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**INTERNATIONAL COMMISSION OF JURISTS' (ICJ) SUBMISSION  
TO THE UN COMMITTEE ON THE RIGHTS OF THE CHILD IN ADVANCE OF  
THE EXAMINATION OF GERMANY'S THIRD AND FOURTH STATE PARTY  
REPORTS IN ACCORDANCE WITH ARTICLE 44 OF THE CONVENTION ON  
THE RIGHTS OF THE CHILD**

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## **ICJ's submission to the UN Committee on the Rights of the Child in advance of the examination of Germany's Third and Fourth State Party Reports**

### **ICJ's submission to the UN Committee on the Rights of the Child in advance of the examination of Germany's Third and Fourth State Party Reports in accordance with 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 examination by the Committee on the Rights of the Child (the Committee) of the Third and Fourth Periodic Report of Germany pursuant to article 44 of the Convention on the Rights of the Child (the Convention).

#### **EXECUTIVE SUMMARY**

2. In this submission the ICJ draw's the attention of the Committee to concerns related to: (a) the pandemic influenza 2009 A (H1N1) vaccine in Germany; (b) the coal industry and its impact on children's health; and (c) violations of children's rights and German companies' supply chains and purchase of raw materials.

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

4. Within each section, the ICJ concludes with a list of proposed recommendations about what steps Germany should undertake in order to fully and more effectively discharge its obligations under the Convention.

#### **a) PANDEMIC INFLUENZA 2009 A (H1N1) VACCINE IN GERMANY**

Under Article 3(1) of the Convention States party must ensure the best interests of the child as a primary consideration when adopting measures that could have an impact on children. Articles 24(1), 24(2) (a, b, d and f) and 24(4) recognize the right to the highest attainable standard of health; and Article 6(1) and (2) guarantee the right to life and the right to survival and development of the child to the maximum extent possible. States shall consider the best interests of the child when adopting health-related decisions that can have an impact on children's health. Some decisions taken in the context of Germany's handling of the 2009 pandemic influenza and buying of H1N1 vaccine may not have sufficiently considered the best interests of the child and may have put at risk the right to the highest attainable standard of health and the right to survival and development.

5. During the 2009 influenza pandemic, a virus called 2009 A (H1N1) notably affected the Northern Hemisphere. This led the World Health Organization (WHO) to gradually raise the levels of pandemic emergency and preparedness. On 11 June 2009, the pandemic was officially declared and designated as pandemic influenza phase 6. Previously, in May of the same year, the WHO modified the description of pandemic alert phases and removed the criteria relating to the severity of the disease as pre-conditions for scaling up to the highest alert level. The new virus apparently led to patterns of death and illness not normally seen in seasonal influenza infections.<sup>1</sup> According to recent information from the European Centre for Disease Prevention and Control (ECDC), while symptoms of the virus were mild in most people, a significant minority of people suffered severe effects and died as a result.<sup>2</sup>

6. Some national authorities had signed "sleeping contracts", pandemic vaccine agreements providing for the receipt of vaccines without delay in the event that the WHO were to declare a pandemic. In this context, Germany had signed an agreement

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<sup>1</sup> The handling of the H1N1 pandemic: more transparency needed. Rapporteur: Mr Paul FLYNN, United Kingdom, SOC, 23 March 2010, Parliamentary Assembly of the Council of Europe, Social Health and Family Affairs Committee, para. 7.

<sup>2</sup> European Commission / Directorate of Health and Consumers: Pandemic (H1N1) 2009 – Factsheet, March 2010.

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with the British firm GlaxoSmithKline (GSK) in 2007 to buy its pandemic vaccine as soon as phase 6 was declared. In mid-June, 2009, the head of GSK's German division urged Germany's then Health Minister, Ulla Schmidt, "to confirm the delivery stipulated under the contract as soon as possible".<sup>3</sup> In this connection, Paul Flynn, the Rapporteur of the Social Health and Family Affairs Committee of the Parliamentary Assembly of the Council of Europe, in his report referred to "pressure exerted on national governments to activate 'sleeping contracts' after very short delays of reflection (using the argument of 'first come – first served') and the attempt to transfer the main responsibility for side-effects of vaccines to the governments themselves".<sup>4</sup>

7. The German government had ordered 50 million doses of the GSK's vaccine Pandemrix, enough for a double dose for 25 million people, about a third of the German population. Later on, it was suggested that a single vaccination was sufficient for the H1N1 flu.<sup>5</sup>

