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PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT

**Report of the Special Rapporteur on the adverse effects of the movement and
dumping of toxic and dangerous products and wastes on the enjoyment of
human rights, Okechukwu Ibeanu ***

Addendum

**Mission to Côte d'Ivoire and the Netherlands **
(4 to 8 August 2008 and 26 to 28 November 2008)**

* Late submission.

** The summary is being circulated in all official languages. The report itself, contained in the annex to the summary, is being circulated in the language of submission and in French.

Summary

This report presents the findings and recommendations of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights emanating from his country visit to Côte d'Ivoire from 4 to 8 August 2008 and to the Netherlands from 26 to 28 November 2008.

The two country visits were undertaken as part of the Special Rapporteur's efforts to examine the effects on the enjoyment of human rights of the movement and dumping of toxic and dangerous products and wastes from the vessel 'Probo Koala', in Abidjan, Côte d'Ivoire, on and about 19 August 2006. The Probo Koala had been chartered by commodity trading company Trafigura and had inter alia docked in Amsterdam, the Netherlands, prior to its journey to Côte d'Ivoire where the waste from the ship was dumped in various sites in the district of Abidjan.

With regard to the Netherlands, the visit focused on events surrounding the aborted offloading of the waste from the Probo Koala in the port of Amsterdam, the reloading of the waste and subsequent departure of the ship. The Special Rapporteur also assessed actions undertaken by the Dutch authorities after the dumping had taken place in Côte d'Ivoire.

The Special Rapporteur concludes that improved measures have been put in place to avoid the recurrence of similar incidents in the Netherlands. He encourages public authorities to ensure rigorous inspection and, where necessary, the detention of ships,

such as the Probo Koala. The Netherlands should also continue to provide support to the Government of Côte d'Ivoire to enable the latter to effectively monitor and address the long-term human health and environmental effects of the incident.

The scope of the visit to Côte d'Ivoire included a review of procedures followed prior to and during the offloading and dumping of the waste from the Probo Koala and an assessment of remedial action undertaken by the Government after the incident had taken place. The Special Rapporteur identified an urgent need to tackle outstanding issues, in particular as regards decontamination, health care and compensation. He encourages the Ivorian authorities to undertake further action to protect the right to life, the right to the enjoyment of the highest attainable standard of physical and mental health and the right to a healthy environment of all affected victims and their families.

The focus of the Special Rapporteur's review of the role of Trafigura in the dumping of the waste from the Probo Koala was on the company's responsibility to respect human rights. In this regards, he recommends Trafigura to continue to fund and support outstanding remedial work in Côte d'Ivoire. In its overall operations, Trafigura should also ensure that timely and reliable information is disclosed regarding its activities and the nature and composition of the waste these activities generate. In addition Trafigura should provide adequate and timely information on the potential environment, health and safety impacts of its activities and systematically ensure waste treatment in an environmentally sound manner, including by rigorously assessing appropriate port reception facilities and balancing commercial interests with human rights and environmental requirements.

ANNEX

Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu

**Mission to Côte d'Ivoire and the Netherlands
(4 to 8 August 2008 and 26 to 28 November 2008)**

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I. INTRODUCTION

1. The Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights conducted a country visit to Côte d'Ivoire from 4 to 8 August 2008 and to the Netherlands from 26 to 28 November 2008.

2. The two country visits were undertaken as part of the Special Rapporteur's efforts to examine the effects on the enjoyment of human rights of the movement and dumping of toxic and dangerous products and wastes from the vessel 'Probo Koala', in Abidjan, Côte d'Ivoire, on and about 19 August 2006. The Probo Koala had been chartered by commodity trading company Trafigura and had inter alia docked in Amsterdam, the Netherlands, prior to its journey to Côte d'Ivoire. Hence, the findings of both visits are presented in one comprehensive report.

3. During his visit to Côte d'Ivoire, the Special Rapporteur met with representatives of the Ministry of Foreign Affairs, the Ministry of the Environment, Water and Forests, the Ministry of Justice and Human Rights, the Ministry of Animal Husbandry and Fisheries, the Ministry of Town and Urban Sanitation, the Ministry of Health and Public Hygiene, the Prime Minister's Office, the Parliamentary Committee on the Environment, the Governor of the District of Abidjan, the Executive Bureau of the National Human Rights Commission of Côte d'Ivoire, the Public Prosecutor, the Côte d'Ivoire Centre of Anti-Pollution (CIAPOL), the President of the International Commission of Enquiry on Toxic Waste in the District of Abidjan, the President of the National Commission of Enquiry on Toxic Waste in the District of Abidjan, the

National Office of Civil Protection, the Chamber of Commerce and Industry, the Autonomous Port of Abidjan, the United Nations Operation in Côte d'Ivoire (ONUCI), the International Committee of the Red Cross, the chief of the village in Akouédo, civil society, and victims. The Special Rapporteur also had the opportunity to visit some of the sites where waste from the Probo Koala was discharged in the districts of Abobo, Akouédo, Route d'Alepe and Vridi.

