

UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD
69th Pre-sessional Working Group of the UN Committee on the Rights of the Child
22-26 September 2014

INTERNATIONAL COMMISSION OF JURISTS' SUBMISSION
FOR THE PREPARATION OF A LIST OF ISSUES IN ADVANCE OF THE EXAMINATION
OF THE NETHERLANDS' FOURTH PERIODIC REPORT IN ACCORDANCE WITH
ARTICLE 44 OF THE CONVENTION ON THE RIGHTS OF THE CHILD

Submitted, September 2014

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ICJ's submission for the preparation of a List of Issues in advance of the examination of the Netherlands' Fourth Periodic Report under article 44 of the Convention on the Rights of the Child

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the preparation of the List of Issues for the examination by the Committee on the Rights of the Child (the Committee) of The Kingdom of the Netherlands' (the Netherlands) Fourth Periodic Report pursuant to article 44 of the Convention on the Rights of the Child (the Convention).

2. In this submission the ICJ draws the attention of the Committee to concerns related to: (a) financing of development projects abroad by Dutch financial institutions; and (b) the existing legal framework concerning the responsibility of Dutch parent companies for the impairment of the enjoyment of children's rights as a consequence of the conduct of subsidiaries abroad.

3. This submission does not represent a full alternative report and it focuses solely on the State obligations regarding the impact of the conduct of agents of the business sector on children's rights.

4. The ICJ concludes each section of this submission with a list of proposed recommendations regarding the information that the Committee may consider requesting from the Netherlands in relation to its implementation of the Convention.

a) Obligations under the Convention and the Optional Protocols to respect, protect and fulfil children's rights in the context of the extraterritorial operations of businesses

Barro Blanco Dam construction and impact on the rights of the child to enjoy his or her own culture, profess and practice his or her own religion or use his or her own language (Article 30 of the Convention)

5. In General Comment No. 16, the Committee notes that home States have obligations arising under the Convention "to respect, protect and fulfil children's rights in the contexts of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned."¹ Further, the Committee emphasizes that "States should enable access to effective judicial and non-judicial mechanisms to provide remedy for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned."²

6. While all the rights contained in the Convention apply to all children, whether indigenous or not, the Convention does provide for specific protections in respect of indigenous children in several provisions (articles 17d), 29(d) and 30). Article 30 of the Convention guarantees that a child belonging to a linguistic minority or indigenous community "shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion or to use his or her own language."

7. The specific references to indigenous children in the Convention are indicative of the recognition that they require special measures in order to fully enjoy their rights. These provisions are to be read in conjunction with the general international standards on the rights of indigenous peoples, in particular, the UN Declaration on the Rights of Indigenous Peoples, which spell out the scope of the indigenous peoples'

¹ Committee on the Rights of the Child, General Comment 16 on State Obligations regarding the

² Ibid. para. 44.

rights and attendant responsibilities of States.³ The Committee has consistently taken into account the situation of indigenous children in its examination of periodic reports from State parties to the Convention and has issued specific recommendations in its concluding observations in light of the significant challenges faced by indigenous children in exercising their rights.⁴ The Committee has noted that the right to exercise cultural rights among indigenous peoples may be closely associated with the use of traditional territory and the use of its resources and that culture may manifest itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.⁵ These principles are also affirmed in the UN Declaration, including in articles 3 and 26.

8. The Barro Blanco Dam is a project financed in part by the FMO, the Dutch development bank, for the construction of a dam in the Tabasará River in the Chiriquiri Province in Panama. In 2006, the government of Panama invited tenders for the award of concession contracts for the development of several hydropower projects in the country. The bid was won by Generadora del Istmo SA (GENISA), a company that was specially created for carrying out the projects associated with the bid. From the outset, the project has been the object of international attention and has engendered criticism from indigenous organizations, especially the Ngobe people, who have been affected by its construction.⁶

9. In order to carry out the project, GENISA received international funding, including a loan from the Dutch Development Bank (FMO).⁷

10. FMO is a private-public partnership, with 51 per cent of its shares owned by the Dutch State. Its mission is to provide funding to companies, projects and financial institutions from developing and emerging markets.⁸

11. The construction of the dam takes place against a background of conflict between the Ngobe people and the government of Panama. The most vocal objection to the project appears to have come from the Ngobe people, even though the project's construction site lies outside their semi-autonomous region, known as the Comarca. The Ngobe depend on subsistence agriculture and have no access to electricity services or paved roads. Many of their cultural, economic, social traditions and institutions have remained unchanged for centuries and they are particularly concerned that the viability of traditional lifestyles will be threatened by GENISA's plans to exploit the Tabasará river. The Ngobe have successfully opposed previous attempts to build dams, in the same location as the Barro Blanco project, such as Tabasará I, which had to be cancelled due to massive local opposition.⁹ Certain civil

³ The Declaration was adopted by General Assembly Resolution 61/295 of 13 September 2007 A/RES/61/295

⁴ Committee on the Rights of the Child, General Comment No. 11 on Indigenous children and their rights under the Convention (GC No. 11), CRC/C/GC/11, 2009, para. 5.

⁵ Ibid. para. 16; Human Rights Committee, General Comment No. 23 on Article 27, CCPR/C/Rev.1/Add.5, 1994, paras 3.2 and 7; Recommendations of CRC Day of General Discussion on the Rights of Indigenous Children, 2003 para. 4.

⁶ See Generadora del Istmo SA, Environmental and Social Summary Report, Barro Blanco Hydroelectric Project, INF-GEN-137-11, (GENISA Report) p. 8, available at:

<http://www.genisa.com.pa/wp-content/uploads/2012/06/INF-GEN-138-11%20Environmental%20and%20Social%20Summary%20Report%20BBHP%20072811.pdf>

accessed on 16 July 2014.