8. Between 2009 and 2010, the vaccine Pandemrix contained an oil-in-water emulsion adjuvant called ASO3, a substance added to a vaccine to increase the body's immune response.<sup>6</sup> It had never undergone large-scale human trials in connection with the flu antigen. The former Paul-Ehrlich Institute<sup>7</sup> President, Johannes Löwer, stated that in theory it would have been possible to approve an adjuvant-free flu vaccine in Germany, but that the contracts for Pandemrix had been signed in 2007, and they came into effect automatically when the WHO decided to declare phase 6.<sup>8</sup>

9. Acknowledging that the side effects of the adjuvant were not yet entirely known, the Interior Ministry confirmed that it had ordered an alternative vaccine, Celvapan, for government officials and the military. Celvapan, which is made by U.S. pharmaceutical company Baxter, did not contain an adjuvant and was believed by medical experts to have fewer side effects than Pandemrix.<sup>9</sup>

10. Studies undertaken in different countries to assess the effectiveness of the vaccine have produced different results. In May 2010, the Robert Koch Institute made a rapid assessment of the vaccine's effectiveness based on reported data of

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<sup>3</sup> "Part 2: 'Fine-Tuning' the Definition of Pandemic". Der Spiegel (Germany), 12 March 2010, Available online: <http://www.spiegel.de/international/world/reconstruction-of-a-mass-hysteria-the-swine-flu-panic-of-2009-a-682613-2.html>, Accessed 19 November 2013.

<sup>4</sup> See, "The handling of the H1N1 pandemic: more transparency needed", Social Health and Family Affairs Committee, Doc. 12283, 7 June 2010, para. 46, available online: <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12463&Language=EN>, accessed on 19 December 2013, as well as Dr. Wodarg. "Faked Pandemic: WHO and Big Pharma, H1N1-Report of the Council of Europe". Available online: <http://www.wodarg.de/english/3509880.html>, accessed on 21 November 2013.

<sup>5</sup> "Part 2: 'Fine-Tuning' the Definition of Pandemic". Der Spiegel (Germany), 12 March 2010. *Op. cit.*

<sup>6</sup> CDC statement on narcolepsy following Pandemrix influenza vaccination in Europe. Available online: [http://www.cdc.gov/vaccinesafety/Concerns/h1n1\\_narcolepsy\\_pandemrix.html](http://www.cdc.gov/vaccinesafety/Concerns/h1n1_narcolepsy_pandemrix.html), accessed on 19 November 2013.

<sup>7</sup> "The Paul-Ehrlich-Institut is an institution of the Federal Republic of Germany. It reports to the [Bundesministerium für Gesundheit](http://www.bmg.bund.de) (Federal Ministry of Health). Most of its activities relate to the various duties laid down in German and European medicinal product legislation, such as for example the approval of clinical trials and the marketing authorisation of particular groups of medicinal products." For more information, see <http://www.pei.de/EN/institute/institute-node.html>, accessed on 19 December 2013.

<sup>8</sup> "Part 2: 'Fine-Tuning' the Definition of Pandemic". Der Spiegel (Germany), 12 March 2010, Available online: <http://www.spiegel.de/international/world/reconstruction-of-a-mass-hysteria-the-swine-flu-panic-of-2009-a-682613-2.html>, accessed on 19 November 2013.

<sup>9</sup> Moore T. "In Germany, a Better Vaccine for Politicians?" Time, Health & Family, October 2009, available online: <http://content.time.com/time/health/article/0,8599,1932366,00.html#ixzz2lHaGKIQN>, accessed on 21 November 2013.

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vaccinated and unvaccinated pandemic influenza cases and vaccination coverage estimates applying a screening method. Preliminary results show excellent effectiveness in persons aged 14-59 years and moderately high effectiveness in those 60 years or older.<sup>10</sup>

11. In 2013 a study conducted by the BMJ Group in England,<sup>11</sup> highlighted a causal association between an increased risk of narcolepsy and vaccination with AS03 adjuvant pandemic A/H1N1 2009 vaccine, consistent with other findings from Finland. However, a potential overestimation of this risk may remain<sup>12</sup> given the more rapid referral of vaccinated children because of variable delay in diagnosis. Vaccination against seasonal influenza in 2009/2010 or in previous years was reported in 15.7% of all children in Germany.<sup>13</sup>

12. As emphasised by the Committee in its General Comment No. 16, the State has the obligation to respect, protect and fulfil children's rights. Under article 3(1) of the Convention, Germany must ensure that there is a continuous consideration of the impact on the rights of the child when adopting a business related policy, legislation or when contracting with business enterprises. The States must take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children's rights and it is responsible when it fails to undertake these preventive measures. In this regard, to undertake a child rights impact assessment could be especially beneficial.

