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INTERNATIONAL COURTS AND TRIBUNALS

PART 4 OF 4

REGIONAL COURTS INCLUDING HUMAN RIGHTS

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Introduction

Part four of A4ID and Clifford Chance's four part introduction to international courts and tribunals. This part concerns regional courts, including human rights courts, in Europe, the Americas and Africa.

Europe

There are a number of regional courts in Europe. This guide focuses on the two courts available to individuals and legal entities, the European Court of Justice and the European Court of Human Rights. It does not address the Court of Justice of the European Free Trade Agreement or the Court of Justice of the Benelux Economic Union both of which only hear certain types of cases. Individuals cannot bring cases before these courts.

European Court of Justice and the Court of First Instance

The European Court of Justice of the European Communities (the "**ECJ**") is the highest court in the European Union and it has the ultimate say on matters of EU law.

By signing up to the various treaties that established the European Union, each Member State endorses EU law and integrates it into national law. The role of the ECJ is therefore to ensure that Member States interpret and implement EU law effectively, and where this is not the case, ensure that the necessary remedies are carried out to comply with EU law. The ECJ mainly deals with claims between Member States whereas the Court of First Instance has jurisdiction to hear direct actions brought forward by individuals against acts of Community institutions (although it can also hear actions brought by Member States against the Commission).

For further information about the Court of First Instance, see: <http://curia.europa.eu/>

There are four types of actions that can be brought before the ECJ, the first of which is only available to individuals and companies:

1. Any European citizen, institution, company or a Member State can bring an action in the ECJ if the subject matter is one that is covered by the jurisdiction of the ECJ. The ECJ has jurisdiction to determine whether a Member State has fulfilled its obligations under Community law. The Commission will first instigate a preliminary procedure, which gives the Member State the opportunity to reply to the complaints brought against it. If that procedure does not result in that Member State terminating the failure, an action for infringement of Community law may subsequently be brought by the Commission or by another

Member State. The Commission may impose a periodic financial penalty if the Member State does not remedy the breach.

2. Preliminary Ruling

Member States can apply to the ECJ for a preliminary ruling regarding an issue of EU law that they need to be resolved at the national level. A preliminary ruling essentially clarifies areas of law which are uncertain, and enables the Member State to implement EU law in the way envisaged by the Court.

3. Direct Action

A Member State may bring an action for the annulment of a measure, regulation, directive or decision adopted by a Community institution, such as the Parliament or Council. These actions can be brought by a Member State against the European Parliament or against the Council or brought by one Community institution against another.

4. Appeal against decision by the Court of First Instance

There is also an appeal procedure in which an appeal of a point of law may be taken to the ECJ if it is believed that a decision of the Court of First Instance has made an error of judgment. If the appeal is admissible and well founded, the ECJ can set aside the decision of the Court of First Instance and the latter will then be bound by the ECJ's decision. If not, then the ECJ must refer back to the Court of First Instance.

Proceedings before the ECJ comprise a written phase followed by an oral phase. The course of the written procedure differs slightly depending on the nature of the proceedings, i.e. whether it is a direct action, an appeal against a decision of the Court of the First Instance, or a Preliminary-ruling proceeding.

All pleadings must be sent to the Registry of the Court and the original must be signed by the Counsel for the party concerned. There are no formal requirements for the pleadings, but they must be clear, concise and complete. They should cover the relevant facts, the pleas in law on which the application is based, arguments in support and the forms of order sought.

Once the written procedure has been completed, there is a preliminary report before the general meeting, which is attended by all the Members of the Court. The exact date of the oral procedure is normally put in place. The purpose of the oral procedure is to provide a more detailed analysis and to answer questions put by the court.

For more information visit: <http://www.curia.europa.eu>

European Court of Human Rights

The European Court of Human Rights (the "**ECHR**") is an international court based in Strasbourg. Its task is to ensure that all Member States that have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms respect the rights and guarantees in the Convention. It examines complaints from individuals or other Member States where there has been an alleged infringement of rights, such as the right to a fair trial or the right to a private life. A judgment of the Court is final and binding on the Member State.

Any individual, company, association or another Member State can lodge an application to the ECHR. The applicant must show that he or she has personally and directly been the victim of a violation of one of the rights that is set out in the Convention. The applicant does not need to be a national of one of the States bound by the Convention but the violation must have been committed by a public entity of one of these States. The applicant must exhaust all domestic remedies in the State concerned, including appeals procedures, before an application is brought to the ECHR. The application must be brought within six months of the final decision made in that State.

