitimate, reliable and neutral.

## 2.3 Engagement of the Commission Nationale Consultative des Droits de l'Homme (CNCDH) on France's Corporate Duty of Vigilance Law

By Céline Branaa – Roche, Advisor, CNCDH

### 2.3.1 Overview

In its September 2013 statement on the implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs), the Commission Nationale Consultative des Droits de l'Homme (CNCDH) – France's national human rights institution – stated that 'based on the existing duty to prevent and repair in

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<sup>17</sup> *Socio-Environmental Impacts and Possible Affectation of Rights Due to The Hydroelectric Production in Colombia* Delegate Ombudsman for Environmental and Collective Rights of Colombia (2017).

environment related issues, the CNCDH recommends to put into the legislation a duty of vigilance for parent companies regarding their subsidiaries to prevent human rights violations'.<sup>18</sup> A law proposal was introduced two months later. The text was drafted by a coalition of non-governmental organisations,<sup>19</sup> who worked with law professionals, trade unions, researchers and some deputies from different political parties.<sup>20</sup>

The text adopted on 27 March 2017 is the result of a very long legislative process which lasted more than four years.<sup>21</sup> After intense back-and-forth between the National Assembly and the Senate and strong lobbying from companies and finance, most involved NGOs were invited to discuss with the Minister for Economy to finalise a text which could be adopted by all parties in the National Assembly

### 2.3.2 Key elements of the law

The 'Duty of Vigilance' Law requires companies to elaborate, publish, and effectively implement a 'vigilance plan'. The plan must list all 'reasonable vigilance measures to adequately identify risks and prevent serious violations of human rights and fundamental freedoms, risks and serious harms to health and safety and the environment'.<sup>22</sup> 'Serious violations' is defined to include violations against human rights, fundamental freedoms, health and security of the people and the environment.

The law applies to France-based companies that have at least 5,000 employees in France, or at least 10,000 worldwide. It is also applicable to foreign companies headquartered abroad with a subsidiary in France that has at least 10,000 employees.<sup>23</sup> There is so far no comprehensive list stipulating the companies that are subject to the law. However, one estimates that it applies to between 165-170 companies. It covers the activities of parent companies, their subsidiaries, and certain subcontractors and suppliers, in France and abroad.<sup>24</sup>

### 2.3.3 Content of the plan

The law provides that companies must include the following items in their vigilance plan:<sup>25</sup>

- A mapping of the risks (risk identification and prioritisation);
- Procedures to regularly assess how subsidiaries, suppliers, and subcontractors are performing against this risk mapping;
- Measures to prevent and mitigate serious human rights abuses;
- A functioning alert mechanism that collects reporting of existing or actual risks, developed in partnership with trade union organisations; and
- Monitoring mechanisms to evaluate implementation and effectiveness of measures implemented.

<sup>18</sup> *Entreprises et droits de l'homme*, CNCD, n.d., [www.cncdh.fr/fr/publications/entreprises-et-droits-de-lhomme](http://www.cncdh.fr/fr/publications/entreprises-et-droits-de-lhomme)

<sup>19</sup> Led by: Amnesty International, CCDF Terre solidaire, Sherpa, Le collectif Ethique sur l'étiquette and les Amis de la Terre)

<sup>20</sup> Including: Danielle Auroi, Dominique Potier and Philippe Noguès.

<sup>21</sup> *LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1)*, Legifrance (2017), <https://www.legifrance.gouv.fr/affichTexte.do?dateTexte=&categorieLien=id&cidTexte=JORFTEXT000034290626&fastPos=13&fastReqId=1738831604&oldAction=rechExpTexteJorf>

<sup>22</sup> *Law n° 2017-399 of March 27th, 2017 relating to the duty of vigilance of parent and instructing companies* (English Translation) [*hereinafter Duty of Vigilance Law*], <http://www.bhrinlaw.org/law-duty-of-vigilance-2-versions-en-october-2018.pdf> (last visited Jan. 23, 2019).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Duty of Vigilance Law*, *supra* note 6.

<sup>25</sup> *Ibid.*

The plan should be developed in coordination with the company's stakeholders. Yet no further details are provided for by the law. Since no complementary decree will be adopted, what precisely is expected from companies has so far only been analysed by civil society and will need to be clarified by the judicial system.<sup>26</sup>

### 2.3.4 Why is this law a historical step for corporate responsibility and access to remedy and justice for victims?

The law establishes two mechanisms:

1. Any concerned persons may request that a judge compels a company to enact a vigilance plan, ensure its publication, and account for its effective implementation. The judge can impose a penalty on the company if it fails to comply within three months.<sup>27</sup> Initially, the judge could have imposed a civil fine up to 30 million euros in this situation. But this provision was removed by the Constitutional Court on the grounds that some terms of the law were not specific enough.<sup>28</sup>
2. Any concerned persons may seek damages for negligence by the company, through civil action. A company can be found liable for damages for failing to effectively implement its vigilance plan, or for an inadequate vigilance plan. The judge will publicise the decision.<sup>29</sup>

Additionally, the law enables victims to directly access the whole content of a company's vigilance plan, when they would otherwise ordinarily face significant difficulties in obtaining precise information from companies.

Furthermore, the law requires companies to establish an 'alert mechanism that collects reporting of existing or actual risks, developed in partnership with trade unions'.<sup>30</sup> Such a mechanism should also contribute to alerting companies to existing risks which are addressed by the vigilance plan, or for which prevention measures are inappropriate or inefficient. This mechanism should be set up with all stakeholders.

### 2.3.5 The limits of the law regarding access to remedy and justice

The law establishes an obligation of means and not an obligation of results. As a result, the burden of proof still lies on the plaintiff: s/he must prove that the failure of the company to comply with its obligations listed in the first article of the law led to the damages (link between the fault and harms suffered).<sup>31</sup> The company must then be able to demonstrate that they have taken and effectively implemented all measures described in the vigilance plan.

### 2.3.6 Concerns

The first vigilance plans were not very detailed. This could be due either to a lack of time to prepare the document (only a couple of months), or to an unwillingness by

<sup>26</sup> Companies published their first vigilance plans in early 2018. See e.g., analysis of the published plans by B&L Evolution and Entreprises pour les droits de L'homme, *Application de la loi sur le devoir de vigilance: Analyse des Premiers Plans Publiés* (Apr. 25, 2018), [https://www.e-dh.org/userfiles/Edh\\_2018\\_Etude\\_FR\\_V8.pdf](https://www.e-dh.org/userfiles/Edh_2018_Etude_FR_V8.pdf); and a guide published by Sherpa, *Guide de Référence pour les Plans de Vigilance* (Dec. 6, 2018), [https://www.asso-sherpa.org/wp-content/uploads/2018/12/Sherpa\\_VPRG\\_web\\_pagepage-min.pdf](https://www.asso-sherpa.org/wp-content/uploads/2018/12/Sherpa_VPRG_web_pagepage-min.pdf)

<sup>27</sup> Duty of Vigilance Law, *supra* note 6.

<sup>28</sup> *Décision n° 2017-750 DC du 23 mars 2017*, Conseil Constitutionnel, [www.conseil-constitutionnel.fr/decision/2017/2017750DC.htm](http://www.conseil-constitutionnel.fr/decision/2017/2017750DC.htm)

<sup>29</sup> Duty of Vigilance Law, *supra* note 6.

<sup>30</sup> *French Corporate Duty Of Vigilance Law: Frequently Asked Questions*, European Coalition for Corporate Justice (Mar. 24, 2017), <http://corporatejustice.org/documents/publications/french-corporate-duty-of-vigilance-law-faq.pdf>

<sup>31</sup> *Ibid.*

companies to detail all their measures as they do not know how a judge will interpret the plan's contents and follow-up/alert mechanisms. Companies explained that they could not disclose certain information for reasons of business confidentiality or legal risks. Legal departments of companies have been extensively involved in the drafting of the plan, rather than CSR departments.

### 2.3.7 The role of the CNCDH

The CNCDH has been extensively involved since 2015 in the drafting of the National Action Plan (NAP) on Business and Human Rights for France; a process that has been led by the National Plateforme for Actions on Corporate Social Responsibility (Plateforme CSR).<sup>32</sup> Members of the platform worked for over a year on the drafting a statement on the NAP,<sup>33</sup> relying on the recommendations issued by the CNCDH in September 2013 in its statement "Business and human rights".<sup>34</sup> The NAP on business and human rights was adopted and presented by the French Government in April 2017.<sup>35</sup>

During the discussion, civil society and the CNCDH, in particular, insisted on the importance of sticking to the three pillared structure of the UNGPs, so that the NAP would include also recommendations regarding access to remedy.

The plan repeats the three pillars of the UNGPs and includes nine recommendations by the CNCDH regarding judicial and non-judicial mechanisms<sup>36</sup>. These include:

- continue thinking about ways to prevent denials of justice,
- increase and secure human and financial means for the OECD NCP and increase cooperation with civil society including the CNCDH,
- promote ILO conventions and coherence between commercial, financial and economic politics at both national and international levels, corporate grievance mechanism.

A list of actions is attached to the plan.<sup>37</sup> The CNCDH will control and monitor the implementation of the NAP.

