The role of civil society in investment treaty arbitration : status and prospects

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2. Standing for civil society – A look at international human rights jurisdictions

Civil society acts as a directly affected applicant in cases where it has been itself the victim of a human rights violation. In such cases, international human rights jurisdictions afford civil society, as they do to '*any person*', standing as a disputing party. There are indeed two ways through which civil society may be afforded standing before international human rights jurisdictions. In the event a civil society organization is (a) a victim of a human rights violation and (b) a representative of victims of human rights violations.[878]

[873] D. Shelton, *supra* note 400, at 34.
[874] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Reports 66, at para 29. See also Ibid., at 34.
[875] Gabčikovo-Nagymaros Project, Hungary v. Slovakia, Judgement, Merits (Separate Opinion of Vice-President Weeramantry), [1997] ICJ Rep 88, at 115. See also Ibid., at 33.
[876] See also Ibid., at 33.
[877] See Part II – Section 3.2.
[878] As will be shown, the representation of victims is still not permissible – in principle – before the ECtHR.

Access to justice to civil society at international human rights jurisdictions is guaranteed by virtue of relevant treaties and conventions.[879] This reflects the increasing recognition of the *individual* as a subject of international law, and the underlying emphasis of international law on the protection of individuals' human rights and fundamental freedoms.[880] It is argued against this backdrop that 'the key participant in each international community is the individual … the individual is the true basic unit for the international system'.[881] This fits within a broader scheme of progressive development of international human rights law – as explained by Francioni:

> The progressive development of international human rights law has endowed *every person* with the abstract capacity to invoke international law, customary law, and treaty law against a state, including the national state, which is responsible for an abusive exercise of its governmental powers.[882]

As will be shown in Part III, civil society petitioners requested '*standing*' in investor-state proceedings as '*third party intervenors*'. Unlike international human rights conventions such as the ECHR, IIAs or BITs do not enunciate any procedural rights with respect to persons other than foreign investors and contracting states, let alone third parties – this difference is essential in understanding the limited procedural modalities that may be available to civil society before investor-state tribunals.

2.1 Civil society as a victim of human rights violations before the ECtHR

The European human rights system is portrayed as 'the most effective international system of human rights protection ever developed'.[883] The direct access of individuals to the ECtHR was not granted upon the implementation of the ECHR in 1950. It was rather acquired progressively through numerous amendments and developments.

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[879] See Hitoshi Mayer's empirical survey of NGO involvement in international human rights jurisdictions. See L. Hitoshi Mayer, *infra* note 911.

[880] On the increasing importance of human rights, see V. Gowlland-Debbas, *supra* note 118, at 248.

[881] S. Charnovitz, *supra* note 36, at 910. For further analysis on the impact of the position of individuals, and ultimately individualism, on international law, see also M. Majlessi, *supra* note 110, at 80-81.

[882] F. Francioni, 'The Rights of Access to Justice under Customary International Law', in F. Francioni (ed.), *Access to Justice as a Human Right* (2007), at 6-7 (our emphasis).

[883] Citing judge Wildhaber, former president of the ECtHR, in D. Popović, *The Emergence of the European Human Rights Law* (2011), at 15. It is particularly crucial in granting access to international justice to individuals where the credibility of domestic justice may be questioned. For instance, up to 2010, there were 34,000 pending applications at the ECtHR against the Russian Federation. Figures are provided up to 31 March 2010, and represented 27.7% of the backlog of applications at the ECtHR. See K. Koroteev, 'Approches nationales: Russie', in P. Dorneau-Josette, and E. Lambert Abdelgawad (eds.), *Quel filtrage des requêtes par la Cour européenne des droits de l'homme?* (2011), at 471.

Initially, individuals and civil society organizations did not have direct access; it was only the European Commission of Human Rights or a state-party that could submit cases to the ECtHR.[884] Admitting the victims' attorneys to the proceedings modified this practice, victims were later allowed to sit with the European Commission of Human Rights; they were then allowed to file written statements, and finally, they were permitted to directly address the ECtHR subsequent to the entry into force of Protocol 11 in 1998 and Article 34.[885]

2.1.1 Standing as a redress for violations of ECHR *rights*

Article 34 is the bedrock of standing under the ECHR. It opens the door to 'any person' to stand before the ECtHR in the following terms:

> The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.[886]

The article forms the basis on which individuals or 'any person', including civil society organizations, may file claims against states for violations of the rights guaranteed to them under the ECHR. As is clear from the drafting of Article 34, it sets out both a *ratione personae* and *sine qua non* condition in relation to the status of a 'victim'; i.e. solely victims may submit claims to the ECtHR.[887] This would typically mean that *actiones populares* are excluded from the scope of Article 34.[888] That said, there is a need to consider the extent to which Article 34 may or may not close the door in front of the representation of victims by civil society organizations that are not themselves victims *per se*. A first look at how Article 34 is applied by the ECtHR's case law is thus merited, which will be followed by a consideration of whether the ECtHR may be opening the door for such representation in practice.

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[884] T. Meron, *supra* note 846, at 339-340.
[885] Ibid., at 339-340.
[886] ECHR, *supra* note 844.
[887] *Conka and others* v. *Belgium*, Decision on admissibility of 13 Mars 2001, [2001] ECtHR (51564/99), at 11.
[888] M. Frigessi di Rattalma, 'NGOs before the European Court of Human Rights: Beyond *Amicus Curiae* Participation?', in Treves, T., et al. (eds.), *Civil Society, International Courts, and Compliance Bodies* (2005), at 57; N. Vajic, *supra* note 36, at 94.

