



HUMAN RIGHTS COUNCIL 23<sup>rd</sup> REGULAR SESSION

PARALLEL EVENT

Sponsored by the ICJ

**'DISCUSSION PANEL ON ACCESS TO JUSTICE AND  
CORPORATE COMPLICITY IN HUMAN RIGHTS ABUSES'**

**SUMMARY NOTE OF EVENT**

31 May 2013, *Palais des Nations*

*The International Commission of Jurists (ICJ) is a non-governmental organisation founded in 1952, in consultative status with the Economic and Social Council since 1957. The ICJ is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. It takes an impartial, objective and authoritative legal approach to the protection and promotion of human rights through the Rule of Law. It provides legal expertise at both the international and national levels to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the national level.*

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## **'Discussion Panel on Access to Justice and Corporate Complicity in Human Rights Abuses'**

The panel discussion on access to justice and corporate complicity in human rights abuses was held in the margins of the 23rd regular session of the Human Rights Council in Geneva, Switzerland, in the United Nations building on 31 May 2013. The event marked the fifth anniversary of the Human Rights Council's adoption of the Framework "Protect, Respect and Remedy," and the publication of the ICJ Report on "Corporate complicity in international crimes."

Senior Legal Adviser to the ICJ on business and human rights, **Carlos Lopez**, chaired and moderated the panel that included Mr Humberto Piaguaje Lucitante and Mr Pablo Fajardo Mendoza (from Ecuador)<sup>1</sup>, Mr Peter Kayiira Baleke (from Uganda)<sup>2</sup>, and Mr Muwafaq Khatib (from Palestine)<sup>3</sup>. The event aimed to highlight the pending agenda of the Human Rights Council in the area of business and human rights.

**Dr Carlos Lopez**, welcomed the participants on behalf of the International Commission of Jurists, Al-Haq, Geneva for Human Rights, and FIAN International, the co-organisers of the event. He explained that in 2008, the United Nations Human Rights Council adopted by unanimity, the United Nations "Protect, Respect and Remedy" Framework for Business and Human Rights<sup>4</sup> proposed by Professor John Ruggie, which three years later was followed by a set of Guiding Principles on Business and Human Rights<sup>5</sup>. One of the three pillars of the said framework is ensuring access to remedy to all victims affected by activities of business enterprises, which requires access to justice. There are many cases in which business corporations operations become involved in gross human rights abuses through their significant contribution to violations committed by government agents or other actors, what is called complicity. In 2008, after several years of work, the ICJ published a report<sup>6</sup> that conceptualized the meaning of "corporate complicity in gross human rights abuses". It has been 5 years since the UN Framework was adopted and the ICJ report published and many of the problems on the ground of five years ago still exist, despite the adoption of documents and declarations and the initiatives undertaken. The cases that will be presented in the panel attest to the perpetuation of the most serious problems. The Chair/moderator stated that the event was to be filmed for non commercial purposes and disclosed that no governmental or corporate funding had been used for the preparation of the event.

**Mr Mwafaq Khatib** presented the situation of his community in Palestine. He explained that his community is not far from Jerusalem, but they were historically independent from this community. Their economy was based on quarries and pastures, but Israel decided to establish a checkpoint in the port of Hizma for the construction of the Wall, so they started to take away the land of the villagers and construct the Wall in their lands. He told that the

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<sup>1</sup> Representatives of the Lago Agrio (Ecuador) communities affected by Texaco/Chevron's oil spill in the Amazonian jungle.

<sup>2</sup> Representative of Mubende (Uganda) community who claim their lands were forcefully taken by the Uganda Army and given to Kaweri Coffee Plantation Inc, subsidiary of the German company Neumann Kaffee Gruppe

<sup>3</sup> Chairman of Hizma Village Council (in the Jerusalem Governorate), who provided a victim's testimony in a complaint filed against Riwal, subsidiary of Dutch company Lima Holding B.V., for complicity in the commission of war crimes and crimes against humanity through its construction of the settlements built on the village's confiscated land.