## 2.4 A Public Inquiry into Mining Activities in Taita Taveta County by the Kenya National Commission on Human Rights

By James Mwenda Mwongera, Senior Human Rights Officer, Economic, Social and Cultural Rights Department, Kenya National Commission on Human Rights

32 Plateforme RSE, n.d., [www.strategie.gouv.fr/chantiers/plateforme-rse](http://www.strategie.gouv.fr/chantiers/plateforme-rse)

33 Avis sur le Plan d'action d'application des Principes directeurs des Nations unies pour les droits de l'homme et les entreprises, Plateforme RSE (Sep. 2016), [www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/avis\\_sur\\_le\\_pnedh\\_-\\_version\\_definitive\\_-\\_complet.pdf](http://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/avis_sur_le_pnedh_-_version_definitive_-_complet.pdf)

34 Entreprises et droits de l'homme : avis sur les enjeux de l'application par la France des Principes directeurs des Nations unies, CNCDH (Oct. 24, 2013), [www.cncdh.fr/fr/publications/entreprises-et-droits-de-l'homme](http://www.cncdh.fr/fr/publications/entreprises-et-droits-de-l'homme)

35 Plan national d'action pour la mise en œuvre des principes directeurs des Nations unies relatifs aux droits de l'Homme et aux entreprises, France Diplomatie (Apr. 26, 2017), [https://www.diplomatie.gouv.fr/IMG/pdf/3\\_-\\_pnadh\\_fr\\_version\\_finale\\_bandeau\\_cle0be656.pdf](https://www.diplomatie.gouv.fr/IMG/pdf/3_-_pnadh_fr_version_finale_bandeau_cle0be656.pdf); National Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights, Government of France (2017) (English Version), <https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/france-nap-english.pdf>

36 Ibid (French Version), p. 51; (English Version), p. 46.

37 National Action Plan for the United Nations Guiding Principles on Business and Human Rights: Proposed Actions, Government of France (2017) (English Version), [https://www.diplomatie.gouv.fr/IMG/pdf/liste\\_actions\\_pnadh\\_cle86245e-1.pdf](https://www.diplomatie.gouv.fr/IMG/pdf/liste_actions_pnadh_cle86245e-1.pdf)

### 2.4.1 Overview of the case

The Kenya National Commission on Human Rights (KNCHR) is a constitutional National Human Rights Institution (NHRI) compliant with the Paris Principles and is an A status member of the Global Alliance of National Human Rights Institutions (GANHRI). The Commission's core mandate is to protect and promote human rights in the country. On the basis of its mandate, KNCHR routinely conducts human rights clinics and fact-finding missions on the status of human rights across the country. Between 22<sup>nd</sup> and 31<sup>st</sup> August 2016, the Commission held a public inquiry on the status of mining in Taita Taveta County in which members of the public were invited to present complaints on human rights violations. The process, findings and recommendations of the inquiry were documented in a report titled "**Public Inquiry Report on Mining and Impact on Human Rights**".<sup>38</sup> The alleged key abuses included land displacement, lack of land ownership documents for local residents, arbitrary denial of mining licences, corruption, child labour, sexual and gender-based violence in the mines, child-led families (owing to parents working in the mines), harassment by government officials, human-wildlife conflicts due to invasion of natural habitats by miners, and in some instances invasions of mining fields by unlicensed groups of miners.<sup>39</sup>

### 2.4.2 KNCHR mandate

The KNCHR Act (2011) outlines a series of actions that KNCHR can undertake to bring redress to victims of human rights violations. Among these actions is the conducting of a public inquiry, where hearings are accessible to the public.<sup>40</sup> Accordingly, the Commission can: refer a matter of criminal nature to the Director of Public Prosecutions or any other relevant authority; recommend other judicial redress to the complainant; recommend other appropriate methods of settling the complaint or obtaining relief; and to submit summonses it deems necessary in fulfilment of its mandate.<sup>41</sup> Where a party refuses to implement the recommendations of the Commission, the Commission should report this refusal to the National Assembly for the National Assembly to take appropriate action. The Commission can also use public interest litigation to assist victims' access remedy from the courts, especially where violations are systemic.

### 2.4.3 Mining Inquiry process

Between 24<sup>th</sup> and 28<sup>th</sup> August 2015, KNCHR carried out a situational analysis on mining in order to assess the extent of human rights abuses and what role each actor played. From this situational analysis, the county was mapped out to identify areas where mining was taking place. Various actors were then identified and their mandates/roles in regard to the mining sector identified. KNCHR interventions were therefore built around these actors. On this basis, a needs assessment was carried out for each actor and then acted upon. Community empowerment forums were held to enhance the capacity of the citizenry to claim their rights. For example, the Commission in 2016 organised a capacity building workshop on human rights and mining for state agencies. Each of these government departments were represented

<sup>38</sup> *Public Inquiry Report on Mining and Impact on Human Rights*, Kenya National Commission on Human Rights, (2017), <http://www.knchr.org/Portals/0/EcosocReports/Taita-Taveta-Inquiry.pdf?ver=2013-02-21-141554-053>

<sup>39</sup> Large Scale Miners have had individuals trespass into their mining fields causing damage to mining tunnels and stealing minerals

<sup>40</sup> Kenya National Commission on Human Rights Act (2011), Section 38, [http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/KenyaNationalCommissiononHumanRights\\_Act\\_No14of2011.pdf](http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/KenyaNationalCommissiononHumanRights_Act_No14of2011.pdf)

<sup>41</sup> *Ibid*, Section 27

in the training. Another capacity building workshop on business and human rights was held for businesses where discussions were centred on compliance with national and international instruments on business and human rights. Training was also carried out on the provisions of the new Mining Act 2016, which came into law during the course of the project.

While implementing these interventions, the Commission also received and processed complaints relating to the Inquiry. After the complaints were received, they were analysed according to pre-determined criteria. Complainants that qualified to become witnesses during inquiry were identified. The Commission then prepared these witnesses to appear before the Inquiry. Preparation in this instance involves getting the witnesses/complainants to identify issues that they would present during inquiry.

Duty-bearers whom allegations were made against were all invited to respond to the allegations against them and explain procedures or processes which the inquiry panel needed clarified. Key among the agencies brought in included: (1) the Department of Labour to address labour-related issues; (2) the Kenya Wildlife Service to respond to complaints about the harassment of miners in National Parks; (3) the Department of Mining to address issues around licensing; (4) the Kenya Police to address issues of security and the reporting of cases of violence against women and workers; (5) the Department of Child Services to address child labour and abuse; and (6) the County Government of Taita Taveta and the National Lands Commission to address issues concerning land.<sup>42</sup> KNCHR also met with small-scale miners, large-scale miners and workers in the mines to hear their perspectives.

#### **2.4.4 Outcomes**

After the public inquiry, communities reported significant improvements in the sector and reduced incidences of human rights abuses. For example, one of the key witnesses in the Inquiry who had been unfairly dispossessed of his land and mining rights reported that he had made progress and was awaiting his mining licence. Another case involved a widow whose neighbour had invaded her land and begun mining. Since the public inquiry, the complainant had gained back her land and mining rights to the same. There had also been a conflict between members of a community-based organisation that was engaged in mining activities. One of the complainants from this disagreement made a presentation during the public inquiry that he had been unfairly ejected from the group. By the time of the public inquiry report's dissemination, he had been reinstated.

#### **2.4.5 Opportunities and challenges**

Inquiries are very expensive in terms of time and other resources, such as finances. The inquiry by KNCHR cost approximately USD 100,000. This amount includes preliminary activities before the hearings and excludes expenses from follow-up activities. Recommendations can take a long time to follow through. It took approximately two years, from the public inquiry's inception until publication of the report in 2018. Follow up on recommendations and assessment of implementation is ongoing. The public inquiry's success as a mode of investigation to provide remedy to victims of business-related human rights abuses could be easily replicated by other NHRIs. Since public inquiries bring together multiple duty-bearers and rights-holders,

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<sup>42</sup> The National Land Commission (NLC) is the agency mandated with administration of community land

it has the potential to lead to a comprehensive identification of gaps that contribute to human rights violations. This happens because all actors are present (through invitation and where need be, summonses) in the public inquiry. The Commission has the power to summon those it deems crucial to investigations.<sup>43</sup>

Immediate remedy comes when it turns out that the cause of abuses may have been due to some oversight and actors subsequently commit to taking immediate action to remedy some of the issues. For example, officials from the Ministry of Mining accepted in their submissions that licensing was a big problem because they did not have the tools and technology to carry out the necessary mapping. However, the Ministry was in the process of renewing its tools and upgrading its technology for effective mapping and determination of licensed areas. The Kenya Forest Service and Kenya Wildlife services, the County Administration and the National government officers committed to deal with environmental degradation, mainly caused by cutting of trees for charcoal burning. The Ministry of Education, Ministry of Interior and Coordination of National Government, and the Department of Children's Services also committed to deal with the issue of children being lured from schools to engage in prostitution and substance abuse. This mainly would include more stringent monitoring and enforcement of laws, and the establishment of entertainment facilities near schools. These are some of the commitments that the open Inquiry achieved.



The Inquiry Panel, led by the Chairperson of the Kenyan National Commission on Human Rights (fourth on the right). The Panel includes Commissioners from the KNCHR and the National Gender and Equality Commission, a Director from the National Lands Commission, and a mining expert from Taita Taveta University College. Photo Credit: Kenya National Commission on Human Rights

<sup>43</sup> Kenya National Commission on Human Rights Act (2011), Sections 27 and 28, [http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/KenyaNationalCommissiononHumanRights\\_Act\\_No14of2011.pdf](http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/KenyaNationalCommissiononHumanRights_Act_No14of2011.pdf)

## 2.5 The Human Rights Commission of Malaysia's National Inquiry into Business and Human Rights-Related Abuses against Indigenous Peoples in Malaysia

By Dr Aishah Bidin, Commissioner, Human Rights Commission of Malaysia

### 2.5.1 Overview

Since its establishment in 1999, the Human Rights Commission of Malaysia (SUHAKAM) has received various complaints and memorandums from indigenous communities alleging various forms of human rights violations related to customary rights to land, many of which have not been resolved. These complaints from indigenous peoples relate to allegations of encroachment and/or dispossession of land; land being included into forest or park reserves; overlapping claims and slow processing of requests for the issuing of native titles or community reserves. Most complaints are targeted at private sector actors, namely companies, and some to the state, such as the agencies related to land matters.