2.1.2 Representation on the basis of *rights* and not *interests* – Examples from the case law

The landmark case of *Association Ekin* v. *France* illustrates a situation where civil society acts in international adjudication as a 'victim' pursuant to Article 34.[889] Ekin sought redress for violations of its *own* right to freedom of expression under the ECHR.[890] Ekin published a book entitled 'Euskadi at War'[891] which was censored and prohibited from circulation by French authorities. They portrayed Ekin as a *porte-parole* for ETA,[892] thus as an association supporting terrorism.[893] As per the requirements of Article 34 of the ECHR, in order for Ekin to successfully submit a claim against France, it had to justify its status as a 'victim' of a violation of a right guaranteed by the ECHR under the same test that applied to individuals.[894] The ECtHR's jurisprudence is clear on the matter: only persons who are actually affected by state measures, which could potentially amount to violations of the ECHR, may file claims as 'victims' under Article 34.[895] In this light, the ECtHR found, *inter alia*, that Ekin maintained its status as a victim of a violation of Article 10 on freedom of expression since state redress took place only nine years following the prohibition in question.[896]

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[889] See numerous other examples in Ibid., at 94.

[890] Ekin is a Basque association dedicated to the preservation of Basque culture and identity. Indeed, the Basque conundrum has for long triggered vigorous debates over minority-rights in Europe in general, and in Spain and France in particular. See *Association Ekin* v. *France*, Decision on admissibility of 18 January 2000, [2000] ECtHR (n°39288198) ('Ekin case').

[891] Translation of the term 'Euskadi' is 'Basque country'.

[892] 'ETA' stands for *Euskadi Ta Askatasuna* – which means 'Basque Homeland and Freedom' in Euskera. ETA is designated as a terrorist organization by the EU and US, amongst other states.

[893] Ibid., at 12.

[894] The French government contended that Ekin could no longer claim the status of a victim in light of a decision by Conseil d'Etat invalidating the government's prohibitive decision with retroactive effect. See *Association Ekin* v. *France* case, *supra* note 890, at 10.

[895] Ibid., at 11.

[896] The Court noted in addition that a risk of a similar prohibition in the future was real and effective; which altogether was reinforced by the fact that France had recently rejected the legal registration of the association. Article 10 provides that : '(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary'. See ECHR, *supra* note 844, as well as E. Lambert Abdelgawad, 'La perte de la qualité de victime', in P. Dorneau-Josette, and E. Lambert Abdelgawad (eds.), *Quel filtrage des requêtes par la Cour européenne des droits de l'homme?* (2011), at 41.

Had it not been recognized as a victim, Ekin would not have been able to benefit from the direct access set forth under Article 34. The only opportunity Ekin would have had in terms of standing in front of the ECtHR would have been via the procedure set forth under Article 36(2), which allows *amicus curiae* submissions to be filed in on-going proceedings. Resorting to Article 36(2) essentially means that Ekin would not be considered as a victim. In such a hypothetical scenario, there would have been another claimant, which would be exclusively considered as the party claiming to be the victim in the case. This claimant would have initiated the proceedings independently and Ekin would have only intervened once proceedings would have commenced. Ekin as a third-party would have no role in initiating or controlling proceedings. This highlights the limitations of the *amicus curiae* procedure – which will be discussed in further detail in the next section below.

In *Conka and others* v. *Belgium*,[897] the ECtHR did not accept the *Ligue des droits de l'homme*'s argument that it should be considered as an 'indirect victim'. The Court upheld Belgium's objection to the effect that the organization did not have adequate standing as it was not a victim of the alleged violations. The Conka family members, who are Rom of Slovak nationality, had essentially alleged violations to Articles 3 ('Prohibition of torture')[898] and 5 ('Right to liberty and security'). This made the ECtHR come to the conclusion that the *Ligue* – an NGO based in Belgium – could not possibly claim to be a victim of such alleged violations.[899] Here, although the *Ligue* undoubtedly had an *interest* as a civil society group to uphold the Conka family's ECHR rights, this was found to be insufficient for justifying standing on the basis of article 34. Several precedents at the ECtHR do in fact confirm the position adopted in the *Conka* case.[900]

In *Gorraiz Lizarraga v. Spain*, five individuals as well as an association, the *Coordinadora de Itoiz*, filed a claim against Spain.[901] The dispute revolved around the construction of a dam in Itoiz, the area inhabited by the claimants, the expropriation of

[897] *Conka and others* v. *Belgium*, *supra* note 887.
[898] Article 3 is inherently aimed at individuals or groups of individuals, and indeed may be difficult to apply to a civil society organization such as the *Ligue*. It states that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. See ECHR, *supra* note 844.
[899] Ibid., at 11.
[900] Such as *Asselbourg and others* and *Greenpeace-Luxembourg* v. *Luxembourg*, Judgment of 29 June 1999, [1999] ECtHR (29121/95). See also the analysis by N. Vajic, *supra* note 36, at 94.
[901] *Gorraiz Lizarraga and others* v. *Spain*, Final judgement of 27 April 2004, [2004] ECtHR (62543/00) ('Itoiz case').

their property and ensuing proceedings in front of Spanish courts. The claimants were members of the *Coordinadora* since its inception in 1988. It was created for 'the defence of their civil rights and interests' and had in fact been leading related proceedings before Spanish courts. The ECtHR found that the *Coordinadora* may therefore allege violations to Article 6 ('Right to a fair trial').[902]