<sup>4</sup> Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/8/5 (2008) See: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

<sup>5</sup> Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN doc. A/HRC/17/31 (2011) See: [http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf)

<sup>6</sup> *Corporate Complicity and Legal Accountability*, International Commission of Jurists, Geneva, 2008.

wall was 5 kilometres of longitude and that it separated the village from the city of Jerusalem, and other villages. As a result, it changed their lifestyle and culture because they cannot use their resources and have access to other communities. Since 1976, Hizma has been the principal water source for Israel, but since the construction of the wall, they cannot access this water source for their own use because it is under Israeli control and occupation now. He said that they want to take action to recover their lands and challenge all the countries that helped the construction of the Wall and the destruction of their homes.

**A representative of Al-Haq** explained that Al Haq brought a criminal complaint against the company Riwal in The Netherlands in 2010. This company rents cranes, and other construction equipment to construction companies that are building the annexation Wall in Hizma, causing destruction of property and appropriation of land. Between 2006, and 2009, the cranes were spotted three times, constructing the wall and an industrial complex in a settlement in the occupied territory of Palestine. The cranes were filmed by a Dutch news media network and this was broadcast in The Netherlands, where civil society mobilized and involved Al-Haq to initiate the case against Riwal for complicity in war crimes and crimes against humanity. The investigations lasted for 4 years and sadly in May 2013, the Dutch prosecutor dismissed the prosecution of the case. Among the large number of obstacles was the difficulty of gathering evidence in an extra-territorial case. Also the prosecutor introduced the case on behalf of the entire Palestinian community instead of specific individuals and raised the bar so high that it was out of reach for the tribunal, and making it difficult for small organizations to raise funds for this type of cases. Even though the case was dismissed, it sent a strong message to company managers and the publicity obtained was also very important.

**Mr Mwafaq Khatib** added that as a result of Israeli measures most of their land and plantations were destroyed. They claimed for their rights through the Israeli judicial system, but they only obtained an order for one of the colonies to be dismantled in 2011, but the order has not been enforced yet. He also stated that coming from Palestine to Geneva is easier than moving 20 meters within Hizma, due to the Wall, and demanded from the Human Rights Council help to Palestinian communities to be able to protect their lands and to use them.

**Mr Peter Kayiira Baleke** presented a video, in which explained the situation of his community, the Mubende community in Uganda, due to the actions of the German company Neumann Kaffee Group and the methods used by this enterprise with the complicity of the government of Uganda, to forcibly evict them from their land and homes. The Neumann Kaffee Group started doing business with the government of Uganda with the objective of establishing a coffee plantation of 11.6 square miles, that it is located in the land of his community. The corporation paid the government for the use of this land and the government used the military forces to forcibly evict them from their homes.

The action of the government military forces was violent, using fire arms in order to fright and intimidate them so they leave the land. As a result, they decided to get organized and start a legal action against the company. Mr Kayiira told that a government official had told them that any law suit was going to be a waste of time because they controlled the judicial system and that it was going to take a lot of time to obtain a decision from the judges: most of the plaintiffs were going to die before reaching a verdict and that their sons were going to be so tired and weak that would not be able to continue the process. Gladly the legal procedure has ended now after more than 10 years.

In March 28, 2013, the High Court ruled in favour of the community and decided that damages should be paid and the Government must restore their statutory right to possess

the land. He explained that the company must open a dialogue with them in order to keep on the coffee production, and if they do so, they must pay for the use of land or have to stop their activities. The company has appealed the decision of the judge, yet the community know they are going to win the appeal. The appeal process should not take too much time, but there are not enough judges in the Appeal Court. The company instead of appealing the judgment attacked the judge in newspapers. These kind of corporations believe that they help countries, as the global North assisting the global South to develop for which the South should be grateful. But development cannot be imposed.