⁷ See the Complaint filed against FMO for Funding the Barro Blanco Dam in Panama, available at: <http://grievancemechanisms.org/attachments/CartaReclamacionBarroBlanco.pdf> p. 1, accessed 8 August 2014.

⁸ Information on the FMO can be found on their website, <http://www.fmo.nl/about-us/profile> accessed 30 June 2014.

⁹ See Pulitzer Centre on Crisis Reporting, Panama: Dam Promises or Dam Lies. Further, a complete chronology of the events relating to the development of the Barro Blanco project is available at: <http://www.internationalrivers.org/chronology-of-events-for-barro-blanco-dam-panama>, accessed 30 June 2014.

society and international organizations¹⁰ that opposed the Barro Blanco Dam project filed an *amicus curiae* brief in Panama's Supreme Court of Justice in support of a challenge by indigenous people to the environmental review of the Barro Blanco hydroelectric dam.¹¹

12. The FMO has internal policies and procedures that are aimed at evaluating the environmental and social impacts of the projects that may potentially be financed by the bank. Nevertheless, the Ngobe community representatives alleged that these safeguards were ignored when the FMO decided to invest USD 25 million in the construction of the dam.¹²

13. Pursuant to their own Environmental, Social and Corporate Governance (ESG) policy, the FMO is required to ensure that all their investment clients comply with "national E&S [Environmental and Social] law as a minimum standard, and with international standards, whichever stricter".¹³ In addition, the Policy uses two sets of international standards as benchmarks: the International Financial Corporation Performance Standards on Environmental and Social Sustainability (IFC Performance Standards) and the Organisation for the Economic Cooperation and Development Guidelines for Multinational Enterprises (OECD Guidelines).¹⁴ The IFC Performance Standards require that "[i]n addition to meeting the requirements under the Performance Standards, clients must comply with applicable national laws, including those laws implementing host country obligations under international law."¹⁵ Similarly, the OECD Guidelines require companies to respect the internationally recognized human rights of those affected by their activities.¹⁶

14. The company, GENISA, following FMO requirements, performed an impact assessment on the Barro Blanco Project prior to the granting of the loan by the FMO in July 2011. The findings of this impact assessment were documented by GENISA in its project management report.¹⁷ Concerning the impact on cultural heritage, pursuant to the objectives of IFC Performance Standard 8, ("To protect cultural heritage from the adverse impacts of project activities and support its preservation"¹⁸), the report stated:

The area belongs to the Gran Chiriquí cultural area that has a human presence of 5000 to 3000 years B.C. The archaeological prospection done over the Project's area found one area, a possible dispersed village with cultural remains and some petro glyphs of heritage value but without discarding the possibility of finding more. This area has been partially disturbed due to livestock farming and the use of a quarry by a neighbouring village but some areas are not disturbed and need to be explored. The additional archaeological report (Recursos Arqueológicos Proyecto Hidroeléctrico Barro Blanco), prepared by registered archaeologist Alvaro Brizuela, completes the

¹⁰ Among these organizations are the Environmental Advocacy Center, Panamá (CIAM), the Interamerican Association for Environmental Defense (AIDA), the Center for International Environmental Law (CIEL) and Earthjustice.

¹¹ See Earth Justice, Groups Support Challenge To Dam Project In Panama For Violating Indigenous Rights- Amicus brief highlights unlawful consultation process <http://earthjustice.org/news/press/2013/groups-support-challenge-to-dam-project-in-panama-for-violating-indigenous-rights>, accessed 22, August 2014.

¹² See Complaint. *Op. Cit.* note 7, p. 2. For further information on FMO processes and policies, see <http://www.fmo.nl/basic-process> accessed 30 June 2014.

¹³ FMO, Environmental and Social Policy, p. 2, available at <http://www.fmo.nl/esg-policy> accessed 30 June 2014.

¹⁴ *Ibid.*

¹⁵ IFC Performance Standards on Social and Environmental Sustainability, Introduction, para. 5.

¹⁶ OECD Guidelines, Chapter IV, paras 2 and 5.

¹⁷ GENISA Report *Op. Cit.* note 6, p. 55.

¹⁸ IFC Performance Standards on Social and Environmental Sustainability, Edition 2012. Performance Standard 8, para. 1. Available at: http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES, accessed 16 July 2014.

archaeological survey in the area, identifies all applicable Panamanian legislation (that is aligned with internationally recognized practices and Panama's adherence to cultural heritage conventions), prepares an *Intervention Protocol* and proposes the following programmes: Archaeological Programme, Archaeological Rescue Programme, Monitoring, Surveillance and Environmental Control Programme and Materials Analysis Programme.¹⁹

15. GENISA's impact assessment report confirms that the project will develop a plan for the management of cultural heritage, comprising three components, namely:

- i) The project will contract a registered archaeologist to provide advice throughout the construction period;
- (ii) Workers on the site will be trained to recognize remains of possible archaeological interest, and under a 'chance finds' procedure, will stop work immediately in an area of 40 meters from the possible find. The authorities will be notified, and the project will follow their direction as to how to handle artefacts and when to re-start work. Records will be maintained of any finds;
- (iii) The project will enable archaeological investigation of other areas within the site that will not be disturbed by the project.²⁰

16. However, notwithstanding the development of a plan for the management of cultural heritage within the context of the project, questions have arisen as to whether GENISA's assessment of the project's impact on cultural heritage, was performed in a thorough manner that would allow for an appropriate determination of impact to be ascertained.