In response to these, SUHAKAM conducted investigations between 2010 and 2013 into specific cases, carried out field studies, held dialogues with the relevant communities, roundtable discussions with the Government and other relevant agencies as well as private enterprises indicated in these complaints. Based on the activities, reports were published and submitted to the relevant parties.<sup>44</sup> SUHAKAM is of the view that a problem of this magnitude could not be overcome by using piecemeal approaches or addressed on a case-by-case basis. Instead, there is the need to tackle the root causes of issues comprehensively by taking cognisance of the experiences of indigenous peoples all over Malaysia and examine these from human rights lens. SUHAKAM thus decided to conduct a National Inquiry into the land rights of indigenous peoples in Malaysia.<sup>45</sup>

A national inquiry is a mechanism that can be used to achieve SUHAKAM's mandate to investigate systemic human rights issues with a view to solving them through systematic means. By adopting a broad-based human rights approach, the Commission can examine a large situation as opposed to an individual complaint, and has a dual focus, fulfilling both fact-finding and educational roles (capable of educating the public and all parties concerned and regarded to be better at investigating systemic causes of human rights violations).

### 2.5.2 SUHAKAM mandate

SUHAKAM's authority to conduct a National Inquiry lies in Section 12(1) of the SUHAKAM Act (Act 597).<sup>46</sup> Section 12(1) of the Act states that the Commission may, on its own motion or based on a complaint made by an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or a group of persons, inquire into an allegation of the infringement of the human rights of such person or group of persons. It is clear, from Section 12(1), that if SUHAKAM has information suggesting that an infringement of human rights has occurred in Malaysia, it may inquire on its own motion into the incident.

<sup>44</sup> *Report of the National Inquiry into the Land Rights of Indigenous Peoples*, Human Rights Commission of Malaysia (2013), <https://drive.google.com/file/d/0B6FQ7SONa3PRbUlnUGcxdzdEWU0/preview>

<sup>45</sup> *SUHAKAM to Conduct a National Inquiry into the Land Rights of Indigenous Peoples in Malaysia*, Human Rights Commission of Malaysia (May 10, 2011),

<https://drive.google.com/file/d/0B6FQ7SONa3PRZThOcXoxOEM0biU/edit>

<sup>46</sup> <https://drive.google.com/file/d/0B6FQ7SONa3PRZEJoa3lqMTFmM0E/edit>

### 2.5.3 Process of the National Inquiry

The National Inquiry committed to a cooperative and responsive approach to developing solutions to land problems of indigenous peoples. It started in December 2010 and ended in June 2012. A range of stakeholders were consulted, including government agencies, non-governmental organisations (NGOs), indigenous communities, private companies, and other interested groups and individuals, to identify and develop practical solutions that will yield improvements to the status of land ownership of the indigenous peoples of Malaysia.

The Inquiry commenced with introductory sessions, followed by public consultations with stakeholders. Throughout the same period, the Inquiry also called for written public submissions. Subsequently, public hearings were conducted to hear selected cases from the consultations and submissions. The Inquiry also commissioned studies by academics into the land rights of the indigenous peoples to be conducted in Peninsular Malaysia, Sabah and Sarawak. To ensure that all stakeholders understood the true intention of SUHAKAM, appreciated the Terms of Reference, and participated actively in the process of the Inquiry, SUHAKAM held a series of introductory sessions in the Peninsula, Sabah and Sarawak.

SUHAKAM also appointed researchers to undertake an in-depth study into the land rights of the indigenous peoples.<sup>47</sup> Researchers, based at the University of Malaya, University Malaysia Sabah and University Malaysia Sarawak, were appointed to conduct field studies and GIS mapping regarding indigenous land conflicts in selected cases in Peninsular Malaysia, Sabah and Sarawak respectively. Alongside these studies, research into the conceptual and legal framework of indigenous peoples' land ownership in Malaysia was also carried out. This research reviewed applicable laws and procedures involving indigenous peoples' land, based on international standards and principles.

SUHAKAM invited key government departments and agencies, indigenous peoples, organisations, and NGOs to submit views on matters pertinent to the land rights of indigenous peoples in Malaysia. The inquiry received 57 submissions. SUHAKAM, through a public consultation process, also gathered information on areas of conflict pertaining to indigenous land and related evidence, as well as applicable laws, procedures and policies. Invitations were sent to all stakeholders including, but not limited to, key government departments and agencies, indigenous communities, the private sector, NGOs and the media, to participate in the consultations.

The consultation process involved a briefing on the Inquiry, followed by a short dialogue session with the indigenous peoples present. SUHAKAM's officers then recorded statements from those who wished to provide one, either individually or in groups. At the same time, the Commissioners consulted with government

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<sup>47</sup> See e.g., *Orang Asli: Rights, Problems & Solutions*, Human Rights Commission of Malaysia (2010), <https://www.suhakam.org.my/wp-content/uploads/2013/12/Orang-Asli-Rights-Problems-Solutions.pdf>; Suhakam's Report on the Murum Hydroelectric Project and its Impact towards the Economics, Social and Cultural Rights of the Affected Indigenous Peoples in Sarawak, Human Rights Commission of Malaysia (2009), <https://www.suhakam.org.my/wp-content/uploads/2013/12/Murum1.pdf>; *Legal Perspectives On Native Customary Land Rights In Sarawak*, Human Rights Commission of Malaysia (2008), <https://www.suhakam.org.my/wp-content/uploads/2013/12/Legal-Perspectives.pdf>; *Penan Benalih Blockade Issue*, Human Rights Commission of Malaysia (2007), <https://www.suhakam.org.my/wp-content/uploads/2013/12/Penan-Benalih-Blockade-Issue.pdf>; SUHAKAM's *Report On Penan In Ulu Belaga: Right To Land And Social-Economic Development*, Human Rights Commission of Malaysia (2007), <https://www.suhakam.org.my/wp-content/uploads/2013/12/Report-On-Penan-In-Ulu-Belaga.pdf>

representatives in a more informal manner to get feedback on cases raised during the dialogue, its perspectives and experience pertaining to land issues and recognition of land rights of indigenous peoples, and to ascertain measures that have been taken thus far. Meetings were also held with some NGOs, the private sector and key individuals.

The public consultations were conducted at several venues in 23 districts around Malaysia, totalling 34 days. The consultations received an overwhelming response from the public with more than 6,500 indigenous peoples participating in the sessions. A total of 892 statements were recorded: 407 statements from Sabah, 198 statements from Sarawak and 287 statements from the Peninsula.<sup>48</sup>

The Public Hearings were a continuation of the consultations where specific witnesses appeared before a panel to give further information or to verify certain facts. Bearing in mind the pattern of issues identified through the public consultation process, the Inquiry selected a number of representative cases that were recorded at the public consultations and submissions to be further examined by the Panel at the Public Hearings. The cases selected were based on the availability of valid supporting documents and evidence.

A total of 132 cases were selected covering a wide range of issues from administrative, plantation, logging and forest reserves, inclusion of land into protected areas, indigenous land development schemes and commercial development projects. The Public Hearing is an open process and was conducted in accordance with Part III of the Human Rights Commission of Malaysia Act 1999.

#### **2.5.4 Outcomes**

On the basis of the facts and determinations arising from the National Inquiry, 18 key recommendations with key activities for their implementation were made under the six main themes:

1. Recognise Indigenous Customary Rights to Land
2. Remedy Land Loss
3. Address Land Development Issues / Imbalances
4. Prevent Future Loss of Native Customary Rights (NCR) Land
5. Address Land Administration Issues
6. Recognise Land as Central to Indigenous Peoples' Identity.

As a result of the recommendations, the Cabinet set up a National Task Force in 2013 to:

- Assess the findings and recommendations of the National Inquiry Report vis-a-vis implementation;
- Gather, wherever appropriate, additional information (records held by the state authority/ agency) on particular issues;
- Take into account the rights, interests and views of all stakeholders; and

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<sup>48</sup> See, *Report of the National Inquiry into the Land Rights of Indigenous Peoples*, Human Rights Commission of Malaysia (2013), <https://drive.google.com/file/d/0B6FQ7SONa3PRbUlnUGcxzdEWU0/preview>

- Develop and incorporate recommendations for short-term and long-term measures to address any existing legal, policy and administrative constraints.

SUHAKAM has since distributed the Inquiry Report to various stakeholders including, but not limited to, government agencies and NGOs, relevant international organisations and other national human rights institutions. SUHAKAM was informed that the Task Force's Report had been submitted to the Minister on 10 September 2014 but as at the end of 2014, SUHAKAM had yet to obtain any information regarding the report.

Nevertheless, without pre-empting the outcome of the Task Force, SUHAKAM reiterates the urgent need for the Government to ensure early and effective implementation of the recommendations in the Inquiry Report, given the long-standing nature of the problems facing the indigenous communities. At the same time, there have been various meetings and consultations with different stakeholders since 2014. Between 2016 until now the Government has conducted follow-up sessions with various agencies on the different forms of consequential short term, medium and long term activities. Meetings were also conducted with various states agencies, some of which were chaired by SUHAKAM.