The ECtHR's positive decision in *Gorraiz Lizarraga* is a precedent for the representation of victims by civil society at the ECtHR. Yet, the facts particular to this case makes it difficult to speculate on potential jurisprudential developments.[903] The ECHR did not envisage representation of victims by civil society. The practice of the ECtHR has not bypassed the principle enshrined in Article 34. Civil society organizations clearly do have standing so long as they claim to be victims of violations of rights guaranteed by the ECHR; thus, a civil society organization would be able to represent victims if it may be deemed as a victim itself as well as manifested in both the *Ekin* and *Itoiz* cases.[904] Alternatively, Article 36(2) allows them to partially access the ECtHR through the *amicus curiae* procedure – as examined in further detail subsequently.[905] With that being said, it is questioned whether the ECtHR would ultimately need to adopt a more liberal approach, similar to that of the IACtHR or the ACHPR, given the tremendous and ever-increasing backlog of cases it is currently facing. Indeed, in a recent case, *Association for the Defence of Human Rights in Romania – Helsinki Committee on Behalf of Ionel Garcea v. Romania*, the ECtHR noted that

> …the Court has recently established that in exceptional circumstances and in cases of allegations of a serious nature, it should be open to associations to represent victims, in the absence of a power of attorney and notwithstanding that the victim may have died before the application was lodged under the Convention. It considered that to find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention.[906]

[902] The Court also found that the five applicants can claim to be 'victims' although they were not part of the domestic proceedings. See Ibid., at 12, 14.
[903] N. Vajic, *supra* note 36, at 104.
[904] D. Popović, *The Emergence of the European Human Rights Law* (2011), at 139.
[905] See Part II – Section 3.3.
[906] *Case of Association for the Defence of Human Rights in Romania – Helsinki Committee on Behalf of Ionel Garcea v. Romania*, Final judgment of 24 June 2015, [2015] ECtHR (2959/11), at para 42 citing *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Judgement of 17 July 2014, [2014] ECtHR (47848/08), at para 112.

This decision has been welcomed by civil society groups.[907] Developments in that respect at the ECtHR will have to be monitored closely. In any event, the fact remains that, for the purposes of this research, the ECtHR's practice sheds light on the importance of the nexus between the violation of ECHR-recognized human rights and civil society's standing – a crucial point to recall when the issue of the adequacy of civil society's standing before investor-state tribunals will be discussed subsequently.[908]

2.2 Representation of victims of human rights violations before the IACtHR and ACHPR

Civil society has the capacity to act as a representative of victims before the IACtHR (and the Commission)[909] as well as the ACHPR.[910] In such cases, the civil society organization involved is not personally or directly prejudiced by the contested violation, it is not a victim *per se*, nor does it act as the legal counsel of victims; rather, it is representing a group of individuals or communities that have been themselves the

[907] Mental Disability Advocacy Center, 'European Court Reaffirms NGOs Standing to Secure Justice for Victims of State Abuse', 25 March 2015, available at: http://www.mdac.info/en/news/european-court-reaffirms-ngos-standing-secure-justice-victims-state-abuse (last accessed 1 February 2016).

[908] See Part III – Section 2.

[909] The function of representation of victims is clearly defined in Article 23 of the revised Rules of Procedure of the Inter-American Commission, which provides the right to civil society organizations to act on behalf of third parties (i.e. victims) in front of the Commission. It states the following: 'Any person or group of persons or *nongovernmental* entity legally recognized in one or more of the member States of the OAS *may submit petitions* to the Commission, on their behalf or *on behalf of third persons*, concerning alleged violations of a human right…' (our emphasis). See Rules of Procedure of the Inter-American Commission on Human Rights, Article 23, available at: http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp (last accessed 10 July 2012) (our emphasis).

[910] The ACHPR was inaugurated as a supervisory body – although it does not monitor state compliance – of the Banjul Charter, which entered into force in 1986 after being adopted in 1981, and has been ratified by all 52 African Union state-members. The ACHPR is considered as unique for creating an adjudication system combining civil and political rights on the one hand; and socio-economic and cultural rights on the other. The ACHPR has the functions of a quasi-judicial body with protective and promotional mandates. The ACHPR's decisions are only binding once confirmed by the African Union, and cases of non-compliance could be referred to the African Court on Human and Peoples' Rights – the decisions of which are final and not subject to appeal or political confirmation. The Court's first judges were sworn in on 2 July 2006 and, up to now; it has issued 22 final decisions. See G. Lynch, 'Becoming Indigenous in the Pursuit of Justice: the African Commission on Human and People's Rights and the Endorois ', (2011) 111 *African Affairs* 24, at 36; A. Boyle, *infra* note 622, at 631; K. Sing'Oei, *supra* note 766, at 526. See also Article 28(2) of the Protocol establishing the Court states that: 'The judgment of the Court decided by majority shall be final and not subject to appeal'. See Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, entry into force June 9 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), available at: http://www.african-court.org/en/index.php/about-the-court/court-establishment (last accessed 06 October 2014); and African Court on Human and Peoples' Rights's website: http://www.african-court.org/en/index.php/2012-03-04-06-06-00/finalised-cases-closed/22-recient-judgements/250-recent-dec (last accessed 06 October 2014).

victims of that violation by acting *on their behalf*.[911] This is possible before the IACtHR and the ACHPR.