17. Concerning the impact on indigenous people, GENISA's report, under the requirements of IFC Performance Standard 7, stated:

The Ngobe-Bugle community owns part of the riverbank land that will be rented by Genisa. Ngobe-Bugle people are not affected regarding their livelihood, cultural patterns or ancestral value. A Memorandum of Understanding has been [concluded] between the company and the Ngobe-Bugle community in line with the indigenous people law.... An indigenous specialist report has documented the consultations to date, livelihood of indigenous people in the project area, potential impacts and recommendations on mitigation measures etc. However a group within the community opposes the project and, to date, negotiations with this group have not reached a positive outcome.²¹

18. In this regard, the report mentions that the project will continue to engage with the indigenous community through, among other measures, community projects and try to engage with groups that oppose the project as well.

19. According to a complaint filed in 2014 with the FMO grievance mechanism, in 2012, a year after the funds from FMO were released,²² a technical roundtable was organized to consider all aspects affecting the construction of the dam. By agreement of 15 March 2012 between the Government of Panama and National Assembly on one side and the traditional authorities of the Comarca Ngobe and the association for the defence of the Ngobe people on the other side, a Verification Mission was established to observe outstanding issues on site. The Mission was composed of representatives of the indigenous communities, the traditional authorities of the Comarca Ngobe Bugle, the company, the government, the UN and the Catholic Church. The Mission

¹⁹ GENISA Report *Op. Cit.* note 6, pp. 55 and 56.

²⁰ *Ibid.* p.34.

²¹ *Ibid.* p.55.

²² Complaint Annex filed against Dutch Development Bank FMO for Funding the Barro Blanco Dam in Panama, p.1, available at: <http://grievancemechanisms.org/attachments/BarroBlancocomplaintanalysisofpoliciesandprocedures.pdf>, accessed 30 June 2014.

took place in September 2012 and a report was published by agreement among the parties later on with the findings.²³ Regarding the social and cultural impact of the construction of the dam, the mission found that important areas for conducting the practices of indigenous cults as well as schools for the teaching of Ngobe writing and religion would be severely affected by the construction project together with the socioeconomic activity of the indigenous communities.²⁴ The mission also found that there was a general lack of information about the details of the project among the affected communities and strong opposition by them to the construction. Finally the report recommended the carrying out of an independent study,²⁵ which was later on performed under the auspices of the UNDP office.

20. The findings of the UNDP-initiated study, released in September 2013, covered various aspects, including rural participation and socioeconomic impacts.²⁶ The conclusions of the independent study confirmed that the affected communities had not been properly consulted throughout the process prior to the decision to build the dam. The lack of adequate consultation had in turn resulted in the community fearing the direct and indirect impact of the project.²⁷ The UNDP-led study further concurred with the field verification mission findings that beyond the environmental impact that would significantly affect the socioeconomic landscape of the affected populations, the project would have a real cultural impact on the Ngobe community and their traditional lifestyle, threatening the right of every child from minority or indigenous populations to enjoy their own culture and practice their own religion (article 30). In particular, both reports agree on the impact of the project on different petroglyphs venerated within the community.²⁸

21. In February 2014, in light of the then ongoing evictions of Ngobe families from the areas concerned in the context of the construction of the dam, the Movimiento 10 de Abril made an appeal to James Anaya, the then UN Special Rapporteur on the Rights of Indigenous People, highlighting the role of the financiers in the construction of the project and emphasizing the resulting rights violations.²⁹ At the end of his visit

²³ Informe de la Mision de Verificacion, realizada del 23 al 28 de Septiembre de 2012, p.5, available at http://www.banamarepublic.com/informe_mision_verificacion_final_20121219.pdf, accessed 27 June 2014.

²⁴ Ibid. p. 22-26.

²⁵ Ibid. pp. 31 and 37.

²⁶ UNDP Panama, Peritaje Independiente de la Represa de Barro Blanco, Panama Resumen Ejecutivo Consolidado, 5 de Septiembre 2013, available at http://www.pa.undp.org/content/dam/panama/docs/povred/undp_pa_peritaje_barro_blanco2013.pdf accessed 27 June 2014.

²⁷ UNDP Panama Ibid. p. 12 The report specifically states "*La falta de una consulta adecuada con respecto al proyecto Barro Blanco ha creado una situación de miedo y extrema ansiedad entre estos pobladores*". The lack of an adequate consultation concerning the Barro Blanco Project has created a situation of fear and extreme anxiety among this population (non-official translation)

²⁸ Ibid. p. 12 "*Los impactos directos e indirectos no han sido claramente explicados o entendidos, pero ciertamente estos impactos directos pueden afectar a la comunidad en su totalidad y deben ser mitigados en forma correcta*" The indirect and direct impacts have not been clearly explained or understood, but certainly these direct impacts can affect the community as a whole and must be mitigated correctly. (non-official translation) and p. 18 "*Finalmente, existen impactos intangibles relacionados a la cultura de las comunidades Ngäbe y a su forma de vida tradicional. Entre estos se han identificado la alteración de los Petroglifos de Quebrada Caña y Kiad, con los que las poblaciones Ngäbe mantienen una conexión cultural. Los cambios cumulativos en las características y el acceso a los recursos naturales descritos pueden también tener consecuencias importantes en el estilo de vida y cultura de las poblaciones Ngäbe de las 3 comunidades.*" Finally, there are intangible impacts related to the Ngobe community culture and to their traditional lifestyle. Among these, it has been identified the alteration of the Petro glyphs from Quebrada Caña y Kiad, with which the Ngabo community maintains a cultural connection. The cumulative changes in the characteristics and the access to the natural resources described can also have important consequences in the lifestyle and culture of the Ngobe population in the three communities. (non-official translation)