**Mr Humberto Piaguaje Lucitante**, a Secoya representative of some 30,000 people from the Amazon jungle in Ecuador, presented his testimony by explaining what happened from the perspective of a person who was born in nature. As a young boy he appreciated nature and grew up in harmony with it. People in his community would bathe in clean water sources and breathed clean air, fished and hunted in full respect to nature. Chevron's activity has destroyed everything: their lifestyle, and in the process they lost themselves as human beings.

Since 1964, there have been over 30 years of oil exploitation. Mr Piaguaje recalled how the community at first did not know what was really happening. The company disposed the wastes of oil in the rivers and lakes. At first, they believed that these wastes would help the earth killing bugs and other insects. He remembered her mother used to collect oil in a recipient to use it in lamps to light up the huts. They were not informed about the consequences of the exploitation and were not aware of the problems and diseases with which they would deal with in the future. One day his grandfather returned after swimming in the lake all covered in oil, reporting how fish were dying in the river. The grandfather died because of cancer, as other members in their family without enough money to attend a hospital.

Mr Piaguaje said his people are dying and the company must be held responsible for the damages and destruction caused also to future generations, it should recognise the disaster caused to nature, their culture and way of life. This is the reason why the union of victims affected by Texaco was created: to fight for their life and dignity. They have been fighting for the last 20 years to obtain redress for the damages caused by Texaco, but the company has used all its economic resources and power to avoid responsibility. But they will continue defending the life and dignity of their children, and for nature.

**Mr Pablo Fajardo Mendoza**, the lawyer of the Lago Agrio communities, used slides to show the impact of Chevron-Texaco's activities since 1964 to 1992: more than 60,000 litres of contaminated water were thrown into the environment and there are at least 880 toxic pots in the jungle, which entails the destruction of 5 million acres of jungle. This creates a major impact in the inhabitants' health: it exists more than one case of cancer per family in the region, children born with congenital diseases, and two indigenous communities disappeared due to the contamination produced by Texaco.

These were the reasons why a legal process was initiated in New York in 1993 against Texaco, but the company sought to be judged in Ecuador, and even signed a commitment to respect and accept the decision of the Ecuadorian courts. Thus, in 2002, the New York court sent back the case to Ecuador where the trial against Texaco-Chevron started in 2003. The file comprised more than 250,000 documents. In 2011, the Ecuadorian court ruled ordering Chevron to pay 19,000 million US dollars for the harm and damage caused in the Ecuadorian Amazon Jungle. But the company refuses to pay and bowed to continue fighting until "hell freezes over, and then will continue fighting on skates". Silvia Garrido, a Chevron representative, was quoted saying that "Chevron does not want to be tried in any court."

Texaco-Chevron is now blocking the enforcement of the judgment, and has started more than 20 legal proceedings against the plaintiffs' representatives and even against the Government of Ecuador. The company has spent more than 60 million U.S. dollars in a lobby against Ecuador, and has launched a media campaign against Ecuador justice system. In addition, it has hired more than 200 lawyers around the world trying to stop the enforcement of the judgment in other countries, and more than 1,000 spies to spy over the plaintiffs. For instance, in Argentina the company is using bilateral commercial agreements with the government to avoid the enforcement of the Ecuadorian ruling.

Mr Fajardo assured that they will fight until the company pays for its crimes, and called on the United Nations subsidiary bodies to help them to protect the rights of indigenous communities and the environment.

### **Interventions/ questions & answers**

The Chair/Moderator recalled that in March of 2013, the United Nations Human Rights Council adopted a resolution on the report by the Fact Finding Mission on Israeli settlements in the OPT<sup>7</sup> calling on the Working Group on Business and Human Rights, to pay attention to the involvement of private companies in international crimes being committed there. The Working Group should be expected to provide information on the steps it is taking. Then, the floor was open first to any representative of a concerned company, and then to concerned governments present in the room.