SUHAKAM also regrets to note that during the Universal Periodic Review (UPR) held at the Human Rights Council in Geneva on 24 October 2013, the Government did not support six significant recommendations concerning the indigenous peoples, particularly recommendations pertaining to their land rights which were also in line with the recommendations contained in the Inquiry Report. Several indigenous tribes expressed their disappointment with the slow progress of the Government in making available the Special Task Force report to the public and the indigenous community. Concerns were also raised that the delay in implementing the Special Task Force's recommendations would allow the old policies, which were infringing the rights of indigenous peoples, to continue.

On 3 June 2015, YB Senator Datuk Paul Low Seng Kuan, Minister in the Prime Minister's Department, announced the formation of a Cabinet Committee on Native Land Rights to address, monitor, and implement the findings of the Special Task Force's report which will be headed by then Deputy Prime Minister YAB Tan Sri Dato' Hj Muhyiddin Hj Mohd Yassin<sup>49</sup>. The Cabinet Committee would also play the role of an independent National Commission, in line with one of the 18 recommendations made by SUHAKAM in the Inquiry Report. However, due to the Cabinet reshuffle on 28 July 2015, SUHAKAM was informed that the convening of this Cabinet Committee had been delayed.

This led to the inaugural meeting of the Cabinet Committee in 2015 which was chaired by the Deputy Prime Minister. At the meeting, the following recommendations were made:

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<sup>49</sup> *Cabinet Forms Committee on Indigenous Land Rights*, The Star (Jun. 17, 2015), <https://www.thestar.com.my/news/nation/2015/06/17/cabinet-approves-indigenous-lands-rights/>

1. Each State Government is to report periodically on the status of gazetting aboriginal areas/reserves under Section 6 and 7 of the Aboriginal Peoples Act 1954;
2. Guided by the principle of a human-rights-based approach and the principle of free, prior, and informed consent (FPIC) as envisaged by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), JAKOA and the states of Sabah and Sarawak are to develop guidelines to ensure the participation of indigenous peoples in the country's/state's development agenda, especially in those areas which would have direct impact on them;
3. The proposal for JAKOA's restructuring is to be submitted to the Ministry of Rural and Regional Development (KKLW) and the Public Service Department (JPA) for approval;
4. National Institute of Land Survey (INSTUN) and JAKOA are to develop a training module for staff members and officers in charge of native land and administration of indigenous peoples;
5. The Legal Affairs Division of the Prime Minister's Department is to carry out research on the concept of Native Land Rights;
6. The objective of the National Legal Aid Foundation (YGBK) is to be amended by expanding its mandate to enable it to represent indigenous peoples in land cases as well as to enhance the capacity of its members in dealing with native land cases; and
7. Three additional posts are to be created in Department of Good Governance and Integrity (BITU) in order for BITU to carry out its duty as the Secretariat to the Cabinet Committee effectively.

### **2.5.5 Challenges and opportunities**

SUHAKAM is very concerned about the Government's slow progress in implementing the Inquiry's recommendations. As a result, indigenous peoples continue to suffer human rights abuses, especially encroachment of their native lands for the purpose of development. As such, in 2017, SUHAKAM facilitated a meeting between JAKOA and Selangor state governments regarding the gazetting of indigenous peoples' land in Selangor. At the meeting, both parties agreed to work together to ensure that all impeding factors in gazetting indigenous peoples land be addressed smoothly. SUHAKAM will continue and expand its engagement with other states such as Kelantan, Pahang and Johor. SUHAKAM continues to receive complaints from the indigenous peoples with regard to native land rights and is still dealing with those complaints on a case-by-case basis.

Another aim of the Inquiry was to create and promote more public awareness on the indigenous peoples' rights to land and their way of life. Towards this end, media involvement is vital to promote transparency for the process, to play an educative role, and to provide some form of pressure on the relevant authorities. The media, particularly the local media, played an active role throughout the process. Looking forward, there are many challenges for SUHAKAM as the Commission has been considered to be the catalyst of change and the driving force for the Government to follow the recommendations. SUHAKAM hopes there will be new developments with the new Government, elected in 2018, who have promised to protect the interest of marginalised groups in the country, including indigenous peoples.

In addition to creating public awareness, the Inquiry is seen as a major empowering platform for the indigenous communities, thereby mobilising themselves towards protecting their customary land. Communities came together to trace historical evidence to substantiate their stories and claims of Native Customary Rights land to be presented before the Inquiry. For some, it also meant that a number of villages had to select one representative to speak on their behalf. Women too, also rose to the challenge despite the fact that some have never stood in public to speak. The format, structure and strategy of the National Inquiry can be adopted by other NHRIs, depending on their mandate and function, to contribute to addressing systematic business-related human rights issues.

## **2.6 The Moroccan National Human Rights Council's role in the resolution of a business-related human rights complaint**

By Nouzha Ababou, Business and Human Rights Project Manager, Directorate of Monitoring and Human Rights Protection, National Human Rights Council of Morocco

### **2.6.1 Overview**

On 6 September 2017, the Moroccan National Human Rights Council (NHRC) received a collective complaint from 19 residents living near a company operating several stone quarries in the region of Casablanca, Kingdom of Morocco.

The complainants, owners of agricultural and grazing land, complained that the company's activities had a negative impact on their human rights. Among the most significant alleged impacts were: the nuisances caused by deflagrations (cracks in their homes and loud noise generated by explosions outside legal working hours during the day, night and on public holidays); destruction of their crops; contraction of respiratory diseases due to the spread of dust; deterioration of roads caused by the frequent passage of the company's heavy vehicles; and the low employment rate of the local population in the said company. Following further discussions with the complainants, it appeared that they had opposed implementation of the project from its inception due to perceived potential negative impacts of the project on the environment, crops, health, and their quality of life. Despite their various claims to the competent authorities, (written letters, demonstrations and sit-ins to oppose the project's implementation) their voices were not heard and the company commenced its activities.

### **2.6.2 NHRI mandate**

In accordance with its prerogatives in the field of human rights protection, as derived from the law n° 76-15 of 22 February 2018<sup>50</sup> – which grants the NHRC the power to carry out the necessary investigations and inquiries into human rights abuses on request or by its own initiative, including through hearings – the NHRC conducted an on-site visit on 9 November 2017 in order to observe the alleged negative impacts caused by the company's activities and to meet with the affected communities.

### **2.6.3 Procedure**

The investigating team comprised three NHRC employees: the Business and Human Rights Project Manager; the Protection and Monitoring Department's Complaints

<sup>50</sup> Official Gazette n°6662, 5<sup>th</sup> April 2018, at 684-694.  
[http://www.sgg.gov.ma/BO/FR/2018/BO\\_6662\\_Fr.pdf?ver=2018-04-09-162443-967](http://www.sgg.gov.ma/BO/FR/2018/BO_6662_Fr.pdf?ver=2018-04-09-162443-967)

Officer and the Director of the Regional Human Rights Commission in Casablanca. The NHRC heard from the complainants and their representative, and also visited some of their homes. The complainants' representative also submitted several documents to substantiate their claims, such as bailiff's reports recording the company's activities outside legal working hours and an environmental expert report attesting to the existence of some negative impacts.

Following an analysis of these documents and having noted some of the induced negative impacts – such as the high concentration of dust in the air, the presence of numerous cracks in the houses close to the place of business and the dryness of the surrounding agricultural land – the NHRC contacted the competent local authorities to obtain their opinion on the complainants' allegations. The latter replied that the company's activities were legally authorised and in accordance with the specifications as set forth by the applicable regulations.

In parallel, the complainants filed an application before the judge of expedited matters in the first instance tribunal of Benslimane seeking to stop the company's activities and won their case. However, the company in question appealed against this decision on the grounds that urgency was not established to justify recourse to the interim relief judge and the decision was subsequently set aside by the Casablanca Commercial Court. In the face of this judicial defeat and, pursuant to the complainants' claims that the judicial process was unequal, lengthy, costly and ineffective due to the substantial resources deployed by the company, the NHRC intensified its efforts to obtain an appointment with the company to mediate between the parties.

Finally, on 26 July 2018, the NHRC held a meeting with the company's human resources manager to inform him about these complaints and to raise awareness about the company's responsibility to respect all internationally recognised human rights, as well as its due diligence responsibilities in this regard, all of which are in accordance with United Nations Guiding Principles on Business and Human Rights (UNGPs). From his end, the HR Manager stressed the fact that their activities were legally authorised and provided NHRC with the relevant environmental reports to attest the compliance of the company's activities.

#### **2.6.4 Outcomes**

As agreed during this meeting, the NHRC provided the company with the necessary tools (UNGPs, OECD Due Diligence Guidance for responsible business conduct, NHRC internal recommendations on the implementation of human rights due diligence) so that the company could better understand its responsibility to respect all internationally recognised human rights. The company made further efforts to take account of the complainants' claims. In addition, the company proposed that the NHRC organise a future visit to its premises in order to verify that its activities complied with the relevant legal requirements in this area. In September 2018, the complainants informed the NHRC that the deflagrations outside legal working hours had stopped, some local residents had been employed by the company, and that the victims' representative (and his family of eight people) whose house was closest to the company's operations had received financial compensation.

### 2.6.5 Challenges and opportunities

Although it has no coercive power against companies, the NHRC's intervention and handling of this complaint, through a conciliatory approach between the complainants and company, could be considered as a partial success. The NHRC helped raise the company's awareness of its due diligence responsibilities in the field of human rights and the risks involved in cases of non-compliance with these obligations. It was thereby possible to restore dialogue between some of the parties involved, while helping them to find solutions to mitigate the negative impacts on human rights caused by the company's activities. At this stage, the company has compensated nine out of the 19 victims. The NHRC is still urging the company to indemnify the remaining 10 victims.