²⁹ M-10 et al., Urgent Appeal, Imminent Forced Evictions of Indigenous Ngöbe Families due to Barro Blanco Dam in Panama, Feb. 18, 2014, available at

to Panama, the Special Rapporteur stated that "it is manifestly clear" that the flooding of land next to the Ngobe Buglé's territories for the purposes of building an hydroelectric plant would "directly affect the inhabitants of this area".³⁰ In his final report the Special Rapporteur concluded that the flooding, or other form of impact, of certain land next or within the Ngobe territories should not proceed without a prior agreement with the representative authorities of the Ngobe people. Without such an agreement, the State could only allow for a project engendering such effects on the land rights of the people under a valid human rights compliant public purpose, and only to the extent that the impairment is necessary and proportionate to that valid purpose.³¹

22. Finally, on May 5 2014, local groups in Panama, represented by *Movimiento 10 Abril*, filed a complaint with the newly established FMO independent grievance mechanism. The complainants raised concerns about the project's impact on the Ngobe peoples' cultural heritage and traditional way of living, together with the lack of consultation with the affected communities that has impeded a comprehensive assessment of the real impact and consequences of the project on the indigenous communities.³² Using the conclusions of the verification mission and the UNDP report, the complaint also asserts that the company's assessment regarding the project's impacts on cultural heritage, had not been thoroughly carried out.³³ The complaint emphasizes, in particular, GENISA's failure to ensure that prior and informed consent was obtained. Indeed, following IFC Performance Standards' requirements adopted by the FMO as its own benchmark, both IFC PS7 and PS8 provide that:

Where a project may significantly impact on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of Indigenous Peoples' lives, priority will be given to the avoidance of such impacts. Where significant project impacts on critical cultural heritage are unavoidable, the client will obtain the Free, Prior and Informed Consent (FPIC) of the Affected Communities of Indigenous Peoples;³⁴ and
Where a project may affect cultural heritage, the client will consult with Affected Communities within the host country who use, or have used within living memory, the cultural heritage for long-standing cultural purposes. The client will consult with the Affected Communities to identify cultural heritage of importance, and to incorporate into the client's decision-making process the views of the Affected Communities on such cultural heritage. Consultation will also involve the relevant national or local regulatory agencies that are entrusted with the protection of cultural heritage.³⁵

23. A further issue raised by the complaint was that the FMO had ignored the fact that, at the time the loan was granted to GENISA, a complaint had been filed before Panamanian Courts to challenge the National Environmental Authority's approval of the Environmental Impact Assessment of the Barro Blanco project. The complainants argued that "coming before FMO's approval of the project, the lawsuit should have

<http://earthjustice.org/sites/default/files/files/AppealForcedEvictionBarroBlancoDam14-02-18.pdf>. The Movimiento 10 de Abril, M-10 was formed in 1999 by the Ngobe community and farmers to promote protection of the environment and other human rights. The conclusions of the UN Special Rapporteur after his visit to Panama are available at <http://unsr.jamesanaya.org/statements/declaracion-del-relator-especial-sobre-los-derechos-de-los-pueblos-indigenas-al-concluir-su-visita-oficial-a-panama> accessed on 30 June 2014.

³⁰ Ibid. (UN Special Rapporteur's conclusions following his visit to Panama).

³¹ UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, La situación de los derechos de los pueblos indígenas en Panamá, May 7, 2014, A/HRC/27/52/Add.1, para 75 (i) and (j), available at <http://unsr.jamesanaya.org/docs/countries/2014-report-panama-a-hrc-27-52-add1-sp-auversion.pdf>, accessed on 8 August 2014). (non-official translation)

³² M-10 et al, *Op. Cit.* note 29.

³³ Complaint Annex, *Op. Cit.* note 22, p. 17 "The 2013 UNDP Expert Assessment Report does not provide an extensive study of the petroglyphs and their value for the local communities"

³⁴ IFC, *Op. Cit.* PS7 para 16.

³⁵ IFC, *Op. Cit.* PS8 para 9.

been part of FMO's due diligence and considered an indication that there were serious concerns with the project".³⁶

24. While Article 30 of the Convention is not expressly invoked in the complaint, the specific rights of indigenous populations and the need for free, prior and informed consent from these communities concerning the use and potential eviction from their ancestral lands are raised throughout the complaint, pursuant to international standards as set out in the UN Declaration on the Rights of Indigenous peoples.³⁷ In this context, it is worth recalling that the Committee itself has paid particular attention to the impact of financial institutions' investments on the rights of the child. It has called on international financial institutions to ensure that their activities give primary consideration to the best interests of the child and promote the implementation of the Convention.³⁸

Recommendations

25. *In this particular case, the ICJ recommends that in its List of Issues the Committee should request from the Government of the Netherlands the following information:*

1. *Whether recourse to an effective remedy has been made available to the alleged victims of the Barro Blanco Project pursuant to the Convention and the General Comments issued by the Committee.*³⁹
2. *Would a final decision by the FMO grievance mechanism be binding upon the FMO? What measures are being taken by the Netherlands to effectively monitor FMO clients' compliance with ESG policies and international law and standards, including the Convention and the Declaration on Indigenous Peoples?*
3. *Has the Netherlands considered including specific and stricter compliance standards within FMO policies in cases where children may be potentially affected by a project?*

³⁶ Complaint Annex *Op. Cit.* note 22 p. 4. Demanda Contencioso Administrativa de Nulidad, con Solicitud Especial de Suspensión Provisional, Contra la Resolución DIEORA IA-332-2008 de 9 de Mayo de 2008, Proferida por la Administradora General de la Autoridad Nacional del Ambiente (ANAM).