2.2.1 Flexible *ratione personae* and exacting *ratione materiae* criteria

At the ACHPR, the distinction between filing a complaint and representing victims can seem quite elusive. This is because Articles 55 to 59 of the Banjul Charter on 'Other Communications' do not address the issue of the identity of complainants and do not set any *ratione personae* criteria. The only indication that is given is that persons other than state parties to the Charter may also submit communications to the ACHPR. Article 55 reads as follows:

> 1. Before each Session, the Secretary of the Commission shall make a list of *the communications other than those of States parties to the present Charter* and transmit them to the members of the Commission, who shall indicate which communications should be considered by the Commission.
> 2. A communication shall be considered by the Commission if a simple majority of its members so decide.[912]

Instead the Charter sets exhaustive *ratione materiae* criteria on the requirements for, and content of, such communications.[913]

The most extensive and detailed provisions on the representation of victims are on the other hand set out in the IACHR. [914] Article 44 of the IACHR is broad in scope. Not

[911] L. Hitoshi Mayer, 'NGO Standing and Influence in Regional Human Rights Courts and Commissions', (2011) 36 *Brooklyn Journal of International Law* 911, at 913.
[912] Banjul Charter, *supra* note 845, Article 55 (our emphasis).
[913] Article 56 states that: 'Communications relating to human and peoples' rights referred to in 55 received by the Commission, shall be considered if they: 1. Indicate their authors even if the latter request anonymity, 2. Are compatible with the Charter of the Organization of African Unity or with the present Charter, 3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity, 4. Are not based exclusively on news discriminated through the mass media, 5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged, 6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and 7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter'.
[914] The IACtHR intervenes only if a state decides to challenge the Inter-American Commission's conclusions. Unlike the European human rights system, a commission – the Inter-American Commission – still exists. It receives complaints, engages in fact finding, attempts to bring about friendly settlements, and if it attributes the human rights violation to the state, it may make recommendations as per Article 50(3) of the IACHR. Article 50 of the IACHR provides that: '(1) If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report. (2) The report shall be transmitted to the states concerned, which shall not be at liberty to publish it. (3) In transmitting the report, the Commission may make such proposals and recommendations as it sees fit'. The Inter-American Commission may submit a case to the

only does it allow victims or their family members to file complaints, but also any person, group of persons or non-governmental entity that is legally recognized in a member state who could allege that an individual's, or group's, rights have been violated. The Article reads as follows:

> Any person or group of persons, *or any nongovernmental entity* legally recognized in one or more member states of the Organization, *may lodge petitions* with the Commission containing denunciations or complaints of violation of this Convention by a State Party. [915]

In the same vein as Article 34 of the ECtHR, Article 44 opens the door as well for civil society organizations to file complaints if they were themselves victims of violations of rights guaranteed by the IACHR. This is indeed confirmed by Article 23 of the revised Rules of Procedure of the Inter-American Commission, which allows victims to participate directly and autonomously in all phases of the proceedings. It explicitly provides the right to civil society organizations to act *'on their behalf'* or *'on behalf of third parties'* (i.e. victims) in front of the Commission. It states the following:

> Any person or group of persons or nongovernmental entity legally recognized in one or more of the member States of the OAS may submit petitions to the Commission, *on their behalf or on behalf of third persons*, concerning alleged violations of a human right…[916]

The 'non-governmental entity' subject to both Articles 44 and 23, i.e. the civil society organization involved, is not merely acting as the legal counsel of victims; rather, it is representing a group of individuals or communities that have been themselves the victims of that violation by acting *'on their behalf'*. Once proceedings have reached the IACtHR, victims and their representatives still benefit from the standing they were entitled to in front of the Inter-American Commission by virtue of Article 25 of the Rules of Procedure

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IACtHR contingent, however, on the state's acceptance of the IACtHR's jurisdiction as per Article 62 of the IACHR. See the IACHR on Human Rights, *supra* note 843. For a further analysis on the Commission's procedure, see J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2003), at 25. The IACtHR's decisions are final, and Article 65 provides the IACtHR with a function of monitoring and supervising compliance with its judgements as it can refer to the OAS General Assembly cases of non-compliance and can make recommendations to that effect. See Article 65 states that: 'To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations'. See the IACHR on Human Rights, *supra* note 843.

[915] Ibid.

[916] Rules of Procedure of the Inter-American Commission on Human Rights, Article 23, available at: http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp (last accessed 10 July 2012) (our emphasis).

of the IACtHR.[917] The general formulation of these rules even open the door for other organizations such as national human rights committees and ombudsmen to file petitions against their own states. [918]

2.2.2 Access to justice on the basis of *actio popularis* – A look at the case law

In *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe*,[919] a coalition of twelve human rights NGOs submitted a complaint against Zimbabwe alleging grave violations to the Banjul Charter as a result of the violence that ensued the rejection of the constitutional referendum of February 2000 – then considered as a no-confidence vote to President Robert Mugabe's rule. Zimbabwe contested the communication on the basis that (i) it was solely based on facts circulated by the media; and (ii) local remedies had not been exhausted. The ACHPR delved straight into the details of the requirements to the communication's admissibility without going into the details of who exactly were the victims represented by the Forum, nor did Zimbabwe seem to object to such representation.[920] The ACHPR ruled that the communication was admissible and then shifted onto substantive matters. It noted that the Zimbabwean state had passed Clemency Order 1 of 2000, which was an order prohibiting prosecution and setting free perpetrators of 'politically motivated crimes, including alleged offences such as abductions, forced imprisonment, arson, destruction of property, kidnappings and other human rights

[917] It is worthy to mention here the illustrative heading of Article 25 – 'Participation of the Alleged Victims or their Representatives'. The Article reads as follows: '(1) Once notice of the brief submitting a case before the Court has been served, in accordance with Article 39 of the Rules of Procedure, the alleged victims or their representatives may submit their brief containing pleadings, motions, and evidence autonomously and shall continue to act autonomously throughout the proceedings'. See Rules of Procedure of the Inter-American Court of Human Rights, Article 25, available at: http://www.corteidh.or.cr/reglamento/regla_ing.pdf (last accessed 10 July 2012) (our emphasis).