## 2.7 The Netherlands National Human Rights Institute's Work on Access to Remedy in the Area of Business and Human Rights

By Nicola Jägers, Commissioner, Netherlands National Human Rights Institute

### 2.7.1 Introduction

In order to illustrate the work of the Netherlands National Human Rights Institute (the Institute) on access to remedy in the field of business and human rights and the opportunities and shortcomings, a particular topic has been selected: sexual harassment in the workplace. Recently, allegations of sexual harassment and abuse on a large scale of girls promoting beer in African countries caught the attention of the media.<sup>51</sup> The girls are employed by a large multinational corporation (MNC), headquartered in the Netherlands. The MNC employs around 20,000 'promo girls' worldwide. The case of the Dutch beer-company offers an illustration of what the Institute can and cannot do on access to remedy both in the strict sense as a complaint-handling platform and in a broader sense.

### 2.7.2 Access to remedy in a strict sense

In the Netherlands, sexual harassment in the workplace is prohibited, *inter alia*, under the Equal Treatment Act.<sup>52</sup> This brings sexual harassment as a form of discrimination within the mandate of the Institute, as it oversees equal treatment legislation and, in individual cases, assesses whether a person has faced discrimination at work, in education or as a consumer. Employees that experience sexual harassment or consider measures taken by the employer to address such conduct inadequate, can submit a request for an opinion to the Institute. However, the jurisdiction of the Institute is restricted to the Netherlands.<sup>53</sup> The case concerning sexual harassment of 'the beer promotion-girls' employed by the Dutch MNC cannot be considered by the Institute in its individual complaint-handling function as the Equality Act only concerns the Dutch jurisdiction.

<sup>51</sup> See, e.g., *Heineken Promo-Girls Sexually Harassed in African Countries: Report*, NL Times (Mar. 26, 2018), <https://nltimes.nl/2018/03/26/heineken-promo-girls-sexually-harassed-african-countries-report>; *Heineken's Promotional Girls Sell Beer With Their Bodies*, Olivier van Beemen (Mar. 23, 2018), <http://eucam.info/wp-content/uploads/2018/03/Heineken%E2%80%99s-promotional-girls-sell-beer-with-their-bodies.pdf>

<sup>52</sup> *Equal Treatment Legislation*, College voor de Rechten van de Mens, (English Translation) (May 2013), <https://mensenrechten.nl/sites/default/files/2013-05-08.Legislation%20Equal%20Treatment.pdf>

<sup>53</sup> As stated in the Netherlands Institute for Human Rights Act, Chapter 1, Section 1, art. 3: "The object of the Institute is to protect human rights, including the right to equal treatment, *in the Netherlands*, to increase awareness of these rights and to promote their observance." (emphasis added), <https://publicaties.mensenrechten.nl/file/699f27c7-d0dd-4e5f-9855-da295884667a.pdf> (last visited Jan. 23, 2019).

### 2.7.3 Access to remedy in a broader sense

Under its mandate to promote human rights, the Institute has undertaken various activities relevant for access to remedy in this area. Within the Netherlands, efforts are geared towards (further) improving access to remedy for victims of sexual harassment. For example, by offering advice on draft legislation currently pending in parliament aimed at the criminalisation of sexual harassment as such. Furthermore, the Institute offers advice on addressing sexual harassment at the company level by means of, for example, a code of conduct. Besides advising the Government directly on such issues, the Institute engages with international mechanisms, such as reporting on the Istanbul Convention. Despite the existence of legal remedies, these avenues are underutilised which shows the need to increase awareness and address the root causes of sexual harassment within the Netherlands.<sup>54</sup>

### 2.7.4 Challenges in providing access to remedy for transnational business-related human rights abuse

When a case concerns access to remedy in business and human rights cases with a transnational character, the Dutch Government in general tends to place emphasis on access to non-judicial remedies, such as the OECD National Contact Point. Victims of corporate-related human rights abuse face significant hurdles when seeking access to *legal* remedy in the Netherlands.<sup>55</sup> The Institute has thus engaged with policy-makers on how to improve access to legal remedy in transnational business and human rights cases. The Dutch National Action Plan on Business and Human Rights is largely silent on the matter of access to legal remedy.<sup>56</sup> To name an example, in its comment on the Dutch National Action Plan, the Institute recommended that the restrictive rules in the Netherlands on discovery, governing access to information in litigation, be revised. The restrictive rules can make gathering evidence on corporate structures and practices difficult, jeopardising access to justice and the right to fair trial.

## 2.8 The Nigerian National Human Rights Commission's Special Investigation into the Human Rights Implications of Activities by Oil Companies in the Niger Delta Region

By IHEME RICHMOND, Assistant Director, Investigation (Monitoring), Nigerian Human Rights Commission

### 2.8.1 Overview

In February 2016, the National Human Rights Commission of Nigeria established an investigative panel to address complaints from Niger Delta communities that activities by oil companies had led to environmental pollution, degradation, and related human rights abuses.<sup>57</sup> The decision to investigate came after multiple similar complaints were brought before the Commission.

<sup>54</sup> To date the Institute has received only a very limited number of requests for an opinion concerning sexual harassment. To illustrate: in 2016, the Netherlands NHRI published 151 views concerning discrimination, only one case dealt with sexual harassment. Likewise, very few cases concerning such conduct are brought before courts.

<sup>55</sup> See, e.g., *Adjudicate this! Foreign Direct Liability and Civil Jurisdiction in Europe*, Lucas Roorda, in *Business and Human Rights in Europe*, Angelica Bonfanti (ed), (2018).

<sup>56</sup> The Netherlands Ministry of Foreign Affairs, National Action Plan on Business and Human Rights (English Version) (2014), <https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/10/NAP-Netherlands.pdf>

<sup>57</sup> Complainants included: GOI Community Gokana LGA, Rivers State; Oron LGA, Akwa Ibom State; Ibedu Fadama Farmers Community; Gokana LGA, Rivers State; All Farmers Association of Nigeria AKS; Buruku LGA, Delta State; All Farmers Association Cross River State; Etch Peoples' Liberation Congress; Mkpata Enin LGA, Akwa Ibom State; GOI Community, Gokana LGA Rivers State; Nka Uwani Fishing Group, Ibiono Ibom LGA, Akwa Ibom State; Akwa Ibom Production Development Network (AKIPCON); Oron LGA, Akwa Ibom

### 2.8.2 NHRI mandate

The Commission's mandate is set out in Section 6 of the NHRC Amendment Act (2010). It is broad and includes the following:

- Assist victims of human rights violations and seek appropriate redress and remedies on their behalf.
- Receive and investigate complaints concerning violations of human rights and make an appropriate determination as may be deemed necessary in each circumstance.

The Commission therefore relied on its mandate in setting up a Public Hearing to address the matters raised by the Niger Delta communities.

### 2.8.3 Process

The Commission set out to make findings that could be used as the basis for determining the appropriate remedial measures. During the fact-finding stage, instead of dealing with each complaint in isolation, the Panel decided to address the matters through a Public Hearing because the complaints were systemic and on similar issues. A call was made in the newspaper for submissions/memoranda from the public on this subject. This approach aimed to give other members of the public (persons or communities) an opportunity to raise concerns related to the hearing. It also provided respondents with an opportunity to respond to the allegation(s), in line with the right to a fair hearing. The Panel commenced hearings and had held sittings with a view to entertain the complaints, make findings, and determine the issues presented.

### 2.8.4 Outcome

Midway through the hearings, however, the Panel was served summons from various Courts that had been initiated by different oil companies challenging the Commission's powers to carry out such investigations.<sup>58</sup>

The plaintiffs argued, among other things, that:<sup>59</sup>

- The Federal High Court has the exclusive jurisdiction to deal with minerals, oil spillage, pollution, and environmental degradation by virtue of Section 251 of the 1999 Constitution, and cannot share such powers with an inferior tribunal or panel; and
- The powers exercised by the Commission in establishing the Panel of Inquiry are *ultra vires*- that is, beyond its powers.

As a result, the Commission had to suspend its Inquiry, pending the outcome of the case challenging its powers to bring such investigations. The Court processes stalled

State; HRM Owong Aendem Bassey Ibok Okobo LGA, Akwa Ibom State; Akwa Ibom Oil Producing Community Development Network (AKIPCON); All farmers Association of Nigeria (AFAN) Cross Rivers State Chapter; All Farmers Association of Nigeria, Akwa Ibom State; Obemuah Esq.

<sup>58</sup> Plaintiffs/Oil Companies who filed the suits include: The Shell Petroleum Development Company of Nig. Limited; Total E&P Nigeria Limited; Moni Puplo Limited; Chevron Nig. Limited; Addax Petroleum Development (Nig) Limited; Nigerian Petroleum Development Company Limited; Nigeria Agip Oil Company Limited; Oriental Energy Resources Limited.

<sup>59</sup> See, e.g., *Oriental Energy Resources Limited v National Human Rights Commission* FHC/ABJ/CS/628/2016; *Addax Petroleum Development (Nig.) Limited v National Human Rights Commission* FHC/ABJ/CS/431/2016

the Inquiry's progress, as it would be *sub judice* for the Panel to continue its investigations while the question of jurisdiction was before the courts. No remedies have been awarded, as the Commission had not reached a stage of making findings that would have warranted a determination of remedy, before the jurisdictional challenges, which suspended the Public Hearings, arose.