A lawyer from a law firm representing Chevron in arbitration proceedings took the floor recognising that there is human suffering involved in the case concerning Chevron. But the discussion is about corporate complicity in human right abuses and the question that emerges is if we are looking at the right culprit. In the cases of Mubende (Uganda) and the Wall in Palestine there seems to be complicity between the state and a particular company. However, in the case of Ecuador v. Chevron, one possible culprit linked to the state, very much involved in petroleum activity in the region, was deliberately left aside, preferring instead to go after the big international company. The first question is whether in this confrontation between David and Goliath, this is the right Goliath. Secondly, there are a number of concerns that have been raised about the means by which the case is been dealt with, because of the alleged fraudulent evidence, corruption of experts and judges. This made Chevron to begin following-up the case due to these serious accusations and to request that the judgement ordering compensation not be enforced until the merits of a investment arbitration case were decided by an international arbitration tribunal. This arbitral tribunal has ordered Ecuador not to enforce the judgment until the merits of the case, including allegations of corruption, have been examined. A dozen tribunals in the United States have found evidence of fraud in the dispute conducted in Ecuador and ordered the disclosure of documents no longer protected by the attorney - client privilege. There are a number of concerns that Chevron feels can be raised in the context of investment arbitration. The law firm that represents Chevron considers that justice must be done in all aspects, and that includes respect for international law.

The Ambassador of Ecuador took the floor to explain that the issues between Chevron and Ecuador have been going on for more than 20 years. It involves not only the component of indigenous communities taking Chevron to trial but also the use of the provisions of a bilateral investment treaty by Chevron. The Bilateral Investment Treaty between Ecuador and the United States entered into force in 1997, five years after Texaco finished their

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<sup>7</sup> Human Rights Council, UN doc. A/HRC/22/L.45 (2013) See: <http://daccess-dds-ny.un.org/doc/RESOLUTION/LTD/G13/122/96/PDF/G1312296.pdf?OpenElement>

operations in Ecuador, therefore it could not be applicable. But the arbitral tribunal asked Ecuador not to enforce a sentence of one of its own tribunal, which is a very particular thing to ask. Domestic law in Ecuador does not allow the Government to suspend the execution of a court judgment or order. Furthermore, the proceedings between Chevron and the indigenous communities in Ecuador are a private law case, but the company has decided to bring the Government of Ecuador to court in a public strategy to undermine its prestige and international standing, which is unacceptable. The Ambassador clarified that Mr. Fajardo is acting as an individual representing the communities affected by environmental depredation by a company in a case that is still under judicial proceedings, because Chevron has taken them to many jurisdictions. Ecuador is a small country under a lot of stress due to the extensive judicial processes initiated by Chevron. On a personal note, he added that he wrote his doctoral dissertation on transnational corporations and the law in 1975 but never thought he would confront a transnational, which is like a man standing in front of a tsunami. The issue of human rights and transnational corporations, the respect of human rights by enterprises that have multilateral capability, way beyond governments, is the new frontier for human rights.

A lawyer from Argentina (CEDHA) highlighted the importance of respect for international law, and in case of conflict between investment law and human rights law the latter obligations should prevail. Chevron should be consistent with its commitment to respect the judgment by Ecuadorian Courts. He asked Mr. Kayiira if the appeal suspends the execution of the court ruling, and if that is the case, how they will proceed in order to speed up the procedure instead of waiting two more years to obtain redress?

A delegate from the Mission of the United Kingdom in Geneva asked the panellists if they have made use of any of the non-judicial procedures established by the United Nations in any of these cases, and the point of view of those procedures.

A delegate from Namibia asked whether the International Commission or Jurists would study the cases and identify common elements that are of general application in order to indicate how to deal with these cases in the future. He explained his familiarity with the tactics and strategies used by lawyer to delay judgments and avoid the setting of precedent, and highlighted the importance of focussing on the independence of the judiciary. It would be important to examine the oversight of the judiciary and identify the sources – not always governmental- of influence over the judges.