[918] Nonetheless, there are formalistic restrictions such as the submittal of a power of attorney signed by the victim or the family of the victim, and issues regarding the validity of representation of victims have arisen before – as reflected by the *Castillo Petruzzi* case below. See Article 23(1) of the Rules of Procedure of the IACtHR. See also the analysis of J.M. Pasqualucci, *supra* note 914, at 102. See also J. Anaya, and C. Grossman, 'The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples', (2002) 19 Arizona Journal of International and Comparative Law 1, at 1 and 8.

[919] *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe*, Decision of 11 May 2006, ACHPR (128/2006).

[920] The Commission acknowledged nonetheless the fact that the claimant consisted of a coalition of twelve NGOs, and noted the deaths of 82 individuals including those of prominent political dissidents, but no additional details were noted as to exactly which victims were represented.

violations'.[921] This constituted a violation of the victims' right to judicial protection and to have their cause heard pursuant to Article 7(1) of the Banjul Charter.[922]

In *CEMIRIDE and MRG on behalf of Endorois Welfare Council* v. *Kenya*,[923] the Endorois, an indigenous community, complained of displacement from the area of Lake Bogoria, which became a location for a wildlife reserve, hotels, universities, and energy and mining companies.[924] The Endorois called on MRG, which espoused their claim by accepting to act as their representative/claimant. Again, the fact that two civil society organizations were representing the Endorois did not seem to stir any debate, nor did Kenya seem to object to such representation, and the ACHPR has not dealt with this issue in its final decision.[925] Instead, the ACHPR focused on the substantive matters raised by the claimants, who argued that the Endorois' displacement violated collective rights guaranteed by the Banjul Charter, namely the right to religious practice (Article 8) and culture (Article 17), property (Article 14), free disposition of natural resources (Article 21),[926] development (Article 22), and that it jeopardized a 'sustainable way of life which

[921] It was ultimately of the view that by issuing Clemency Order 1, Zimbabwe encouraged impunity and denied victims the right to seek the investigation of, and redress from, the alleged human rights violations that were committed. See Ibid., para 211.

[922] Article 7(1) of the Banjul Charter provides that: '1. Every individual shall have the right to have his cause heard. This comprises: a. the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; b. the right to be presumed innocent until proved guilty by a competent court or tribunal; c. the right to defence, including the right to be defended by counsel of his choice; d. the right to be tried within a reasonable time by an impartial court or tribunal'. See also *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe* case, *supra* note 919, para 212.

[923] The title of the case, including the term *'on behalf of'* is indeed illustrative and self-explanatory. See *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608.

[924] The Endorois constitute an indigenous community made up of roughly 6,000 people inhabiting the area of Lake Bogoria, Rift Valley Province in Kenya, which was regarded during the British colonial era as one of the most backward and desolate in the region. Kenya gained independence in 1963 and the Endorois remained marginalized, they were displaced by the state between 1973 and 1986 due to the establishment of the Lake Bogoria Game Reserve, and their disenfranchisement allegedly persisted thereafter. The Endorois' cultural and economic pastoralism was side-lined in favour of more capital and labour intensive economic sectors such as tourism, mining and energy. G. Lynch, *supra* note 910, at 43; K. Sing'Oei, *supra* note 766, at 515, 521.

[925] The complaint initially originated when Minority Rights Group (MRG), a UK-based NGO, solicited groups or communities potentially interested in African human rights litigation by launching a 'call for cases'. See G. Lynch, *supra* note 910, at 35.

[926] It is worthy here to quote Article 21, which states that: '(1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. (2) In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. (3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. (4) States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. (5) States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable

was inextricably linked to their ancestral land'.[927] This in a way reflects the ACHPR's, and also the disputing parties', concern in dealing primarily with substantive matters given that the underlying procedural rules afford significant flexibility for civil society representation. The ACHPR's decision in *CEMIRIDE and MRG on behalf of Endorois Welfare Council v. Kenya* was in fact particularly influenced by the newly-adopted UN Declaration on the Rights of Indigenous Peoples, and the IACtHR's decision in *Saramaka People* v. *Suriname*.[928] As previously mentioned, with this case, the ACHPR became with this case the first international jurisdiction to deal with the right to development; it thus tackled the notions of 'capabilities' and 'choices' put forward by development experts such as Amartya Sen.[929] The ACHPR also cited the UN Declaration on Development in clarifying that the right of development includes 'active, free and meaningful participation in development'.[930]

Similarly, in *SERAC v Nigeria*,[931] SERAC, which describes itself as a NGO concerned with the promotion and protection of economic, social and cultural rights in Nigeria, along with the Center for Economic and Social Rights, an American-based NGO, filed a communication to the ACHPR seeking to hold Nigeria accountable for human rights violations suffered by the Ogoni. The latter are an ethnic group inhabiting the oil-rich Niger Delta region, which were prejudiced by the operations of the Nigerian National Petroleum Company (a state-owned company), the majority shareholder in a consortium with Shell Petroleum (an Anglo-Dutch multinational). Specifically, environmental degradation and health problems allegedly resulted from systematic oil contamination. The complainants alleged that Nigeria violated, *inter alia*, the following Banjul Charter rights: the right to life (Article 4), property (Article 14), best attainable

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their peoples to fully benefit from the advantages derived from their national resources'. See Banjul Charter, *supra* note 845.