13. In light of the above, the ICJ considers that, while the studies undertaken thus far by German institutions are welcomed, there is still a lack of sufficient knowledge concerning the vaccine's side effects and its safety, particularly in respect of children. As a result, it would appear that the State party did not take all the appropriate measures to ensure the effectiveness and safety of the vaccine. In turn, this may have impaired children's right to the enjoyment of the highest attainable standard of health protected by article 24 of the Convention.

### Recommendations

14. In light of the above-mentioned concerns, the ICJ urges the Committee to make the following recommendations. Consistent with its obligations under the Convention, including in particular under Articles 3(1) and 24(1), 24(2) (a, b, d and f) and 24(4), and given the role of business enterprises in the handling of the 2009 H1N1 flu health crisis by Germany, the ICJ considers that the government of Germany must:

- i) *Provide disaggregated data on the number of children affected by the virus, the number of vaccinated children and the effectiveness of the vaccine.*
- ii) *Provide information about the testing measures undertaken for the approval of the vaccine and its adjuvant, including as to whether enough tests were carried out.*

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<sup>10</sup> Wichmann O, Stöcker P, Poggensee G, Altmann D, Walter D, Hellenbrand W, Krause G, Eckmanns T. Pandemic influenza A(H1N1) 2009 breakthrough infections and estimates of vaccine effectiveness in Germany 2009-2010. Euro Surveill. 2010; 15(18):pii=19561; available online: <http://www.eurosurveillance.org/ViewArticle.aspx?ArticleId=19561>, accessed 19 November 2013.

<sup>11</sup> Risk of narcolepsy in children and young people receiving AS03 adjuvanted pandemic A/H1N1 2009 influenza vaccine: retrospective analysis. BMJ 2013;346:f794. Available online: <http://dx.doi.org/10.1136/bmj.f794>, Accessed 19 November 2013.

<sup>12</sup> The BMJ Group research underlines that "despite attempts to minimise ascertainment bias, the potential for overestimation of risk remains because of more rapid referral of vaccinated patients. Long term follow-up of the cohorts exposed to the vaccine is needed to properly evaluate the attributable risk".

<sup>13</sup> Von Kries R, Weiss S, Falkenhorst G, Wirth S, Kaiser P, et al. (2011). Post-Pandemic Seroprevalence of Pandemic Influenza A (H1N1) 2009 Infection (Swine Flu) among Children, 18 Years in Germany. PLoS ONE 6(9): e23955. doi:10.1371/journal.pone.0023955, (p.2).

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- iii) *Carry out investigations in order to clarify the decision-making process in relation to these matters.*
- iv) *Provide information about the legislative or administrative measures aimed at the improvement of governance systems in the public health sector in order to guarantee the highest democratic accountability possible when contracting with business enterprises.*
- v) *If specific individual rights are violated, ensure that effective remedies and reparation are available to the affected population.*

### **b) COAL INDUSTRY AND IMPACT ON CHILDREN'S HEALTH**

15. The emissions of coal power plants contribute significantly to the incidence of ill-health, including serious disease, from environmental pollution, affecting children's right to the highest attainable standard of health protected under Article 24 of the Convention and Article 12 of the International Covenant of Economic, Social and Cultural Rights (ICESCR), and children's right to life, survival and development guaranteed by Article 6 of the Convention.<sup>14</sup> Under Article 3(1) of the Convention the child's best interests should be given primary consideration when adopting measures that could have an impact on children. States must not directly or indirectly aid any impairment of children's rights in any context; they must take into consideration the best interests of the child at all times when adopting budgetary measures or subsidizing business enterprises. The State must not invest public finances and other resources in business activities that may impair the exercise by children of their Convention rights. In this regard, the State Party should require business enterprises to exercise due diligence in respect of children's rights, ensuring that they identify, prevent and mitigate the detrimental impact of their activities on children's rights. Finally, General Comment 16 affirms that when children are identified as victims of environmental pollution, the State Party should take all relevant steps to prevent further damage to children's health and development and repair any damage done.<sup>15</sup>

16. The figures published in the Health and Environment Alliance<sup>16</sup> report show that the coal industry in the European Union has a wide impact that leads to more than 18,200 premature deaths, some 8,500 new cases of chronic bronchitis, and over 4 million lost working days each year. The annual cost of respiratory care and lost workdays is estimated between 15.5 and 42.8 billion euros. Germany is one of the three European countries where coal is heavily used in the production of power, accounting for half of these costs.<sup>17</sup>