³⁷ *Ibid.* p. 10 "However, when the business activity impacts specific groups, like indigenous peoples, then the company should respect the rights elaborated in the UN instruments specific to those groups. Accordingly, FMO should have ensured that the project respected the rights of the Ngöbe, in particular the right to free, prior, and informed consent (FPIC). FPIC is recognized under the UN Declaration on the Rights of Indigenous Peoples, which Panama voted in favor of at the UN General Assembly, and the American Convention on Human Rights, which Panama ratified in 1978. The commitment to comply with international law is enshrined in article 4 of Panama's constitution, which states: "The Republic of Panama abides by the rules of International Law."

³⁸ UN Committee on the Rights of the Child, General Comment 5 on the General Measures for the Implementation of the Convention of the Rights of the Child CRC/GC/2003/5 (GC No. 5) para 64. Also UN Committee on the Rights of the Child, General Comment 16 on State Obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16 2013, para 16.

³⁹ The Convention contains several provisions that call for penalties, compensation, judicial action and measures to ensure reparation for harm caused or contributed to by third parties. For example, Article 32 (2) regarding the economic exploitation of children requires States to provide penalties or other sanctions; Article 19 regarding protecting children from violence refers to investigation and judicial involvement as protective measures; and Article 39 demands that States promote recovery and reintegration following harm such as neglect or exploitation. General Comment 16 on State Obligations regarding the impact of the business sector on children's rights (*supra*) paras 43 and 44; UN Committee on the Rights of the Child, General Comment No. 11, Indigenous children and their rights under the Convention CRC/C/GC/11 (2009) para. 23; General Comment 5 on the General Measures for the Implementation of the Convention of the Rights of the Child (*supra*) para. 24, which provides that "For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties."

b) Shell Group and oil spills in Nigeria and impact on children's rights to life, survival and development, the highest attainable standard of health and the right to a remedy (Articles 6 and 24 and 39 of the Convention)

26. Royal Dutch Shell (RDS), a multinational company headquartered in The Hague, the Netherlands, has been active in Nigeria for many years, particularly through its subsidiaries. In Nigeria, numerous oil spills from oil pipelines and oil facilities occur each year. Several reasons may explain oil spills, such as defective and/or obsolete materials in oil facilities that are no longer in operation, and have been abandoned or have never been formally decommissioned,⁴⁰ or sabotage actions in combination with inadequate safety measures, and stealing crude oil for selling it on the black market, among others.⁴¹

27. The United Nations Environment Programme (UNEP) revealed in a report dated August 2011 that the Niger Delta is severely polluted.⁴² Oil spills pollute the region affecting the human rights of neighbouring and local communities, including the rights of the children living in this area such as *inter alia*, their right to life, survival and development; and the highest attainable standard of health

28. Moreover, oil facilities in the Niger Delta pose a continuous threat to the livelihood of the local people in the area. Given the existence of many forms of oil-generated environmental pollution, life in the Niger Delta has been deleteriously affected in several ways: farming and fishing have become difficult and access to drinking water is limited. As a consequence, diseases and malnourishment are said to be widespread.⁴³ The operations of multinational oil companies also have an impact on the wellbeing of local communities including by way of loss of property, price inflation and prostitution⁴⁴ sometimes involving expatriate oil workers.⁴⁵

29. The pollution of water and land may detrimentally affect children's right to life, survival and development (article 6 of the Convention on the Rights of the Child) and the right of the child to the enjoyment of the highest attainable standard of health (article 24 of the Convention), which includes access to clean-drinking water and adequate nutritious food. Further, pursuant to the article 24(2) (c) of the Convention, State parties are under an obligation to consider the dangers and risks of environmental pollution.

30. In addition, in the context of the extraterritorial activities of businesses,⁴⁶ State parties have the obligation, under the Convention and its Optional Protocols, to respect, protect and fulfil children's rights when a reasonable link exists between the State and the company in question, including when the company has its centre of activity or its main place of business or substantial business activities in the State concerned.⁴⁷ This appears to be the case with RDS, which is based in the Netherlands. Since 20 July 2005, RDS has been at the head of the Shell Group and it holds all

⁴⁰ UNEP, *Environmental Assessment of Ogoniland*, 2011. p. 43 Available: http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf, accessed on 27 June 2014.

⁴¹ *Case Friday Alfred Akpan and Vereniging Milieudefensie v.s. Royal Dutch Shell Plc. and Shell Petroleum Development of Nigeria Ltd*, District Court of The Hague, LJN BY9854, 30 January 2013. Facts, para. 2.2. Available at: <https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-akpan-vs-shell-oil-spill-ikot-ada-udo/view>, accessed on 27 June 2014.

⁴² UNEP, *Op. Cit.* note 40.

⁴³ Essential Action and Global Exchange, *Oil For Nothing: Multinational Corporations, Environmental Destruction, Death and Impunity in the Niger Delta*, January 25, 2000, p.3 Available at: <http://www.essentialaction.org/shell/report/>, accessed on 4 July 2014.

⁴⁴ *Ibid.*, p.10

⁴⁵ Essential Action and Global Exchange, *Op. Cit.* note 43.

⁴⁶ See Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, principle 25 (2012).