The application should contain a brief summary of the facts and complaints, an indication of the Convention rights that have been violated, the domestic remedies pursued in the State concerned and copies of decisions given. The application must be signed. The application form can be obtained at:

<http://www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+court/Application+form+online>

The ECHR will first determine whether the case is admissible. If the conditions are not satisfied then the application will be rejected. The decision of the Court is final. The official ECHR website has detailed sections on how to apply and services offered by the Court: <http://www.echr.coe.int/echr/>

Americas

Inter-American Court of Human Rights

The Inter-American Court of Human Rights (IACHR) is the judicial arm of the Organisation of the American States. Similar to the European Court of Human Rights, its aim is to ensure that States that are parties to the 1969 American Convention of Human Rights observe the fundamental rights that are set out in that Convention. A list of the States that are parties to the Convention are listed on the website. An individual, group or other entity can bring a claim alleging a breach of the Convention against one of these State parties.

To bring a claim, an application must be made to the Inter-American Commission of Human Rights. It should include: the name, nationality and signature of the person making the application; address for receiving correspondence from the Commission; an account of the act or situation specifying the place and date of the alleged violations; the State the petitioner considers responsible for the violation of the human rights; any steps taken to exhaust domestic remedies, or the impossibility of doing so; and an indication of whether the complaint has been submitted to another international settlement proceeding.

The application form is on the IACHR website:

https://www.cidh.oas.org/cidh_apps/manual_pdf/MANUAL2010_E.pdf

Before making an application any domestic remedies available in the State concerned must be exhausted unless there is no due process of law or access has been denied. The application must be brought within six months of a final decision in that State.

The Commission determines whether an application complies with the procedural requirements and whether it has merit. If the application is accepted, the Commission will request a response from the State concerned within two months (or a shorter period if the case is urgent). Further information from the applicant or the State may be requested. If the Commission determines that there are grounds for the application, the case will be brought before the Inter-American Court.

Example: The Saramaka People

The recent case of the Saramaka People v Suriname brought to the Inter-American Court in November 2007 was brought by the Commission of Human Rights on behalf of the Saramaka People. The Court upheld the collective property rights of the Saramaka People and ordered Suriname to grant collective title of their territory. It also gave legal recognition of the Saramaka People's communal system, customary laws and traditions as well as ordering Suriname to take other steps to ensure legal recognition of the rights of the Saramaka People and to ensure consultation in relation to legislative, administrative and other measures that may impact upon their rights.

The Court of Justice of the Andean Community

The Court of Justice of the Andean Community (the "**CJAC**") is the judicial body of the Andean Community, which consists of Ecuador, Peru, Bolivia and Columbia. As with the ECJ, the CJAC interprets and applies the laws of the Andean Community.

Most cases are brought by a Member State against another Member State for alleged noncompliance with Community law. An interpretation of Community law can also be requested by national judges of the member States when dealing with a question of Community law.

The CJAC ensures that Community laws are interpreted properly and that they are applied across the territories of the member countries. The court settles any disputes that arise from any action relating to this. The rules in relation to bringing an action are set out in the Protocol of Modification of the Treaty Establishing the Court of Justice of the Andean Community.

An individual can bring an action to nullify decisions which have been taken by the Andean Council, Andean Community Commission or General Secretariat that affect the applicant's subjective rights or legitimate interests. Any action must be brought before the court within a period of two years following the date of the decision in question. It is also possible to bring an action to declare non-compliance where the person's rights have been affected by the failure of a Member Country to fulfil its obligations.

The procedure for bringing an action to the CJAC can be found on the following websites:

<http://www.tribunalandino.org.ec>

<http://www.comunidadandina.org/ingles/who.htm>

Central American Court of Justice

The Central American Court of Justice or Central Court of Justice as it is now called (the "**CCJ**") is the judicial body of the Organisation of Central American States. The Member States are: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

Most cases before the CCJ concern disputes between Member States. Disputes between a Member State and a Non- Member State which have agreed to the CCJ's jurisdiction can also be brought before the CCJ. An individual or legal entity resident in a Member State can bring a claim against that Member State. Disputes about the integration process arising between the Central American Integration System's Organs and Member States or natural persons can also be brought before the CCJ.

The official website for the CCJ is in Spanish: <http://portal.cci.org.ni/ccj2/>

Caribbean Court of Justice

The Court was created in 2003 under the 2001 Revised Treaty of Chaguaramas of the Caribbean Community (CARICOM). The treaty establishes the Caribbean (CARICOM) Single Market and Economy. There are 15 Member States: Antigua and Barbuda; Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Haiti; Jamaica; Montserrat; Saint Kitts and Nevis; Saint Lucia; St Vincent and the Grenadines; Suriname; and Trinidad and Tobago.