17. Coal power generation greatly increases the poor quality of outdoor air in Europe which is generally caused by the transport sector, industrial processes, residential heating, and agriculture. Coal power plants release significant amounts of particulate matter, sulphur dioxide, and nitrogen oxides, the latter contributing indirectly to the formation of ozone. Among them, fine particulate matter (PM2.5) and ozone are considered the most noxious substances. As these particles are dispersed in outdoor air, the whole European population is likely to be affected by coal pollution.<sup>18</sup>

18. Environmental pollution is mainly associated with respiratory and cardiovascular conditions, which are two important groups of leading chronic diseases in Europe. Among these, one finds chronic respiratory diseases, such as chronic bronchitis, emphysema and lung cancer; as well as chronic cardiovascular diseases, such as myocardial infarctions, congestive heart failure, ischemic heart disease and

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<sup>14</sup> General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights. CRC/C/GC/16

<sup>15</sup> General Comment No. 16, Op Cit note 16 above, para. 31

<sup>16</sup> Huscher J, Smith D. *The Unpaid Health Bill: How coal power plants make us sick*. The Health and Environment Alliance (HEAL), March 2013. Available online: [www.env-health.org/unpaidhealthbill](http://www.env-health.org/unpaidhealthbill), accessed 15 November 2013.

<sup>17</sup> Huscher J, Smith D, op. cit. The other two are Poland and Romania.

<sup>18</sup> Huscher J, Smith D, op. cit. (p. 6).

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heart arrhythmias. Acute effects include respiratory symptoms, such as chest tightness and coughing, as well as exacerbated asthma attacks. The latest studies show that children's early-life exposure to air pollutants is a contributing factor to higher risks of developing chronic diseases later in life, including obesity, diabetes, and hormone-related cancers. Moreover, studies have found that exposure to outdoor air pollution during pregnancy may cause lower birth weight,<sup>19</sup> as well as higher rates of preterm birth and pre-eclampsia.<sup>20</sup>

19. Special concern arises from the large-scale emission of other hazardous substances from the smokestacks of coal power plants, such as heavy metals like mercury. The latter, which can either be breathed in or ingested indirectly via food and water, can impair the cognitive development of children and cause irreversible damage to vital organs of the foetus.<sup>21</sup>

20. In Germany the healthcare cost associated with coal emissions has been found at 2.3 to 6.4 billion euros, taking into account the fact that the attribution of health costs to individual countries does not reflect where the health impact finally occurs. The above notwithstanding, new hard coal plants will start operating by the end of 2013.<sup>22</sup>

21. Coal combustion and coal mining is an industry that receives direct and indirect subsidies in several EU Member States. In Germany, 2.7 billion Euros (equivalent to 75,000 Euros per mining job) of coal subsidies were spent in 2005, hard coal being the source of primary energy that has obtained more subsidies per unit.<sup>23</sup> Although coal is promoted as a cheap fuel, new coal plants receive substantial state subsidies, whether directly or through tax exemptions, without taking into consideration the substantial costs to public health highlighted above.<sup>24</sup>

22. Scientific research has documented the effects of the German coal industry on children's health. As established in General Comment No. 16, the State has an obligation to ensure the survival and development of the child and adopt measures to ensure that the environmental degradation and contamination arising from business activities do not compromise children's right to life and to health (Articles 6 and 24 of the Convention). In this regard, Germany should make sure that the outdoor air quality is suitable to enhance children's right to health and their right to survival and development to the maximum possible extent. When adopting budgetary measures or subsidizing coal industry, the best interests of the child should be a primary consideration (article 3) and the adoption of a child rights impact assessment would be appropriate. Finally, children's rights-based regulation of corporate conduct is necessary to induce the coal industry to respect human rights and adopt due diligence in respect of their activities.

### Recommendations

23. Given the contribution of the German coal industry to environmental pollution and its impact on children's health, consistent with its obligations under Articles 3, 6

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<sup>19</sup> Davdand P, Parker J, Bell ML, et al. (2013): Maternal Exposure to Particulate Air Pollution and Term Birth Weight: A Multi-Country Evaluation of Effect and Heterogeneity. Environmental Health Perspectives, available online: <http://ehp.niehs.nih.gov/pdf-files/2013/Feb/ehp.1205575.pdf>, accessed on 20 November 2013.

<sup>20</sup> Huscher J, Smith D, op. cit. (p. 12).

<sup>21</sup> *Ibid*, (p. 6).

<sup>22</sup> Bloomberg. "Merkel Facing Power Dilemma as Coal Plants Open: Energy Markets", 4 November 2013, available online: <http://www.bloomberg.com/news/2013-11-04/merkel-facing-power-dilemma-as-coal-plants-open-energy-markets.html>, accessed on 20 November 2013.