⁴⁷ General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights. CRC/C/GC/16, para. 43.

shares in its subsidiary Shell Petroleum Development Company of Nigeria (SPDC), a Nigerian legal entity that undertakes oil production operations in Nigeria for the Shell Group.⁴⁸

31. In May 2008, Friends of the Earth Netherlands (Milieudefensie or FoE), together with four Nigerian farmers, filed three lawsuits in the Netherlands against RDS and SPDC over oil pollution in three areas of the Niger Delta: Goi in Ogoniland, Oruma in Bayelsa State and in Ikot Ada Udo, Akwa Ibom State.⁴⁹

32. The District Court of The Hague only found the subsidiary of the firm, SPDC, responsible for one case of pollution, ordering SPDC to pay compensation to the Nigerian farmer, Mr Elder Friday Akpan, from the village of Ikot Ada Udo, on the ground that the company did not adequately protect its oil facilities from vandalism.⁵⁰

33. The District Court ruled that under applicable Nigerian law, the parent company RDS in The Hague did not commit any tort of negligence against FoE and Mr Akpan, dismissing all claims initiated against RDS.⁵¹

Collective litigation in Dutch Law

34. In 1994, the possibility for collective litigation by a foundation or association was incorporated into the Dutch Civil Code (DCC), through Article 3:305a. This provides that an association or foundation with full legal personality established for the purpose of protecting the interests of a group of persons has a right of action in court for the protection of those interests.

35. Nevertheless, this form of collective litigation remains subject to many limitations. This right accrues only to legal entities, which can bring claims only for the protection of those interests that are part of the purpose of the organization as defined by its statute. Furthermore, a claim may only be filed where sufficient attempts have been made to achieve a settlement before litigation, which will be assessed during the proceedings. Finally, an important limitation is that the claimants may not seek monetary compensation through such claims filed on behalf of the persons represented.⁵² Only a declaratory statement may be sought.⁵³

Case Friday Alfred Akpan and Vereniging Milieudefensie v.s. Royal Dutch Shell Plc. and Shell Petroleum Development of Nigeria Ltd, District Court of The Hague, LJN BY9854, 30 January 2013 (Akpan Case).

36. The case involved two specific oil spills in 2006 and 2007 from oil facilities owned by SPDC near the village of Ikot Ada Udo in Nigeria where Mr Akpan lives. After 1959, SPDC's legal predecessor decided not to use the so-called IBIBIO-I well near Ikot Ada Udo to produce oil, since it was an exploratory well. In August 2006, a small volume of oil spilled from the IBIBIO-I well (approximately one barrel) and by early August 2007 a larger volume of oil spilled over (an estimated 629 barrels of oil).⁵⁴

37. In August 2008, after negotiations with the local community, SPDC performed

⁴⁸ Case. *Op. Cit.* note 41, (Facts) para. 2.2.

⁴⁹ FoE. Factsheet Court Case step by step. Available at: <https://milieudefensie.nl/publicaties/factsheets/factsheet-court-case-step-by-step/view>, accessed on 4 July 2014.

⁵⁰ Case. *Op. Cit.* note 41, paras 4.45 and 4.46.

⁵¹ Case. *Op. Cit.* note 41, para. 4.34.

⁵² ICJ. *Access to Justice: Human Rights Abuses involving corporations. Netherlands*, 2010. p. 35-26. Available at: <http://www.icj.org/access-to-justice-human-rights-abuses-involving-corporations-2/>, accessed on 23 June 2014.

⁵³ KARLSGODT, Paul G., *World Class Actions. A guide to Group and Representative Actions around the Globe*. Oxford, 2012. P. 288.

⁵⁴ Case. *Op. Cit.* note 41, para. 2.4 – 2.7.

remediation work in the vicinity of Ikot Ada Udo.⁵⁵ In 2010, after the beginning of the proceedings, SPDC secured the well against sabotage.⁵⁶ In September 2012, an investigation report commissioned by FoE showed that the well had not been properly isolated and secured after being decommissioned.⁵⁷ Later that month, more information was received to the effect that the clean-up assessment reports in the area had been incomplete in terms of their analysis by failing to distinguish between the concentrations of various oil components with different toxic properties.⁵⁸

38. FoE argued that the spills were the result of poor maintenance of the facilities and pipelines; lack of adequate protection from sabotage, as well as limited cleaning-up of the oil spills, in violation of SPDC's obligations under Nigerian law to undertake remediation irrespective of the cause of the spill.⁵⁹

39. FoE also sought a declaratory judgment to the effect that Shell (both parent and subsidiary) had committed a tort against FoE by causing damage to the environment near Ikot Ada Udo in Nigeria and for Shell (both parent and subsidiary) to be ordered to take a number of measures to minimize the impacts of oil spills and to reduce the risk of these happening again. The Court considered FoE's collective complaint admissible (under article 3:305a DCC)⁶⁰ but ruled against FoE's argument that article 3:305a DCC (class action or collective litigation) creates the "legal fiction" that the interests of all parties who have been affected by the harmful practices are incorporated in Milieudefensie (FoE), as this argument is not supported either by Nigerian or Dutch law. The fact that by virtue of article 3:305a DCC, FoE may protect the interests of third parties in law does not mean that any damage to those third parties can be considered to be damage to FoE itself.⁶¹

40. The plaintiffs also submitted that Shell headquarters are responsible for SPDC because it deploys various instruments to control its subsidiaries, including SPDC.⁶² In this regard, the Court, nevertheless, ruled that under applicable Nigerian law, the parent company RDS did not commit any tort of negligence against FoE and Mr Akpan, dismissing all the claims initiated against RDS.⁶³

41. Moreover, the Court ruled that SPDC was not liable for the infringement of Mr

⁵⁵ Case. Op. Cit. note 41, para. 2.8.

⁵⁶ Case. Op. Cit. note 41, para. 2.11.