[927] *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608, para. 283. See also G. Lynch, *supra* note 910, at 25.

[928] *Saramaka People* v. *Suriname*, *supra* note 776. See also G. Lynch, *supra* note 910, at 39; A. Nienaber, 'The African Human Rights System and HIV-Related Human Experimentation: Implications of Zimbabwe Human Rights NGO Forum v Zimbabwe', (2009) 9 African Human Rights Law Journal 524, at 541.

[929] See A. Sen, 'Development As Freedom' (1999).

[930] *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608, para. 283 citing Article 2.3, U.N. Declaration on the Right to Development, U.N. GAOR, 41st Sess., Doc. A/RES/41/128 (1986).

[931] SERAC and Center for Economic and Social Rights v. Nigeria, *Decision of 13 October 2001*, ACHPR (60/2001).

state of physical and mental health (Article 16), free disposition of their wealth and natural resources (Article 21), and a general satisfactory environment (Article 24).[932]

From a procedural standpoint, as in the previously discussed *Endorois Welfare Council*[933] and *Zimbabwe Human Rights NGO Forum*[934] cases, the issue of representation by civil society organizations – rather than a communication submitted by members of the Ogoni community, i.e. the direct victims of the alleged human rights abuses – did not seem to stir any legal debates given that Nigeria did not object to such representation (nor to any of the allegations for that matter).[935] The ACHPR's only commentary in such regard was as follows:

> The Commission thanks the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). Such is a demonstration of the usefulness to the Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter.[936]

This passage clearly reflects the ACHPR's liberalism in openly accepting communications from civil society on human rights abuses.

On the substantive issues of the case, the ACHPR recognized Nigeria's right to exploit oil resources by stating that 'undoubtedly and admittedly, the Government of Nigeria … has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians'.[937] Notwithstanding such recognition, it found that this should not have led to the alleged violations.[938] Environmental degradation,

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[932] In further detail, it is alleged that the consortium disposed toxic wastes into the environment and local waterways, neglected and/or failed to maintain its facilities causing numerous avoidable spills in the proximity of villages, and that the resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems. See Ibid., para 2, 10.

[933] *CEMIRIDE* and *MRG on behalf of EWC* v. *Kenya* case, *supra* note 608.

[934] *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe* case, *supra* note 919.

[935] Nigeria indeed admitted the allegations and provided the Commission with a list of remedial measures it has taken since the return of a civil government, which included: the establishment of a ministry for the environment to address environmental related issues prevalent in Nigeria and as a matter of priority in the Niger delta area inhabited by the Ogoni; as well as a Niger Delta Development Commission to address the environmental and social related problems of the Niger delta area and other oil producing areas of Nigeria; and the inauguration of judicial commission to investigate human rights violations committed against the Ogoni. SERAC and Center for Economic and Social Rights v. Nigeria, *supra* note 931, para 30.

[936] Ibid., para 44.

[937] The richness of their region, the Ogoni-land in the Niger Delta, has effectively plagued it and the Ogoni have resorted a number of times to foreign courts and international jurisdictions. Ibid., para 54; G. Akpan, *supra* note 596, at 74-75.

[938] The ACHPR indeed concluded that Nigeria violated all of the previously mentioned Banjul Charter rights. It further 'appealed' to the government of Nigeria, *inter alia*, to (i) stop all attacks on Ogoni communities and leaders and permit citizens and independent investigators free access to the territory; (ii) conduct an investigation

marginalization, and grave human rights abuses[939] were also key factors that lead the Ogoni to assert their distinctive identity.[940] The ACHPR's decision is thus perceived as an extreme example of the clash between economic, and foreign investment, activity on the one hand; and human rights and environmental protection on the other.[941] Equally, it reflects the recognition of the need for a balance between both under the umbrella of sustainable development rather than the trumping of one over the other.[942]

The *Castillo Petruzzi* case[943] provides an example of the IACtHR's liberal approach on standing criteria. A Chilean civil society organization, the *Fundación de Ayuda Social de las Iglesias Cristianas*, filed a petition on behalf of four Chilean prisoners who were sentenced to life imprisonment in Peru by a military tribunal.[944] The Inter-American Commission endorsed the case and raised it in front of the IACtHR by alleging that Peru violated – *inter alia* – the prisoners' rights to humane treatment and a fair trial (Articles 5 and 8 respectively of the IACHR).[945] In this case, the *Fundación* clearly aimed to represent individuals who were not in a position to submit a claim themselves. Peru objected to the *Fundación*'s representation and argued that the organization lacked legal capacity and standing since it was not recognized as a non-

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into human rights violations and prosecuting officials, most notably of the security forces and the Nigerian National Petroleum Company; (iii) ensure adequate compensation to victims of the human rights violations; and (iv) provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations. See Ibid., at para 70.