The Court considers disputes amongst CARICOM Member States. It is also intended to be a court of final appeal and hear appeals in both civil and

criminal matters from courts of the Member States. It will eventually replace the Judicial Committee of the Privy Council in London.

The official website of the CCJ: <http://www.caribbeancourtjustice.org/>

Africa

The African Court of Human and People's Rights

The African Court of Human and People's Rights (the "**ACHPR**") ensures the compliance of the African Union States with the African Charter on Human and People's Rights. There are fifteen State parties to the African Charter on Human and Peoples Rights:

http://www.achpr.org/english/info/charter_en.html

The Charter protects individual rights such as equality before the law, the right to a fair trial, and the right to security of person. It also protects people's rights such as rights relating to a people's culture.

An individual, group, NGO or legal entity can bring a claim against a State that is a party to the Charter. The applicant must first determine whether the State concerned is a party to the Charter before making an application. Any domestic remedies available in the State must be exhausted, if possible before bringing an application.

The application is made to the African Commission on Human and Peoples' Rights. It must be in writing and addressed to the Secretary or Chairman of the African Commission. There is no particular format for an application, However, it must identify the victim, even if the application is made on behalf of someone else, identify the State that has violated the right, and show that there has allegedly been a violation of a Charter right. It must also show that domestic remedies have been exhausted, or if not, the reason why this was not possible. Further, it should state if the application is being considered by any other international human rights body, such as the UN Human Rights Committee.

Follow the link to the website for further information:

http://www.achpr.org/english/info/court_en.html

Common Court of Justice and Arbitration of the Organisation for the Harmonisation of Corporate Law of Africa (OHADA)

OHADA was set up in 1993 and aims to promote regional integration and economic growth between the Member States. It provides a single, modern and reliable business law, promotes arbitration as a reliable means for settling disputes, and ensures that judges and judiciary staff are trained to specialise in corporate law and business law. OHADA business law is applicable to the following States: Benin, Burkina Faso, Central African Republic, Cameroon,

Chad, Comoros, Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal, and Togo.

The Court advises on the uniform application and interpretation of the common OHADA business law, reviews decisions made by Courts of Appeal of the Member States where OHADA business law has been applied, and monitors arbitration proceedings pursuant to the OHADA Uniform Arbitration Act.

For further information, visit the website (it is mostly in French with only some information in English): <http://www.ohada.com/index.php>

Court of justice of the Common Market for Eastern and Southern Africa (COMESA)

The Court of Justice of COMESA (the "**COMESA Court**") is the judicial arm of the COMESA, which was established by the signing of the Treaty of COMESA in 1993. COMESA brings together Member States from Eastern and Southern Africa and involves co-operation in all economic and social sectors. It also recognises, promotes and protects the human and people's rights as set out in the African Charter on Human and People's Rights.

The COMESA Court has the jurisdiction to hear all matters pursuant to the COMESA Treaty. It ensures proper interpretation and application of the provisions of the Treaty, and adjudicates disputes that arise among the Member States in relation to the interpretation of the Treaty. The decision of the COMESA Court is binding and takes precedence over the national courts' decisions.

For further information visit the website: <http://www.comesa.int>

Complaints Procedure

Individuals or groups may bring a complaint about a violation of human rights against their State before a quasi-judicial committee in the following circumstances:

- The complaint relates to a violation of a human right that may be considered by one of the four human rights treaty bodies described below;
- The State has consented to such complaints being brought; and
- The complaint complies with the procedural requirements set out below.

Human Rights Treaty Bodies

Four of the UN human rights treaty bodies may, under certain circumstances, consider individual complaints or communications:

- (1) The HRC may consider complaints relating to Part III of the ICCPR, which includes the right to life, liberty and security, the prohibition on torture, slavery and arbitrary arrest and detention, and various rights relating to imprisonment, the right to a fair trial, and the right to freedom of thought, religion and expression (see Articles 6 - 27). The HRC consists of 18 independent experts who meet three times a year.
- (2) The CEDAW may consider complaints relating to the discrimination of women. The CEDAW consists of 23 independent experts who meet twice a year.
- (3) The CAT may consider complaints relating to torture and inhuman treatment. The CAT consists of 10 independent experts who meet twice a year.
- (4) The CERD may consider complaints relating to racial discrimination. The CERD consists of 18 independent experts who meet twice a year.