Mr. Peter Kayiira Baleke answered that when an appeal is lodged the execution of the judgment is suspended, but the High Court saw this as a possible delaying tactic and granted leave to appeal only on the condition that appellants deposit the sum of 14 million U.S. dollars with the High Court as an assurance of redress. If the company wins the appeal, it will recover that money, if they lose the money will go to the plaintiffs. This treatment was not reserved only to the company. The plaintiffs also had to make a deposit of 20 million shillings as a guarantee for payment of legal costs in case of losing the case. The community paid that amount thanks to support from non-governmental organisations.

Mr Kayiira also explained that they presented a complaint at the Organization for Economic Co-operation and Development (OECD) National Contact Point in Germany, but this OECD office works within the Ministry of Economics and therefore lacks independence. In this case, the OECD National Contact Points in Germany did not fulfil their task and it cleared the company and dismissed the case.

A scholar from Australia observed that Chevron is in practice seeking that the government interfere to stop the enforcement of a judicial decision , which is problematic for the

separation of powers and the rule of law. She asked Mr. Fajardo about the way the 19,000 million U.S. dollar should be pay, because at first 9,000 million U.S. dollar were the redress and another 9,000 million U.S. dollars were contingent to Chevron giving a public apology, which it has not. Would these 9,000 million U.S. dollar be contingent to the final outcome of the appeal and an eventual apology after the appeal ruling?

A lawyer from Argentina remarked that the framework used by the UN encourages the use of non-judicial mechanism, which has proved to be ineffective in the Mubende case. Conflict of interests and lack of independence are not privative of the German NCP because in most developed countries the economics ministries are also supervising corporations' compliance with OECD Guidelines on CSR. Mr. Kayiira may wish to request a clarification from the OECD Economic Council concerning the declaration and the OECD German NCP to analyze the effectiveness of this non-judicial method to solve this kind of cases.

Mr Pablo Fajardo recalled that the trial was brought to Ecuador because Chevron so requested during proceedings in the United States, and now the company renegades of it. While the plaintiffs do not have money to pursue the case Chevron has spent almost 300 million U.S. dollar. The redress provided by Ecuadorian courts is not for the plaintiffs but for the environment. The community only wanted a public apology, but the company does not recognise its responsibility and this calls for a moral sanction too. The company is attacking the Government of Ecuador in the hope to swap its obligations with the possible responsibility of Ecuador before international arbitral tribunals, but money cannot weight more than human rights. The community has started enforcement proceedings of the ruling of the Ecuadorian tribunal in other countries, such as Brazil, Argentina y Canada, to ensure justice prevails.

Mr Peter Kayiira Baleke stated that it is important to identify the errors committed by OECD contact points in order to avoid them in the future. He read an excerpt from the ruling by the Uganda High Court:

"The German investors had a duty to ensure that our indigenous people were not exploited. They should have respected the human rights and values of people and as honourable businessman and investors they should have not moved into the land unless they had satisfied themselves that the tenants were properly compensated, relocated and adequate notice was given to them. But instead they were quiet spectators and watched the drama as cruel and violent and degrading eviction took place through partly their own workers. They lost all sense of humanity."<sup>8</sup>

Mr Kayiira suggested these different points of view should be presented in the upcoming OECD meeting and it would be important to separate these contact points from the Ministry of Finances and establish them in the Ministry of Justice.

The Chair closed the event by thanking the speakers and the participants. The facts and views presented during discussion were serious and showed the importance of relying on legal principles and remedies to tackle them. Access to justice and legal redress are fundamental principles of the rule of law necessary for the protection of human rights. The ICJ mission is to uphold the principles of the Rule of Law and the guarantee of a judicial remedy through an independent judiciary to protect the rights of victims. The Chair invited the audience to bring these discussions into the Human Rights Council and overcome apparent reluctance to promote judicial remedies.

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<sup>8</sup> Baleke Kayira & 4 Ors v Attorney General & 2 Ors, Civil suit No. 179 of 2002, [2013] UGHC 52, 28 March 2013