<sup>23</sup> IEEP et al. (2007). *Reforming environmentally harmful subsidies*. Final report to the European Commission's Directorate General Environment, March 2007.

[http://ec.europa.eu/environment/enveco/others/pdf/ehs\\_sum\\_report.pdf](http://ec.europa.eu/environment/enveco/others/pdf/ehs_sum_report.pdf).

<sup>24</sup> Huscher J, Smith D, op. cit. (p. 25).

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and 24 of the Convention, the ICJ urges the Committee to make the following recommendations. The government of Germany must:

- i) *Provide information on the existing regulations to assess the environmental impact of coal business on children's rights, as well as about the monitoring measures aimed at regularly protecting children from the environmental impact of business enterprises.*
- ii) *Provide information about the consideration of the best interest of the child by the State Party when adopting budgetary measures such as subsidizing business enterprises affecting children's rights.*

### **c) VIOLATIONS OF CHILDREN'S RIGHTS AND GERMAN COMPANIES' SUPPLY CHAINS AND PURCHASE OF RAW MATERIALS**

24. In the past few years several German companies, through their subsidiaries or as a result of the activities of their supply chains, have been accused of human rights abuses committed abroad. The Committee has underlined on several occasions the obligation of States to respect and ensure children's rights under their jurisdiction, which may not be limited to the State territory.<sup>25</sup> Provided that a reasonable link exists between the State and the company responsible for the conduct concerned, the Committee has reiterated in General Comment No. 16 the State obligations to respect, protect and ensure children's rights abroad.

25. In relation to infringements of human rights by German companies' subsidiaries in host countries, particular attention has been paid to the case of *Mubende vs Neumann Kaffee Gruppen*.

26. In August 2001 the Ugandan army violently expelled more than 2,000 people from their land (2524 ha) in order to lease it to Kaweri Coffee Plantation Ltd., a 100% subsidiary of the Neumann Kaffee Gruppe (NKG) based in Hamburg, Germany. It would appear that the Ugandan Government acted pursuant to an agreement with the foreign investor under which it was committed to providing the land clear of encumbrances. Until today, the evictees have not been compensated for the eviction and the loss of their property. They live in poorer conditions than before the eviction.<sup>26</sup>

27. The eviction and its aftermath for the Mubende community, including their children, violated international standards and also domestic Ugandan law. Article 19 of the Convention requires States to take appropriate measures "to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment..."; Article 27 provides the right "to a standard of living adequate for the child's physical, mental, spiritual, moral and social development"; and Article 28 guarantees the child's right to education. Many of the evictees were lawful customary tenants who had security of occupancy under the 1998 Land Act of Uganda. According to this Act (article 29(2-a)), the evictees qualified as "*bona fide* Occupant" of the land. This means that they had occupied and utilized or developed the land unchallenged by the registered owner or agent of the registered owner for twelve years or more. In the Mubende case the evictees had lived on the land more than 12 years unchallenged by anyone.

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<sup>25</sup> The Committee raised this issue for the first time in its General Comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 41 (A/61/41)*, annex II, para. 12. See also General Comment No. 16 on State obligations regarding the impact of the business sector in children's rights. p. 12 CRC/C/GC/16.

<sup>26</sup> Corporate complicity, access to justice and the international legal framework for corporate accountability, International Commission of Jurists, Geneva 2013, available at: <http://www.icj.org/report-corporate-complicity-access-to-justice-and-the-international-legal-framework-for-corporate-accountability/>. The information in this section is taken from this report.

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28. As reported by the affected communities, which included numerous children, the manner in which the evictions were carried out discloses numerous human rights violations. The villages were stormed by military personnel and their inhabitants, including several children, were violently expelled from the area. The evictees report that they were forced to leave at gunpoint and that some of them were beaten. The military personnel set the place ablaze. Houses were burnt down and demolished, including the private clinic with all the equipment and six churches, movable properties were looted and crops were cut down and uprooted. The building of Kitemba primary school is used as headquarter of the company and no other primary building school has been provided for educational needs.

29. Following the displacement there was an increase in illnesses and deaths as the victims of the eviction had lost much of their access to clean water and health care. Many of the evictees have been living since then on the border of the plantation and have constructed makeshift homes there. In order to sustain their livelihood, some evictees have found shelter on the neighbouring land for temporary, small-scale farming. However, they only have small plots of land for farming which are insufficient to provide their families with adequate food.