In 2017, the Federal High Court delivered a judgment in favour of the plaintiff oil companies, thereby upholding the Federal High Court's exclusive jurisdiction over matters regarding minerals, oil, and so forth.<sup>60</sup> The Commission appealed this ruling to the Court of Appeal, arguing, among other things, that the Commission was not investigating environmental degradation or oil spillage *per se*, but rather the human rights consequences of the oil companies' activities which are clearly human rights concerns within the mandate of the Commission (e.g., adverse impact on lives and livelihoods of affected persons and communities).

In March 2018, the Court of Appeal quashed the Federal High Court's decision and entered judgment in favour of the Commission, thus affirming its powers to investigate the human rights aspects of these complaints.<sup>61</sup> However, the Commission has since learned that the oil companies, dissatisfied with Court of Appeal's judgment, have submitted a further appeal to the Supreme Court.

### 2.8.5 Challenges and opportunities

A major challenge reflected in this case is delay in the justice delivery system. This case began in 2016 and is still making its way through the courts. Accordingly, complaints have not been redressed and the harm subsists, unabated.

The judgment given in favour of the oil companies by the High Court, which denies the Commission's jurisdiction in this area, is a worrisome challenge as it shows a restrictive understanding of human rights by some members of the Bench (judiciary). It is commendable, however, that the Court of Appeal reversed that decision. In any case, the lower court's decision underscores a gap in capacity and the need for capacity building within the judiciary on the role and mandate of the national human rights institution.

The Commission's judicial voyage in this area also seems to present some opportunities. As the highest court in Nigeria, the Supreme Court's decision is final and binding on all other courts. Therefore, affirmation of the Commission's mandate to investigate the human rights impacts of environmental pollution and degradation (not the pollution or degradation itself) sends a clear statement and strongly empowers the Commission to discharge its mandate of promoting, protecting and enforcing all human rights in Nigeria – without exception. A contrary decision, however, will likely diminish the Commission's effectiveness. We hope it will not come to that.

Another significant challenge, however, is the costliness of litigation. With so many funds at their disposal, oil companies are in a position to hire the highest tier of lawyers, while the Commission struggles with lean resources. However, the Commission is not discouraged to test the judicial waters.

<sup>60</sup> See, *Addax Petroleum Development (Nig.) Limited v National Human Rights Commission* FHC/ABJ/CS/431/2016

<sup>61</sup> *National Human Rights Commission v Addax Petroleum Development (Nig.) Limited* FHC/ABJ/CS431/2016



Pictures above: Sittings of the Special Investigation Panel on Oil Spills and Environmental Pollution of the NHRC of Nigeria

## 2.9 National Inquiry by the Philippines Commission on Human Rights on the Impact of Climate Change on the Human Rights of the Filipino People

By the Office of Commissioner Roberto Eugenio T. Cadiz, Commission on Human Rights of the Philippines

### 2.9.1 Overview

In September 2015, a group of Filipino citizens and civil society organisations filed a petition<sup>62</sup> before the Commission on Human Rights of the Philippines (CHRP), requesting that the Commission investigate the responsibility of Carbon Majors<sup>63</sup> for human rights abuses or threats of abuses resulting from the impacts of climate change. The petition asserts that investor-owned Carbon Majors breached the corporate responsibility to respect, as articulated in the United Nations Guiding Principles on Business and Human Rights (UNGPs), through the contribution of their products and production processes to greenhouse gas emissions. The claim is based upon research by Richard Heede of the Climate Accountability Institute, who quantified and traced 'for the first time the lion's share of cumulative global CO<sub>2</sub> and methane emissions since the industrial revolution began to the largest multinational and state-owned producers of crude oil, natural gas, coal and cement'.<sup>64</sup>

The Commission admitted the petition in accordance with its Constitutional mandate to investigate all forms of human rights violations involving civil and political rights of the Filipino people<sup>65</sup>. In 2016, the Commission commenced its inquiry, thus setting an important precedent for investigations by National Human Rights Institutions of corporate responsibility to respect human rights, including extra-territorial obligations resulting from transboundary harm.

### 2.9.2 NHRI mandate

The Commission has a constitutional mandate to investigate allegations of human rights violations. Pursuant to the Philippine Constitution and Rule 2 of the Commission's Omnibus Rules of Procedure, 'the Commission on Human Rights shall take cognizance of and investigate, on its own or on complaint by any party, all forms of human rights violations and abuses involving civil and political rights'<sup>66</sup>.

Furthermore, 'in line with its role as a national human rights institution, [it] shall also investigate and monitor all economic, social and cultural rights violations and abuses,

<sup>62</sup> *Petition Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, Greenpeace Southeast Asia et al. (Sep., 2015), [https://www.greenpeace.org/seasia/ph/PageFiles/735291/CC%20HR%20Petition\\_public%20version.pdf](https://www.greenpeace.org/seasia/ph/PageFiles/735291/CC%20HR%20Petition_public%20version.pdf)

<sup>63</sup> The Carbon Majors are 47 investor-owned oil, gas and cement companies whose activities have been studied as the largest contributors of CO<sub>2</sub> methane emissions since the industrial revolution. The full list of 47 multinational corporations includes: Alpha Natural Resources, Anadarko, Anglo American, Apache, Arch Coal, BG Group, BHP Billiton, BP, Canadian Natural Resources, Cemex, Chevron, ConocoPhillips, Consol Energy, Devon Energy, Encana, Eni, ExxonMobil, Freeport-McMoRan, Glencore, HeidelbergCement, Hess, Holcim, Husky Energy, Italcementi, Kiewit, Lafarge, Lukoil, Luminant, Marathon, Murphy Oil, Murray Energy, North American Coal, Occidental, OMV Group, Peabody Energy, RAG, Repsol, Rio Tinto, Rosneft, RWE, Sasol, Shell, Suncor, Taiheiyō Cement, Total, UK Coal, and Westmoreland: <http://essc.org.ph/content/nicc/>

<sup>64</sup> Carbon Majors: Accounting for Carbon and Methane Emissions 1854-2010, Methods and Results Report, Richard Heede (Apr. 7, 2014), <http://climateaccountability.org/pdf/MRR%209.1%20Apr14R.pdf>

<sup>65</sup> National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People: Press Release, Republic of the Philippines Commission on Human Rights (Dec. 12, 2017) [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20171212\\_Case-No.-CHR-NI-2016-0001\\_press-release-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20171212_Case-No.-CHR-NI-2016-0001_press-release-1.pdf)

<sup>66</sup> The Commission On Human Rights Guidelines And Procedures In The Investigation And Monitoring Of Human Rights Violations and Abuses, and the Provision of CHR Assistance, Book 1, Rule 2, Section 1: [https://pinoyfilecabinet.files.wordpress.com/2014/07/chr-procedures-final\\_approved\\_8-31-2012.pdf](https://pinoyfilecabinet.files.wordpress.com/2014/07/chr-procedures-final_approved_8-31-2012.pdf)

as well as threats of violations thereof<sup>67</sup>. Following the investigation, the Commission may declare that human rights have been violated and provide recommendations on how to adequately redress such violations (Section 18, Article XIII of the Philippine Constitution). The Commission, however, does not have the jurisdiction to award compensation to victims.

### 2.9.3 Process

In July 2016, the Commission served copies of the petition to forty-seven Carbon Majors, seeking their response to the allegations within forty-five days. Most of the companies did not respond. Those that did respond questioned the Commission's jurisdiction to handle the case.<sup>68</sup> Consequently, numerous civil society organisations and international law experts submitted amicus curiae briefs to the Commission arguing that the Commission's mandate to investigate the case is well-founded in international law principles as well as national law.<sup>69</sup> The Commission sent notices in October 2016, requesting that the respondent companies attend a meeting in the Philippines on 11 December 2016 to discuss and agree on how the investigation would be conducted.

The Commission has carried out site visits and fact-finding missions to Tacloban, Albay, Cagayan de Oro, Bukidnon, and Cagayan Valley, where it engaged in in-depth interviews and discussions with residents and authorities<sup>70</sup>. It also conducted investigations and community dialogues in Albay, Quezon, and Batangas. The purpose of these visits was to consult with communities and see how environmental changes have affected their rights to food, water, health, homes, and life.

In 2018, the Commission held hearings in Manila (March 27-28, 2018, and August 29-30, 2018), New York (September 27-28, 2018, hosted by the New York City Bar Association), and London (November 5-9, 2018, hosted by the London School of Economics). The Commission concluded its public inquiry with two days of public hearings in Manila (December 11-12, 2018).<sup>71</sup> The hearings included testimonies from world-renowned climate and human rights experts, and the accounts of residents from communities in the Philippines suffering most from the impacts of climate change. None of the respondent Carbon Majors formally appeared in any of the hearings.

The Commission plans to conclude its investigations and issue its findings in 2019.

<sup>67</sup> *The Commission On Human Rights Guidelines And Procedures In The Investigation And Monitoring Of Human Rights Violations and Abuses, and the Provision of CHR Assistance, Book 1, Rule 2, Section 2*: [https://pinoyfilecabinet.files.wordpress.com/2014/07/chr-procedures-final\\_approved\\_8-31-2012.pdf?fbclid=IwAR1JRIMEPK\\_uGnPEowHFSCs5QQQJFHZL8\\_hb6sw7XepHQXR42zN4IenFsQ](https://pinoyfilecabinet.files.wordpress.com/2014/07/chr-procedures-final_approved_8-31-2012.pdf?fbclid=IwAR1JRIMEPK_uGnPEowHFSCs5QQQJFHZL8_hb6sw7XepHQXR42zN4IenFsQ)

<sup>68</sup> *Fossil Fuel Firms Respond to Petition Before Philippines Human Rights Commission on Human Rights & Climate Impacts*, Business & Human Rights Resource Centre n.d., <https://www.business-humanrights.org/en/fossil-fuel-cos-respond-to-petition-with-philippines-human-rights-commission-on-human-rights-climate-change-impacts> (last visited Jan. 28, 2019).