⁵⁷ "In the Ikot Ada Udo release, the exploratory wellhead Christmas Tree installed in 1959 and obviously still under oil field pressure, was not properly "positively isolated" or secured. From the evidence, I cannot rule out the possibility of sabotage, but the fact remains that the wellhead has not been properly isolated, such as from blindings or bull plugging which is a responsibility of the well operator, Shell. Had Shell properly secured the wellhead, oil release would not have been possible." Case Op. Cit. para. 2. 13

⁵⁸ In an email dated 6 September 2012, (which was produced at the stage of pleadings by Milieudefensie et al.) Mr. Von Scheibler of BKK Bodemadvies B.V. wrote the following to Milieudefensie et al.'s attorney: "The annex includes my comments regarding the documents dealing with Goi. The same reasoning and calculations could be applied by analogy to the other locations. Based on the documents, the following general points stood out in any event. Before and after remediation, Shell compares the TPH concentrations. This is the sum of the concentrations of very many oil components with different toxic properties. This means that nothing can be said regarding the highly toxic BETX concentrations, which may still be above the permissible limit values. By not making any distinction, at a minimum the clean-up reports are incomplete." Case. Op. Cit., note 41, para. 2.14. Further, the Court held at para. 4.52 that: "As Shell et al. rightfully submitted, this email only demonstrates that in general, the concentration of TPH is not a decisive factor in answering the question regarding whether the clean-up was sufficient. However, Von Scheibler's email does not demonstrate – or does not demonstrate sufficiently concretely – that the certificates issued by the Nigerian government for this specific clean-up near Ikot Ada Udo following this specific oil spill in 2007 are substantively incorrect or have otherwise been wrongfully issued.

⁵⁹ FoE. Factsheet. Op. Cit. note 49, p.2.

⁶⁰ Case. Op. Cit. note 41, para. 4.13 – 4.14.

⁶¹ Case. Op. Cit. note 41, para. 4.35.

⁶² FoE. Factsheet. Op. Cit. note 49, p.2.

⁶³ Case. Op. Cit. note 41, para. 4.34.

Akpan's human rights (on the basis that his physical integrity was affected because he had to live in a polluted environment) because SPDC could not be blamed for any active conduct but for negligence, which in itself could not be considered as an infringement of human rights under Nigerian law.⁶⁴

42. Finally, just one claim was admitted, and on 30 January 2013, the Court rendered a declaratory judgment to the effect that under Nigerian law, SPDC had committed a specific tort of negligence against Mr Akpan by insufficiently securing, prior to the two oil spills in 2006 and 2007, the wellhead of the IBIBIO-I well at issue in these proceedings, against sabotage and hence ordered SPDC to compensate Mr Akpan for the damage he suffered as a result.⁶⁵

Appeal launched against the decision in (i) the Akpan Case and (ii) 2 Cases relating to the oil spills in the villages of Goi and Oruma respectively

43. On 1 May 2013, FoE lodged an appeal against the decision delivered by the District Court of The Hague on 30 January 2013, in the Akpan Case in the hope of a reversal of the District Court's decision in respect of its finding of a lack of shared responsibility on the part of RDS for the failures of its subsidiary SPDC, despite RDS's involvement in the daily management of SPDC.⁶⁶

44. An appeal was also filed against the decisions taken in two other cases pertaining to oil spills in the villages of Goi⁶⁷ and Oruma⁶⁸ respectively, in both of which the District Court of The Hague dismissed all the plaintiffs' claims and did not find liability on the part of any Shell entity for the damage suffered by the farmers due to the oil spills as both the oil spills were considered to have been caused as a result of sabotage by third parties,⁶⁹ which the Court ruled could not have been reasonably prevented by Shell.⁷⁰

⁶⁴ "Although this is also reprehensible and constitutes a tort of negligence in this specific case, the District Court is of the opinion that in so-called horizontal relationships like the one at issue, this cannot be designated as an infringement of a human right. As far as the District Court was able to verify, to date there have been no Nigerian rulings in which a reprehensible failure in horizontal relationships such as the one at issue and in the event of sabotage by third parties is considered to be an infringement of a human right. For this reason, the declaratory judgment demanded under II will be dismissed." Case. Op. Cit. note 41, para. 4.56.

⁶⁵ Case. Op. Cit. note 41 para. 5.1.

⁶⁶ FoE. Available at: <https://milieudedefensie.nl/english/shell/news/nigerians-and-milieudedefensie-appeal-in-shell-case>, accessed on 30 June 2014.

⁶⁷ [Case Barizaa Manson Tete Dooh and Vereniging Milieudedefensie v.s. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd. \(Goi Case\)](https://milieudedefensie.nl/english/shell/news/nigerians-and-milieudedefensie-appeal-in-shell-case), District Court of The Hague, C/09/337058/HA ZA 09-1581, 30 January, 2013. Available at: <https://milieudedefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-dooch-vs-shell-oil-spill-goi/view> accessed on 8 August 2014

⁶⁸ [Case Fidelis Ayoro Oguru, Alali Efanga and Vereniging Milieudedefensie v.s. Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd. \(Oruma Case\)](https://milieudedefensie.nl/english/shell/news/nigerians-and-milieudedefensie-appeal-in-shell-case), District Court of The Hague, C/09/330891/HA ZA 09-0579, 30 January, 2013. Available at: <https://milieudedefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-oguru-vs-shell-oil-spill-goi/view> accessed on 8 August 2014.

⁶⁹ Goi Case Op. Cit. note 67, para. 4.25 and Oruma Case Op. Cit. note 68, para. 4.27.