30. On 28<sup>th</sup> March 2013, the High Court in Kampala, Uganda, ordered that compensation in the amount of approximately eleven million Euros be paid to the 2,041 evictees of land now occupied by the Kaweri-Coffee-Plantation, which continues to be owned by the German Neumann Gruppe. In accordance with the judgment, compensation is not required directly from the defendants themselves, but rather from the lawyers of the German investors. However, in his final remarks the High Court judge harshly criticized the German investors for neglecting their duty to exercise due diligence in respect of the way in which their activities affected human rights:

"The German investors had a duty to ensure that our indigenous people were not exploited. They should have respected the human rights and values of people and as honourable businessman and investors they should have not moved into the lands unless they had satisfied themselves that the tenants were properly compensated, relocated and adequate notice was given to them. But instead they were quiet spectators and watched the drama as cruel and violent and degrading eviction took place through partly their own workers. They lost all sense of humanity."<sup>27</sup>

31. In relation to the transnational element of the cases, the Mubende case was not pursued before German courts but before the German National Contact Point (NCP) established to promote compliance with the Organization for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises. It appears that the plaintiffs and their advisors considered that the German legal system did not permit legal action against the parent company (i.e. Neumann Kaffee) on account of its role in the wrongdoing by its subsidiary abroad (Kaweri Inc of Uganda). Instead, the plaintiffs pursued recourse to the German NCP, filing a complaint in June 2009 alleging unlawful forced eviction and the company's unwillingness to engage in dialogue and exert influence on the Ugandan government. The NCP accepted the complaint for further examination and in its final statement<sup>28</sup> it stated that its mediation created a constructive dialogue where each party was able to present its view, but it is unclear whether that dialogue had occurred in face-to-face meetings. What is clear is that there was a final joint discussion in December 2010 in which both

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<sup>27</sup> Baleke Kayira & 4 Ors v Attorney General & 2 Ors, Civil suit No. 179 of 2002, [2013] UGHC 52, 28 March 2013. Furthermore, the judge stated that the evictees were lawful occupants of the land prior to the leasehold of the land by NKG; that the managers of Kaweri had direct and constructive knowledge that the tenants were to be evicted and were indeed evicted; and that the evictees were not compensated.

<sup>28</sup> Final Declaration by the NCP for the OECD Guidelines for Multinational Enterprises regarding a complaint by Wake up and Fight for your Rights Madudu Group and FIAN Deutschland against Neumann Gruppe GmbH, Berlin 30 March 2011.



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parties presented their views and committed to reaching an out-of-court settlement. On this basis, and on account of the company's philanthropic activities, the NCP reached the conclusion that Neumann Gruppe had met the plaintiff's demands. Interestingly, the NCP concludes that "there were no indications that Neumann Gruppe could not believe in good faith that it had acquired the land for use as the Kaweri Coffee Plantation from the Ugandan investment authority free of encumbrances and claims of third parties." It also urgently called on plaintiffs to refrain "from public attacks against Neumann Gruppe".

32. The NCP is situated within the Ministry of Economics which has as a primary objective the promotion of trade and investment, giving rise to a reasonable apprehension of a conflict of interests on the Ministry's part in this matter. Many NCPs and their staff understand their work to consist mainly in the promotion of the OECD guidelines and mediation when disagreements emerge, rather than to serve as a remedial mechanism. In this case, the German NCP also had doubts as to whether it was competent to deal with a case where the primary perpetrator of the eviction and property destruction was the Ugandan Army. However, the Mubende community complains that company personnel in fact had a role in the eviction, destroying crops and trees. Whether the parent company Neumann Kaffee Gruppe was legally culpable or not, at the very least it seems to have ignored its due diligence responsibilities *vis a vis* its subsidiary's actions in Uganda. In this regard, it is of note the stark contrast between the holdings of the Ugandan High Court judge and the German NCP as to the probable knowledge the company should have had in the circumstances.

33. The case was raised before the Human Rights Committee (HRC) in 2012 in the context of its examination of the sixth periodic report of Germany under the International Covenant on Civil and Political Rights. In its Concluding Observations, the HRC stated: "While welcoming measures taken by the State party to provide remedies against German companies acting abroad allegedly in contravention of relevant human rights standards, the Committee is concerned that such remedies may not be sufficient in all cases (art. 2, para. 2). The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad."<sup>29</sup>