<sup>69</sup> See, e.g., *Joint Summary of the Amicus Curiae in Re: National Inquiry on the Impact of Climate Change on the Human Rights of the Filipino People*, CIEL et al. (Mar. 19, 2018), <http://www.ciel.org/wp-content/uploads/2018/03/Joint-Summary-Amicus-submitted.pdf>; *Amicus Submission, re Petition Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, Olivier De Shutter et al. (Dec. 5, 2016), : [https://business-humanrights.org/sites/default/files/documents/Submission\\_Maastricht%20Principles%20drafting%20group.docx](https://business-humanrights.org/sites/default/files/documents/Submission_Maastricht%20Principles%20drafting%20group.docx)

<sup>70</sup> *CHR sets 2019 targets for results of landmark rights-based climate change probe*, GMA News (Dec. 12, 2017), <https://www.gmanetwork.com/news/news/nation/636263/chr-sets-2019-target-for-results-of-landmark-rights-based-climate-change-probe/story/>

<sup>71</sup> *CHR concluded landmark inquiry on the effects of climate change to human rights; expects to set the precedent in seeking climate justice*, Republic of the Philippines Commission on Human Rights (Dec. 13, 2018) <http://chr.gov.ph/chr-concluded-landmark-inquiry-on-the-effects-of-climate-change-to-human-rights-expects-to-set-the-precedent-in-seeking-climate-justice/>

#### 2.9.4 Challenges and opportunities

The Respondent ‘carbon majors’ questioned the Commission’s jurisdiction on the ground that the petition related to economic, social, and cultural rights.<sup>72</sup> Some respondents also alleged that the NHRI lacked territorial jurisdiction over their businesses as they were not operating within the country where the NHRI is located.<sup>73</sup> However, the Commission believes that the petition falls within its general mandate to uphold the human rights of all Filipinos and has thus proceeded with the inquiry.

The Commission does not have powers to summon parties and there has been minimal involvement in the process by the respondent companies. Nonetheless, these factors have not hindered the Commission’s investigations. The refusal of certain parties to participate is not an obstacle to an inquiry about human rights violations. Inquiry panels may send invitations to other resource persons and parties to shed light on the subject of inquiry. Regardless of the number of parties participating in the inquiry, the Commission is determined to pursue it to its logical conclusion. It will present findings and recommendations based on the evidence submitted before it.

The Commission is in a unique position to test boundaries and create new paths. This case represents an exciting opportunity to explore how a state-based, non-judicial mechanism can provide access to remedies for victims negatively impacted by climate change.

This case also has an interesting transboundary element. The investigative process which the Commission has embarked on may interest other National Human Rights Institutions in the handling of human rights cases with extra-territorial character.

Although the Commission cannot award damages, the results of the Inquiry can be relied upon by rights-holders as a foundation for filing cases for punitive damages at a later stage.<sup>74</sup>

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<sup>72</sup> *Philippine Rights Commission’s Landmark Climate Change Inquiry*, Asia Sentinel (Dec. 20, 2018), <https://www.asiasentinel.com/econ-business/philippines-human-rights-commission-landmark-climate-change-inquiry/>

<sup>73</sup> *The Philippines Human Rights Commission and the ‘Carbon Major’s Petition*, EJIL: Talk! (Dec. 22, 2017), <https://www.ejiltalk.org/the-philippines-human-rights-commission-and-the-carbon-majors-petition/>

<sup>74</sup> *CHR concluded landmark inquiry on the effects of climate change to human rights; expects to set the precedent in seeking climate justice*, Republic of the Philippines Commission on Human Rights (Dec. 13, 2018) <http://chr.gov.ph/chr-concluded-landmark-inquiry-on-the-effects-of-climate-change-to-human-rights-expects-to-set-the-precedent-in-seeking-climate-justice/>



Buucan Hangdaan (left), an Ifugao tribal elder, and William Mamanglo, of the Ifugao Cultural Heritage Office, relate their experiences to the Commission



Richard Heede testifying on the Climate Accountability Institute's work on quantifying the contributions of carbon producers to climate change and climate damage



Dr Neil Aldrin Mallari (rightmost), testifying on "Biodiversity and Climate Change" before the CHRP National Inquiry on Climate Change Inquiry Panel



A tribal chieftain sharing his experiences at a community dialogue in Malaybalay City, Bukidnon Province



Scene at the first inquiry hearing of the Commission on Human Rights of the Philippines National Inquiry on Climate Change



Dr Sophie Marjanac speaking about attribution science and climate change litigation

## **2.10 The Commission for Human Rights and Good Governance's Role in implementing an improved complaints handling mechanism to address business-related human rights complaints in Tanzania**

By Jovina Muchunguzi, Business and Human Rights Coordinator, The Commission for Human Rights and Good Governance

### **2.10.1 Overview**

The Commission for Human Rights and Good Governance (CHRAGG) is partnering with the International Peace Information Service (IPIS) and Business and Human Rights Tanzania (BHRT) to implement the project named: 'Improving Monitoring, Research and Dialogue on Business and Human Rights in Tanzania'.<sup>75</sup> The three-year project aims to build local and national capacities for improved reporting, fact-finding, monitoring and follow-up of business-related human rights harm in Tanzania. The overall objective of the project is to enhance protection, prevention, accountability and access to remedies, particularly for vulnerable groups.

### **2.10.2 CHRAGG's role in the project**

As a project partner, CHRAGG is implementing three main interconnected activities: (1) Complaints Mechanism, Fact-Finding and Follow Up to improve reporting and detection of corporate harms/grievances by strengthening CHRAGG's capacity, mechanism and methodology and by building awareness on its role; (2) Research, Mapping and Briefings targeted towards designing and operating a database on business and human rights grievances, thereby enabling aggregated analysis of key challenges, trends and opportunities presented in annual reports with an accompanying web map; (3) Multi-Stakeholder Dialogue to advance the debate and build consensus on the NAP for business and human rights, conduct annual multi-stakeholder conferences to present activities and results, stimulate discussions, collect feedback, and have side sessions for specific stakeholder groups to stimulate self-reflection and lesson learning

### **2.10.3 Objectives of the project**

The main objectives of the project are to:

- Improve the reporting and detection of business and human rights grievances by strengthening CHRAGG's capacity, mechanisms, methodology, and build awareness around the Commission's role with regard to business-related complaints;
- Establish CHRAGG fact-finding teams, available for rapid deployment and trained to independently gather accurate information through mobile data collection; and
- Support and train CHRAGG in its mandate to act upon reported grievances through prompt analysis, balanced recommendations, follow up and mediation.

### **2.10.4 CHRAGG's existing complaints handling mechanism**

The existing complaints handling mechanism operates using a rudimentary SMS-based system. The system allows people to send a single (non-toll/free) SMS with some basic information on their complaint to CHRAGG's central complaints number. A

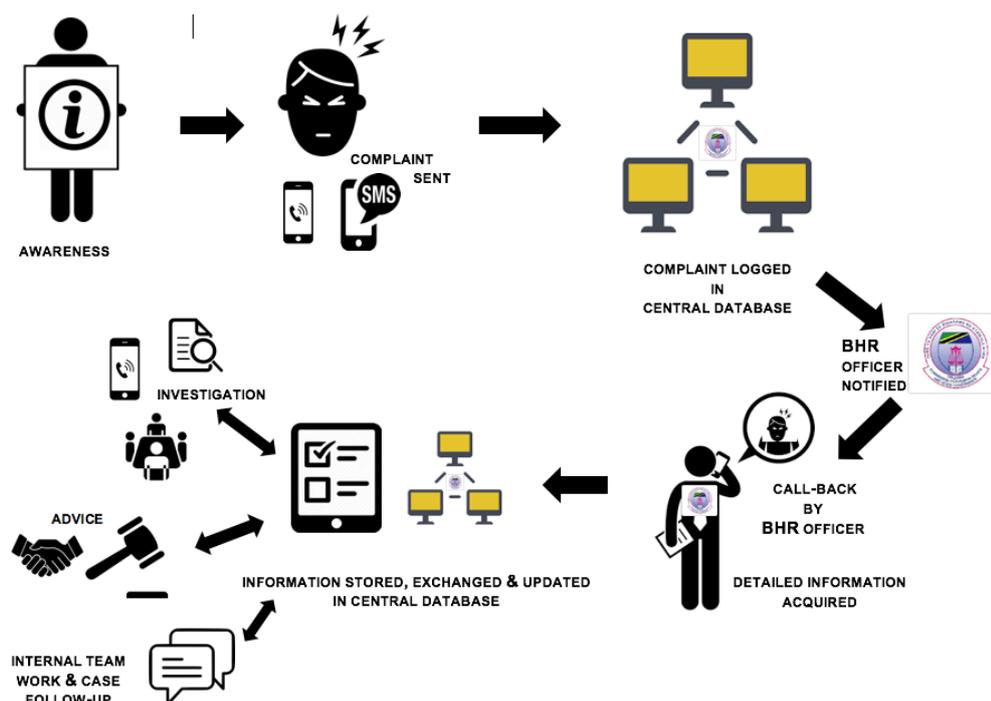
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<sup>75</sup> *Research and Dialogue on Business and Human Rights in Tanzania*, IPIS, (Feb. 2, 2018), <http://ipisresearch.be/2018/02/improving-monitoring-research-dialogue-business-human-rights-tanzania/>

CHRAGG ICT officer then calls the complainant back to ask general questions. S/he fills out a standard hard copy form with all the information gathered during this phone call. The form is forwarded to CHRAGG's legal department for review and scrutiny. The legal department refers all cases falling within CHRAGG'S mandate to the Executive Secretary for approval, and these are then returned to the legal department. The Classification Officer (who sits in the legal department) refers cases to the relevant department (e.g., Human Rights or Administrative Justice). They inform the complainant with a hard copy acknowledgement letter, which includes a case file number. Case follow-up then commences.