⁷⁰ Op. Cit. note 66. In both cases, the District Court of the Hague ruled that no tort of negligence had been committed by the parent company on the basis that there was no duty of care on the part of the parent company for the acts of its subsidiary, SPDC, and further that *Chandler v Cape* did not create any precedent in these cases for reasons including inter alia that: "a possible duty of care of a parent company of an international group of oil companies in respect of the people living in the vicinity of oil pipelines and oil facilities of (sub-) subsidiaries would create a duty of care in respect of a virtually unlimited group of people in many countries." Accordingly the Court concluded that it was far less fair, just and reasonable than it was in *Chandler v Cape* to assume that such a duty of care on the part of the parent companies of the Shell Group exists. (see Goi Case - paras 4.34 and Oruma Case - para. 4.36). Additionally SPDC was also not found liable for the oil spills as they had been caused by sabotage and the Court concluded that by failing to prevent the sabotage committed by a third party, SPDC did not

Obligations of the State Party

45. Access to justice particularly for children includes, *inter alia*, the right to an effective remedy.⁷¹ As emphasized by the Committee on the Rights of Child in General Comment No. 5:

[f]or rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other major international human rights treaties. Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. Therefore States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39 of the Convention.⁷²

46. In addition, the responsibility of States Parties to realize the rights of all children requires structural and proactive interventions to enable access to justice.⁷³ Under both the Convention and the International Covenant on Civil and Political Rights (ICCPR), States are required to ensure that their domestic legal framework is consistent with the rights and obligations provided, including the adoption of appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice.⁷⁴ Article 2(3) of the ICCPR provides for the right to an effective remedy. In its General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, the Human Rights Committee emphasized that "in addition to effective protection of Covenant rights, States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children."⁷⁵ Article 2(3) of the ICCPR also requires the availability of adequate reparations to individuals whose

commit a tort of nuisance under English or Nigerian law. (Goi Case - para. 4.42 and Oruma Case - para. 4.44) Additionally, the Court concluded that SPDC had not committed a tort of negligence and observed in this regard that: "*To date, Nigerian case law has no precedent in which an operator like SPDC was held liable for damage resulting from an oil spill based on a tort of negligence, because the operator had violated a general duty of care to prevent sabotage of its oil pipeline or oil facility by third parties. To date, in Nigerian rulings finding that sabotage was involved, the court consistently ruled that the operator was not liable. This clearly demonstrates that under Nigerian law, operators have no general duty of care in respect of the people living in the vicinity of their oil pipelines and oil facilities to prevent sabotage of these pipelines and facilities. Apparently, to date, Nigerian case law does not designate installing and keeping an oil pipeline or an oil facility in and of itself as creating or maintaining a dangerous situation that creates a general duty of care, even though sabotage frequently occurs in Nigeria.*" (Goi Case- para. 4.45) and Oruma Case - para. 4.47).

⁷¹ Report of the United Nations High Commissioner for Human Rights, Access to justice for children, A-HRC-25-35, 16 December 2013. Available at <http://www.ohchr.org/en/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx> accessed on 24 August, 2014.

⁷² GC No. 5, Op. Cit., note 38, para. 24.

⁷³ FoE Factsheet, Op. Cit., note 49.

⁷⁴ Article 2 of the International Covenant on Civil and Political Rights and article 4 of the Convention on the Rights of the Child; see also: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, article I.2.b.

⁷⁵ Para. 15.

rights have been violated.⁷⁶ The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime further specifies that procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.⁷⁷

47. States are required to ensure children's right to life, survival and development (article 6 of the Convention), the right of the child to the enjoyment of the highest attainable standard of health (article 24 of the Convention), which includes access to clean-drinking water, adequate nutritious food and protection from the dangers and risks of environmental pollution (article 24 (2)(c) of the Convention), as well as effective access to justice and remedies (implicit in the Convention through articles 19, 32(2) and 39). According to the Committee's doctrine the State of the Netherlands, as any other home State, should adopt effective measures to ensure that business enterprises that carry out operations abroad are held accountable for conduct that impairs the enjoyment of children's rights. The State of the Netherlands should establish institutional and legal frameworks that enable businesses to respect children's rights across their global operations. Businesses should be made accountable publicly by using business reporting on their impact on children's rights to assess their performance on the global operation of the entire enterprise.⁷⁸

48. The Guiding Principles on Business and Human Rights reminds States of their obligations and recommend that they "set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations" through measures such as the adoption⁷⁹ of direct extraterritorial legislation and enforcement, criminal regimes, and requirements to report.

49. Finally, States should have in place effective collective complaints mechanisms, such as class actions and public interest litigation, as a means of increasing accessibility to the courts for large numbers of children similarly affected by business actions,⁸⁰ in order to seek effective remedies for abuse or violations of their rights when business enterprises are involved.

Recommendations

50. *In light of the concerns identified above, the Committee should consider requesting the Government of the Netherlands to provide the following information:*

1. *Steps adopted to ensure that business enterprises that carry out operations abroad through subsidiaries can be held accountable for violations of children's rights.*
2. *Steps to make business publicly accountable by using business reporting on their impact on children's rights.*
3. *Steps to ensure that the provisions of the Convention can be directly invoked before Courts, also in civil cases concerning damage caused by a national abroad.*
4. *Steps to ensure that children are able to access effective remedies, in line with the framework set out by the Committee in its General Comment 5, paragraph 24.*
5. *Steps to ensure that collective complaints in the Netherlands, such as class actions and public interest litigation, are in place to ensure that children can seek effective remedies for abuse or violations of their rights when business enterprises are involved.*

⁷⁶ Human Rights Committee, General Comment No. 31, para. 16.

⁷⁷ Para. 35; children may, for instance, need protection in addition to financial redress for violations of their right; see European Court of Human Rights, *Case of K.U. v. Finland* (Application No. 2872/02), Judgment of 2 December 2008, para. 47.

⁷⁸ General Comment No. 16, Op. Cit., note 47, para. 46.

⁷⁹ Guiding Principles on Human Rights and Business, p. 3-4.

⁸⁰ General Comment No. 16, Op. Cit., note 47, paras 68 and 76.