34. A similar case was brought to the German NCP in response to allegations of human rights abuses in the Democratic Republic of Congo (DRC) by the German wood processing company Danzer. Given that under German law legal entities can only incur administrative as opposed to criminal liability, the complainants filed a criminal complaint against one of Danzer's senior managers in Germany.<sup>30</sup> They alleged that he had been responsible for grave human rights abuses, including the rapes of women and girls, committed during raids in the village of Bongulu, northern DRC, on 2 May 2011, by Congolese police and military. At the time, the perpetrators were being financed by Siforco, a Danzer subsidiary in the region from whom they were also receiving logistical support. The criminal complaint focused on the role played by a senior manager at Danzer who had allegedly failed to provide Siforco with clear instructions about local forces engaging in violent acts against the local communities, especially given the well-known record of the police and army in human rights violations in the DRC.<sup>31</sup> While the company contends that they would have never allowed the use of their vehicles to commit the above-mentioned crimes, nevertheless

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<sup>29</sup> Concluding Observations, Germany, CCPR, adopted by the Committee at its 106<sup>th</sup> session, 15 October to 2 November, CCPR/C/DEU/CO/6, 12 November 2012, para. 16, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fDEU%2fCO%2f6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fDEU%2fCO%2f6&Lang=en), accessed on 19 December 2013.

<sup>30</sup> ECCHR (2013), *Criminal complaint filed accuses Senior manager of Danzer Group of Responsibility over Human Rights Abuses against Congolese community*. Available online at <http://www.ecchr.de/index.php/danzer-en.html>, accessed on 18 November 2013

<sup>31</sup> Ibid

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there may have been a lack of proper assessment of the risk and a failure to exercise due diligence.

35. The Convention's Article 4 sets out the obligation to undertake all appropriate legislative, administrative and other measures for the implementation of the rights of the child. General Comment No.16 recommends States "to consider the adoption of criminal legal liability – or other form of legal liability of equal deterrent effect- for legal entities, including business enterprises, in cases of serious violations of the rights of the child such as forced labour." (paragraph 70) Germany should review its national legislation concerning legal liability for legal entities in the light of these recommendations and also consider appropriate reforms of its OECD NCP to ensure it acts with independence, is accessible and its outcomes are effective. For those States adhering to the OECD Guidelines for multinational enterprises, the Committee recommends that they should support their "National Contact Points in providing mediation and conciliation for matters that arise extra-territorially by ensuring that they are adequately resourced, independent and mandated to work to ensure respect for children's rights in the context of business issues".<sup>32</sup>

36. In the past three years complaints have been filed with the NCP against German companies in connection with the direct and indirect purchasing of raw materials, such as Uzbek cotton.<sup>33</sup> Uzbekistan has been repeatedly accused of State organized allegedly unlawful and forced use of child labour in the cotton harvest, in disregard of its obligation to protect the child from economic exploitation (Article 32 of the Convention). For six of the cases presented to different European NCP the complainants and defendants in each case agreed to take specific measures to improve the situation on the ground. As a result at least partly of international pressure, European traders committed to taking specific action and to using their leverage with the Uzbek government to improve the situation and outlaw forced child labour. Nevertheless, as the international campaigns lost momentum the companies' commitment waned and commitments were abandoned.<sup>34</sup> At the time the complaints were filed the issue was also raised by the German Federal government's Commissioner for Human Rights, who expressed his concern about the use of forced child labour in the harvesting of cotton and brought the issue to the German political agenda. The NCP in its final statement confirmed that the German government had raised the issue with its Uzbek counterpart and had asked it to eradicate the use of forced child labour in the cotton harvest industry. Nevertheless, the NGO Anti-Slavery International alleges that concrete measures were not taken beyond mere political statements and there has also been a failure to tackle this issue meaningfully at the European level.<sup>35</sup>

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<sup>32</sup> General Comment No 16, para. 46

<sup>33</sup> Complaint of 22<sup>nd</sup> October 2010 against Otto Stadlander GmbH. In this case the German NCP found that only 5% of the cotton was supplied from Uzbekistan and none from state owned companies according to the company. The NCP considered therefore that the respondent could exert little to no influence over the Uzbek government behaviour. Nevertheless both parties agreed to take measures against child and forced labour and report back to the NCP within a year. Available online at [http://www.oecd.org/daf/inv/mne/17-09-11\\_German\\_NCP\\_final\\_statement\\_Otto%20Stadtlander.pdf](http://www.oecd.org/daf/inv/mne/17-09-11_German_NCP_final_statement_Otto%20Stadtlander.pdf), accessed 15 November 2013. Other European NCP to whom similar complaints were filed did consider OECD guidelines had been violated and declared that the "trade of products resulting from forced child labour, where ever it may occur, amounts to a flagrant and characterized violation of the OECD Guidelines" (the French NCP on the Complaint of 25th October 2010 against Devcot S. A.) The French NCP while acknowledging that the company had not purchased any cotton from Uzbekistan in the last few years reminded the company of its responsibility over their supply chain and invited Devcot to perform due diligence and encourage its business partners to implement the OECD guidelines. Available online at [http://oecdwatch.org/cases/Case\\_194](http://oecdwatch.org/cases/Case_194), accessed 15 November 2013.