#### **2.10.5 Operation of the proposed improved complaints handling mechanism**

Complainants will be able to contact CHRAGG using a free telephone number. The system will be interactive, such that it sends automatic and toll-free requests for further information through a flow, customised to the claimants' responses. Furthermore, the current SMS-only system will be complemented with an internet-based complaints procedure. Complainants using the internet-based option can make complaints using a form tailored for the specific type of infringement that the complainant is reporting on. Both the SMS and internet-based procedures will indicate the type of infringement, location, scale, presumed actors responsible for the harm and those affected by it, and so forth. The improved complaints handling mechanism will also offer people the ability to file complaints verbally, which will make it accessible to people who are illiterate. Upon making a complaint, complainants will receive a standard response message to confirm receipt and assign a case number. The improved mechanism will create a central database where all complaints will be categorised according to type, date, location, economic sector, and urgency. The database will be accessible to, and can be operated by, all CHRAGG team members and offices. All follow-up communication, actions taken to investigate, monitor and mitigate the complaint are individually stored per complaint. This will allow the CHRAGG staff to have an overview of complaints, keep track of the nature of all complaints and to have a better view on the most pressing issues and locations, recurring problems, and other trends and patterns.



Workflow of the expected new complaint mechanism. Credit: CHRAGG

### 2.10.6 Strengths of the project

The project enables an investigation officer from CHRAGG's business and human rights team, who has the legal training and expertise to acquire all relevant information and details from the complainant and answer substantive questions, to first assess the complaint. S/he can refer to other CHRAGG branches, if applicable. It also involves an extensive awareness-raising campaign throughout the country to familiarise people with CHRAGG's new complaints handling mechanism. Finally, it provides for a comprehensive and standardised procedure to follow up on complaints from the moment they are received to the conclusion of the case. This will require training and monitoring to ensure that all relevant staff follow the procedures correctly and consistently.

## 2.11 Remedy Guidance to Businesses and an examination of Cleaning Sector by Britain's Equality and Human Rights Commission

By Elizabeth Bowles and Mark Wright, EHRC

### 2.11.1 Overview

Great Britain's Equality and Human Rights Commission has worked on access to remedy in the business and human rights context in a number of ways. For example, the Commission has produced guidance for businesses on their human rights responsibilities; including guidance for board members, for managers, and on handling

human rights complaints.<sup>76</sup> The Commission engaged with a number of business stakeholders, several of whom have case studies featured in the guidance.

The Commission worked on this area in order to simplify and bring together the various human rights standards and requirements into one place for use by business. The objectives were:

- To publish guidance and support for directors of UK-quoted companies to understand their responsibility to respect human rights and report on their human rights performance.
- To publish guidance and support for business managers more widely to understand their responsibility to respect human rights and to provide effective company-level remedy for human rights harms, with a focus on domestic business operations.

In the space of access to remedy, the Commission has also undertaken more targeted work, including an examination of the cleaning sector in 2014. This project identified good practice in the cleaning sector but found that some employers failed to pay their employees in full or to pay sickness or holiday leave entitlements. Many workers in the sector also spoke of being ‘invisible’ and said they did not understand their rights at work. The Commission set up an industry taskforce to tackle the poor practice highlighted by the Commission’s research. This brought together cleaning and facilities management companies, professional bodies, client organisations that buy-in cleaning services, trade unions, regulators and government. The taskforce’s aim was to:

- inform workers and employers of their workplace rights;
- encourage organisations that buy in cleaning services to procure and contract manage cleaning services in a responsible way; and
- encourage people to treat cleaning operatives with dignity and respect.

More recently, the Commission also intervened in Unison’s successful Supreme Court case against employment tribunal fees, helping ensure access to remedy for workers.

### **2.11.2 NHRI mandate**

The Guidance developed for businesses falls under the Commission’s mandate areas of providing advice and education.

### **2.11.3 Process**

The Commission did not directly provide access to remedy for individuals in this context as (it can support a case in the courts only if it includes an Equality Act 2010 claim, and its powers to investigate only extend to equality and not human rights). However the Commission can use its powers to promote understanding in relation to human rights.

The guidance on handling human rights complaints sits within the remedy pillar of the ‘Protect, Respect and Remedy’ framework. Company grievance mechanisms are an important aspect of non-judicial remedy mechanisms.

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<sup>76</sup> <https://www.equalityhumanrights.com/en/advice-and-guidance/human-rights-and-business>

In respect of the cleaning sector project, the Commission supported an industry-led working group to improve awareness of workplace rights among both workers and first-line managers and to support those managers to have better conversations with their teams, with a focus on promoting knowledge of workplace rights and businesses responding to grievances.

#### **2.11.4 Outcomes**

The Commission has measured the impact of the business guidance project through the influence and awareness of the work achieved at government or NHRI level and for business or business advisory organisations. For example, the UK Government's updated National Action Plan (NAP) on Business and Human Rights published May 2016 featured the Commission's guidance. The Commission has also provided evidence to UK Government and Parliamentary consultations such as the Taylor Review of Modern Working Practices and the JCHR Inquiry into Business and Human Rights.

The Commission has promoted the guidance extensively in UN fora, including a business and human rights event attended by 2,000 people from across the globe; the Commonwealth Forum of NHRIs; and national NHRIs. The Business and Human Rights Resource Centre has sought permission to translate the remedy guide into German to support the German Government's new business and human rights action plan. The board guide was championed by business leaders and investors at launch in May 2016 and potentially reached more than 675,000 people on social media. Companies commented that the guide was timely and that they would use it with non-executive directors and with suppliers. The board guide was used in 'Tackling Modern Slavery in Global Supply Chains' workshops with many of the UK's largest retailers, brands, producers, growers and labour suppliers and distributed to Ethical Trade Initiative members.

The cleaning sector taskforce members, and the wider cleaning industry, have embedded the campaign resources in their own policies and practices by, for example:

- including 'know your rights at work' resources in their induction and training programmes, and making leaflets available through pay slips, staff magazines and trade union members' resources;
- investing in staff surveys and staff meetings to understand the experiences and concerns of cleaning operatives; and
- promoting the taskforce's products and messages across the industry, for example, 2,000 delegates to the Manchester Cleaning Show took away the 'know your rights at work' packs
- leading Facilities Management companies advocating the Commission's procurement guidance.

#### **2.11.5 Challenges and opportunities**

The Commission has been proactive in sharing its resources on business and human rights, and how to operationalise respect for human rights and provide access to remedy. For instance, the Commission regularly promotes its approach to issues in the cleaning industry to other NHRIs, e.g. hosting a side event at the 2015 UN Forum on Business and Human Rights; and presenting at the Northern Ireland Human Rights

Commission's business and human rights forum on our twin approach, of supporting business through guidance on operationalising respect for human rights and targeted examinations of specific sectors. Through the Commission's role as Chair of the Commonwealth Forum of National Human Rights Institutions, David Isaac contributed to a panel discussion on 'NHRIs and access to remedy' at the UN Forum on Business and Human Rights (in Geneva in November 2018). The Commission also held an event in the European Parliament on trade, equality and human rights.



Picture: Dignity and Respect campaign poster developed by a group chaired by Sarah Bentley, The Building Futures Group

## Contact

German Institute for Human Rights  
Zimmerstraße 26/27, 10969 Berlin  
Tel.: 030 25 93 59-0  
Fax: 030 25 93 59-59  
info@institut-fuer-menschenrechte.de  
www.institut-fuer-menschenrechte.de

### EDITORS:

Nora Götzmann, Fiona Robertson, and Elin Wrzoncki, Danish Institute for Human Rights; and Christopher Schuller, German Institute for Human Rights.

## The German Institute for Human Rights

The German Institute for Human Rights is the independent National Human Rights Institution in Germany. It is accredited according to the Paris Principles of the United Nations (A-status). The Institute's activities include the provision of advice on policy issues, human rights education, information and documentation, applied research on human rights issues and cooperation with international organizations. It is supported by the German Bundestag. The Institute is mandated to monitor the implementation of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and has established Monitoring Bodies for these purposes.

## The Danish Institute for Human Rights

The Danish Institute for Human Rights (DIHR) is an independent national human rights institution modelled in accordance with the United Nations Paris Principles with 'A' status. The Institute, which was established by statute in 2002, carries on the mandate vested in the Danish Centre for Human Rights in 1987. This encompasses research, analysis, information, education, documentation and the implementation of national and international programmes. The chief objective of the Institute is to promote and develop knowledge about human rights on a national, regional and international basis predicated on the recognition that human rights are universal, mutually interdependent and interrelated. The Institute believes that societies must be based on the rule of law, where the state protects and confers obligations on the individual while safeguarding the most disadvantaged and marginalised groups in society. The Institute cooperates with organisations and public authorities in Denmark, with academic institutions and humanitarian organisations in other countries, as well as with the Council of Europe, the European Union, the Organization for Security and Co-operation in Europe, the United Nations, the World Bank and a range of international donors.