Consent of the State

A complaint against a State can only be brought before one of the Committees if that State is a party to the relevant treaty and has consented to the complaints procedure (either by becoming a party to a separate treaty, such as the First Optional Protocol to the ICCPR or the CEDAW Optional Protocol, or by making a declaration under the Convention itself).

In most circumstances, a complaint can only be made about an alleged violation that occurred after the treaty entered into force in the State

concerned, i.e. the date that the complainant's State consented to the complaints procedure.

Before considering making a complaint, it is important to check whether the relevant State has given its consent and if so the date consent was given. It is possible to search the treaty bodies database at: <http://tb.ohchr.org/default.aspx>.

Complaints Procedure

Who can bring a complaint or communication?

If consent has been given, any person can lodge a complaint with a Committee claiming that his or her rights have been violated by their State. The complainant must be personally and directly affected by the alleged violation. A complaint cannot be made in the abstract, i.e. the complainant must be a victim of the law, policy or practice. The complainant can bring a complaint on another's behalf with their consent (unless it is brought on behalf of young children or someone who cannot provide their consent).

A lawyer is not required to prepare the complaint itself, though legal advice may assist the preparations. Legal aid is not provided under the procedures.

How is a complaint presented?

A complaint may also be referred to as a "communication" or "petition". It need not take any particular form. It need only be in writing and signed. It should provide basic personal information - the name, nationality and date of birth of the complainant - and the State against which the complaint is brought. Proof of consent should be provided if the complaint is brought on another's behalf.

The complaint should be described in detail, setting out all the facts in chronological order and providing all relevant information. It must show how the complainant has been affected, personally and directly, by the law, policy, practice, act or omission of the State violating the complainant's human rights.

The steps that have been taken to exhaust domestic remedies must be described, i.e. the steps that have been taken before local courts and tribunals to address the violation. It should state whether the complaint has been submitted to another means of investigation or settlement. If possible, the complaint should identify the relevant articles of the treaty that have allegedly been violated. All supporting documents, including administrative or judicial decisions and relevant national laws, should be provided.

Model complaint forms are available on the OHCHR website at <http://www2.ohchr.org/english/bodies/petitions/individual.htm>.

This information should be provided in one of the secretariat's working languages (i.e. English, French, Russian and Spanish).

The secretariat will contact the complainant if the complaint lacks essential information. There is no formal time limit for submitting complaints. However, a complaint should be submitted as soon as possible after domestic remedies have been exhausted.

Where should the complaint be sent?

The complaint should be sent to:

Petitions Team
Office of the High Commissioner of Human Rights
United Nations Office at Geneva
1211 Geneva 10
Switzerland
Email: tb-petitions@ohchr.org (indicating "Human Rights Complaint" in subject line of email)
Fax: +41 22 917 90 22

What happens once the complaint is sent?

If the complaint includes all the essential information, it will be registered. The complaint will be sent to the relevant State for its comments within a set time frame. The complainant will then be able to comment on the State's response. If the State does not respond, the Committee will still consider the complaint.

The case is divided into two stages:

- (1) the "**admissibility**" stage, where the Committee determines whether the complaint meets the necessary requirements to be admitted and the merits considered; and
- (2) the "**merits**" stage, where the Committee determines whether there is a violation.

Some Committees will consider both stages simultaneously.

The Committees will consider requests for urgent action if irreparable harm may be suffered whilst the case is being considered. The Committee may issue "interim measures" such as preventing the execution of a death sentence or the deportation of an individual facing a risk of torture. The Committee may also be requested to suppress sensitive information, including the identity of the complainant, in its final decision.

The Committee's decision

The Committee will consider the merits of the complaint in closed session. It will make its decision on the basis of the written documents, though CAT and

CERD may consider oral submissions in some circumstances. It will not consider information provided by third parties (i.e. amicus briefs). The Committee will make a decision stating the reasons for concluding whether or not there has been a violation of the treaty and, if so, the relevant articles. The Committee may make suggestions or recommendations to the State party. It may indicate an appropriate remedy, such as payment of compensation or release from detention.

The decision will be sent to the complainant and the State concerned. It will also be posted on the OHCHR website.

The decision is final. There is no appeal process. If there is no violation, the process is complete. If the committee finds that there has been a violation, then it invites the State to supply information within three months on the steps it has taken to give effect to the committee's findings. If the State fails to take appropriate steps, further steps may be taken depending upon the practice of the committee considering the case.

For Frequently Asked Questions about Treaty Body Complaints Procedures and further information, please see:

<http://www2.ohchr.org/english/bodies/petitions/individual.htm>