<sup>34</sup> European Center For Constitutional and Human Rights, (ECCHR) (2013). *Forced labour of Children and Adults in Uzbekistan*, p. 3

<sup>35</sup> Ibid p.6. Also see Anti Slavery letter dated 2<sup>nd</sup> May 2013 requesting European Commission to put an end to Uzbek trade preferences based on the grave human rights violations perpetrated by the state. Available online at

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37. Concerns have also been raised about the import of raw materials from energy companies and especially coal import. German energy companies import some 75 per cent of the hard coal that is used in Germany, mainly from supplier companies that are accused of abusing human rights in the host countries.

38. Thirty-one per cent of the imported coal in Germany comes from Colombia where a 95 per cent of the coal is extracted for the export market, and foreign companies almost exclusively control the sector. The activities of these companies have allegedly impaired the enjoyment of children's rights such as the right "to the highest attainable standard of health" (article 24) or the right "to a standard of living adequate for the child's physical, mental, spiritual, moral and social development" (article 27). The regions affected by coal mining are among the poorest in Colombia and they are areas where the mining companies have dispossessed small farmers and indigenous communities. The Cerrejón<sup>36</sup> mine is based in Guajira, where communities reportedly suffer from chronic health problems and 50 per cent of indigenous Wayúu children are severely undernourished. This coal producer company is planning to expand its operations by rerouting the Rancheria River in order to mine 500 million tons of coal beneath the riverbed. This river is the Wayúu communities' lifeline and their agricultural resources would be severely affected without its water in this semi-arid region. Other communities (such as Tabaco) were forcibly displaced and have still not been resettled.

39. The Russian Federation has become the second most important source of foreign coal for German power plants. Most of the coal exported comes from the Kuznetsky Basin (Kuzbass) in the region Kemerovo. Decades of coal mining have had a disastrous impact on the health of the local population: the concentration of air pollutants is at minimum two to three times higher than in the rest of Russia and the drinking water in the vicinity of the mines is highly polluted.<sup>37</sup> Furthermore, the ancestral lands and culture of the local, indigenous tribes (i.e. Shor and Teleut) are under extreme pressure and threat of disappearance altogether.<sup>38</sup>

### Recommendations

40. In light of the concerns identified above, and given the inadequacy of the measure that Germany has taken to ensure the discharge of its obligations under the Convention, the ICJ urges the Committee to make the following recommendations. The government of Germany must:

- i) *Take the necessary measures to ensure that existing legal liability by legal entities, particularly business enterprises, may be enforced by providing under domestic law an individual's right of action which would allow for direct recourse to appropriate administrative bodies and trigger administrative proceedings against the company concerned.*
- ii) *Implement the necessary legislative changes to establish German parent companies' legal liability for acts or omissions amounting to complicity in serious abuses of children's human rights committed by a subsidiary, supplier or associated company.*
- iii) *Establish clear expectations that all business enterprises domiciled in Germany and/or otherwise under its jurisdiction respect children's rights in accordance with the Convention throughout their operations.*

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[http://www.antislavery.org/english/press\\_and\\_news/news\\_and\\_press\\_releases\\_2009/eu\\_should\\_end\\_trade\\_preferences\\_for\\_uzbekistan.aspx](http://www.antislavery.org/english/press_and_news/news_and_press_releases_2009/eu_should_end_trade_preferences_for_uzbekistan.aspx), accessed 19 November 2013.

<sup>36</sup> Anglo American Company.

<sup>37</sup> Ecodefense (2013) Sliviyak, V. Podosenova, O. *Russia Coal Industry. Environmental and public health impacts and regional development prospects*. June 2013 Available online at <http://below2c.files.wordpress.com/2013/06/russian-coal-industry-preliminary-english-version.pdf>, accessed 21 November 2013.

<sup>38</sup> Ganswindt K, Rötters S and Schucking H., *op cit*.

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- iv) Take appropriate measures to strengthen the remedies provided to protect children who have been victims of activities of such business enterprises operating abroad.*
- v) Develop implementation guidelines on human rights due diligence for businesses, also in relation to their global supply chains and subsidiaries and make such due diligence a legal requirement.*
- vi) Ensure that trade arrangements and raw materials partnerships promote human rights, for example through human rights impact assessment or implementation of human rights clauses, rather than fuelling the perpetration of grave human rights abuses.*