[939] For instance, the ACHPR noted that: 'The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes.'. See Ibid., at 62.

[940] The ACHPR recognized the Ogoni people 'as a people' enabling them to claim a wider array of rights under the Banjul Charter. Indeed, a working group of the ACHPR concluded that indigenous rights recognized how 'certain marginalized groups are discriminated in particular ways because of their particular culture, mode of production and marginalized position within the state' with collective rights to land, territory, and natural resources. See G. Lynch, *supra* note 910, at 37.

[941] A. Boyle, *supra* note 622, at 631.

[942] R. Klager, *infra* note 1252, at 202.

[943] *Castillo Petruzzi et al.* v. *Republic of Peru*, Final judgement of 30 May 1999, Inter-American Court of Human Rights (series C) No. 52 (1999).

[944] Those were: Mr. Jaime Francisco Sebastián Castillo Petruzzi, Mrs. María Concepción Pincheira Sáez, Mr. Lautaro Enrique Mellado Saavedra and Mr. Alejandro Luis Astorga Valdez. It is worthy to note that the prisoners were linked to the Túpac Amaru Revolutionary Movement – which was long considered as a terrorist organization by the Peruvian government.

[945] Article 5(1) states that: 'every person has the right to have his physical, mental, and moral integrity respected'. While Article 8(1) provides that: 'every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature'. See American Convention on Human Rights, *supra* note 843.

governmental organisation in Chile.[946] The foundation of Peru's arguments lies in a strictly positivist interpretation of Article 44 of the IACHR which stipulates that 'any nongovernmental entity *legally recognized* in one or more member states of the Organization, may lodge petitions'.[947]

The IACtHR dismissed the objection succinctly and came to the conclusion that, under Article 44, any 'group of persons' may lodge petitions, that the legal recognition of the organization is irrelevant, and more fundamentally, that 'this broad authority to make a complaint is a characteristic feature of the system for the international protection of human rights'.[948] Indeed, the Court did not proceed to an examination of the credentials of the *Fundación*. It regarded this as a question of form rather than substance, which is translated here in the priority of ensuring that alleged victims can seek redress to human rights violations.[949] The *Castillo Petruzzi* case thus highlights the IACtHR's liberalism in allowing unrelated parties to complain of human rights violations. This may prove to be particularly effective whenever access to justice is impeded by poverty, lack of education, scarce legal assistance, and resources to hire lawyers, who are often themselves the targets of reprisals and the same intimidation and retaliation as the victims and their families.[950]

On the more substantive issues raised by the case, the IACtHR most notably found that Peru indeed violated both Articles 5 and 8 of the IACHR. The IACtHR noted that the military tribunal in question should have been competent, independent and impartial as required under Article 8(1) of the IACHR. However, this was not the case given that the Peruvian armed forces, fully engaged in the counter-insurgency struggle, were also prosecuting persons associated with insurgency groups; as well as in light of the fact that the judges who presided over the treason trials were 'faceless' – in contravention to internationally recognized standards against such practice,[951] making it

[946] Ibid., at para. 35.
[947] American Convention on Human Rights, *supra* note 843, Article 44 (our emphasis).
[948] *Castillo Petruzzi et al.* v. *Republic of Peru*, *supra* note 943, at para. 77.
[949] J.M. Pasqualucci, *supra* note 914, at 101.
[950] Ibid., at 102.
[951] In fact, it is worthy to note that Principle 12 of the UN Draft Principles Governing the Administration of Justice Through Military Tribunals on the 'Right to a competent, independent, and impartial tribunal' provides that: 'The organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. The persons selected to perform the functions of judges in military courts must display integrity and competence and

impossible for defendants to identify the judges and, therefore, to assess their competence.[952]

The *Awas Tingni* case is also relevant in relation to the representation of victims in front of the IACtHR. It is also a jurisprudential authority on international principles of indigenous property rights and their protection.[953] The case involved the Awas Tingni, a community made up of around 208 families totaling 1,016 individuals who inhabit the North Atlantic Autonomous Region of Nicaragua; and Solcarsa, a forest management and timber exploitation company (which is a subsidiary of a Korean-based multinational).[954] Nicaragua had granted Solcarsa a logging concession comprising ancestral lands of the community. Although they were unable to obtain official title, the Awas Tingni claimed the communal property to their ancestral land, and contested the validity of the concession, which was granted without their prior consent.[955]

The head and representative of the Awas Tingni community, Jaime Castillo Felipe, initially filed the complaint to the Inter-American Commission in 1995, which later decided to take the case to the IACtHR in 1998.[956] The community's and the Inter-American Commission's main objective was to seek the IACtHR's recognition of indigenous peoples' rights to the communal property and natural resources of their ancestral lands.[957] This position was further reinforced with the substantial number of favourable *amicus curiae* submissions that were received by the IACtHR, which any non-disputing party may file under Article 44(1) of the Rules of Procedure of the IACtHR (as

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show proof of the necessary legal training and qualifications. Military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy. *In no circumstances should military courts be allowed to resort to procedures involving anonymous or "faceless" judges and prosecutors*'. See Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4 (2006), available at: http://www2.ohchr.org/english/bodies/subcom/57/docs/ecn4sub2-2005-9-E-final.doc (last accessed 06 October 2014).

[952] The IACtHR also found that the terms of confinement that the military tribunal imposed upon the victims constituted cruel, inhuman and degrading forms of punishment thereby constituting violations of Article 5 of the IACHR; which was reinforced by the fact that the prisoners' statements were taken in the preliminary proceedings while they were either blindfolded or hooded, and either in restraints or handcuffs. See *Castillo Petruzzi et al.* v. *Republic of Peru*, *supra* note 943, at para 130, 133, 192, 198.

[953] N. Boecher, *supra* note 43, at 58.

[954] L. Burgorgue-Larsen, and A. Úbeda de Torres, *supra* note 44, at 502.

[955] *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights (series C) No. 79 (2001), para. 2. Also, it is worthy to note that the Awas Tingni have been struggling to protect their ancestral land. They were assisted in the past by the World Wildlife Fund (WWF) to obtain the suspension of a similar large scale logging concession that was granted to a Dominican company. See J. Anaya, and C. Grossman, *supra* note 918, at 3.

[956] Ibid., para 6.

[957] *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua* case, *supra* note 955, para. 140.

detailed further below). The decision did not raise any procedural issues with respect to representation of victims.[958] Instead, the IACtHR delved straight into substantive matters, and found that Nicaragua had violated Article 21 of the IACHR by not granting title to the Awas Tingni to their ancestral land. The right to property as recognized by Article 21 was the basis for the IACtHR's reasoning in asserting the protection of indigenous land, making it the first international tribunal to recognize the collective property rights of indigenous peoples.[959]

2.2.3 Rationale for admissibility of *actio popularis*

The practice of the IACtHR and ACHPR generally shows that civil society groups can easily represent victims.[960] Broad representation, or *actio popularis*, may turn out to be crucial when entire communities claim to be victims of human rights violations.[961] Victims can be often vulnerable due to domestic socio-political dynamics, and more particularly, the limitations of their resources, lack of not only legal, but also technical and scientific knowledge or experience.[962] In such cases, any potential international judicial proceeding might pose substantial complexities and costs that could be mitigated when a 'representative group of the host populations' is afforded standing instead.[963] Civil society groups are often in a better position to file a complaint rather than

[958] L. Alvarado, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Awas Tingni v. Nicaragua', (2007) 24 Arizona Journal of International and Comparative Law 609, at 609.

[959] The IACtHR referred to the *travaux préparatoires* of the IACHR, as well as recent developments in international law, to resort to 'an evolutionary interpretation of international instruments for the protection of human rights'. It also took into account Article 29 of the IACHR which prohibits restrictive interpretations of rights guaranteed under the Convention, to deduce that 'Article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua'. Most notably, the IACtHR underlined the fact that indigenous claims to the land transcend the mere possessive and productive elements, such as a real officially recognized title to property, but comprise a spiritual one related to their religious and cultural legacy, and thus the IACtHR asserted that the *Awas Tingni* saw themselves as 'persons responsible for the forest'. See *The Mayagna (Sumo) Awas Tingni Community* v. *Republic of Nicaragua* case, *supra* note 955, para. 148.L. Alvarado, *supra* note 770, at 609; L. Burgorgue-Larsen, and A. Úbeda de Torres, *supra* note 44, at 612.

[960] See also S. Charnovitz, *supra* note 36, at 906; and N. Boecher, *supra* note 43, 58.

[961] At the ECtHR, a mechanism for ensuring *actio popularis* through the Council of Europe Commissioner had been proposed by the Parliamentary Assembly of the Council of Europe. This proposal was ultimately rejected. See Parliamentary Assembly, Recommendation 1606 (2003), 'Areas where the European Convention on Human Rights cannot be implemented', 23 June 2003, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17112&lang=en (last accessed 1 February 2016).

[962] D. Barstow Magraw and L. Baker, 'Globalization, Communities and Human Rights: Community-Based Property Rights and Prior Informed Consent', (2007) 35 Denver Journal of International Law 413, at 414.

[963] On the benefits of group representation in international litigation, see G. Akpan, *supra* note 596, at 57.

individuals themselves, particularly given that they are less prone to succumb to pressures on abandoning the litigation and can gather more resources to undertake it until it is completely adjudicated. The *actio popularis* in the landmark IACtHR decision in *Awas Tingni v. Nicaragua* has for instance propelled the problems of indigenous land demarcation and rights to natural resources 'into the forefront of regional and national politics in Nicaragua' – as shown above.[964]

Civil society's representation in front of international human rights jurisdictions is ultimately subject to the IACtHR or ACHPR's decision on whether a complaint of human rights violations merits to be heard or not; regardless of civil society's role in bringing the matter to the court's attention – as clearly mentioned in the previously discussed *Castillo Petruzzi v. Peru*[965] and *SERAC v. Nigeria*[966] decisions.

[964] L. Alvarado, *supra* note 770, at 609. Helton mentions several positive developments that ensued following the IACtHR's landmark decision in *Awas Tingni* v. *Republic Nicaragua*. See T. Helton, 'Introduction to the IACtHR Report on Indigenous and Tribal Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System', (2010) 35 American Indian Law Review 257, at 262.
[965] *Castillo Petruzzi et al.* v. *Republic of Peru*, *supra* note 943, at para 77.
[966] It is worthy to recall once more that in this case the ACHPR actually thanked the civil society groups who submitted the complaint against Nigeria. See *SERAC and Center for Economic and Social Rights v. Nigeria*, *supra* note 931, para 44.
[967] P. Sands and R. Mackenzie, *supra* note 55, at para 2.