4. During his visit to the Netherlands, the Special Rapporteur met with representatives of the Ministry of Foreign Affairs, the Ministry of Transport and its Inspectorate, the Ministry of Housing, Spatial Planning and Environment and its Inspectorate, the Amsterdam City Council, the Mayor of Amsterdam, the Port of Amsterdam, Amsterdam Port Services, Saybolt International, as well as parliamentarians of the Standing Committee on the Environment, the Public Prosecutor, academics, lawyers and members of civil society. In addition, the Special Rapporteur met with Trafigura's director and his lawyer, as well as with an external adviser appointed by Trafigura to conduct an independent inquiry into the incident surrounding the Probo Koala. Prior to the visit to the Netherlands, the Special Rapporteur had already met with Trafigura representatives in Geneva, Switzerland, on 10 September 2008.

5. Both missions were carried out at the invitation of the respective Governments. The Special Rapporteur wishes to thank both the Government of Côte d'Ivoire and the Government of the Netherlands for extending invitations and for their cooperation during the visits.

6. In relation to the visit to Côte d'Ivoire, the Special Rapporteur would like to thank the Côte d'Ivoire Ministry of Environment, Water and Forestry for having taken the lead in the organization of the mission to Côte d'Ivoire. He would also like to express his appreciation to the United Nations Operation in Côte d'Ivoire (ONUCI) and its Human Rights Division for their tireless efforts and support throughout his visit. In addition, the Special Rapporteur would like to express his sincere gratitude to civil society representatives, including victims and associations representing their interests, who took the time to meet and speak with him during and in relation to his visit to Côte d'Ivoire.

7. In relation to the visit to the Netherlands, the Special Rapporteur would like to thank the Ministry of Foreign Affairs for its leading role in the organization of the visit. He would also like to give special thanks to the Standing Committee on the Environment in the Parliament for its commitment and cooperation during his visit.

8. The present report provides an account of the Special Rapporteur's findings and recommendations emanating from the two visits. Following an overview of the specific objectives of the visits and relevant international standards used by the Special Rapporteur as a framework for analysis, the report briefly describes the sequence of events leading up to the dumping of wastes from the vessel 'Probo Koala' in Abidjan, Côte d'Ivoire, its impact on the enjoyment of human rights and the response by relevant duty bearers and other stakeholders. The report concludes with a set of recommendations geared towards action still to be undertaken to realize the rights of victims and their families.

II. PURPOSE OF THE VISITS AND FRAMEWORK FOR ANALYSIS

9. The specific purpose of the two country visits was essentially threefold:
 - (a) to examine the adverse effects on the full enjoyment of human rights resulting from the movement and dumping of the waste from the Probo Koala;
 - (b) to assess the response by relevant duty bearers and other stakeholders on the basis of their obligations and responsibilities under international human rights and environmental law; and
 - (c) to identify lessons learned and recommend additional measures in order to ensure the full realization of the victims' right to an effective remedy and reparation.
10. While the Special Rapporteur acknowledges the involvement of a range of States and third parties in the movement and dumping of the waste from the Probo Koala, the report is limited to an assessment of actions undertaken by the Government of the Netherlands, the Government of Côte d'Ivoire, and Trafigura. These limitations are imposed by practical and financial constraints on the ability of the Special Rapporteur to undertake country visits, but also reflect the Special Rapporteur's evaluation of the central role played by these stakeholders in the incident.
11. The Special Rapporteur wishes to stress that the purpose of the visits was not to make inferences on the question of alleged liability of relevant stakeholders under

criminal and civil law. He is aware that Trafigura is currently contesting the consequences of the dumping in legal proceedings in several countries, including the Netherlands and the United Kingdom. The Special Rapporteur also notes that the question of liability falls outside the scope of his mandate. Instead, the focus of the report is on the rights of victims of the incident.

12. In order to assess the level of realization of their rights, the Special Rapporteur refers in particular to the following international human rights standards:

(a) The right to life, as enshrined *inter alia* in article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights (ICCPR); and

(b) The right to the enjoyment of the highest attainable standard of physical and mental health, as set out *inter alia* in article 25 (a) of the Universal Declaration of Human Rights and article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

13. Relevant principles, which the Special Rapporteur also considers of great importance to ensure a human rights-based approach to the management of toxic and dangerous products and wastes in general, and which he has taken into account in his analysis, are: accountability, transparency, access to information and participation. These principles are grounded in the right to an effective remedy, the right to freedom of expression and the right to take part in the conduct of public affairs, as enshrined respectively in articles 2, paragraph 3, 19 and 25 of the ICCPR.

14. The Special Rapporteur has also taken into account relevant international environmental standards as they govern inter alia the transportation of hazardous wastes and the prevention of marine pollution. In this regard, reference is made to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), which establishes a prior informed consent procedure for such movements to take place and requires that all practicable steps are taken to ensure that hazardous or other wastes are managed in a such a manner as to protect human health and the environment against the adverse effects, which may result from such wastes. Reference is also made to the International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL Convention).

15. Both Côte d'Ivoire and the Netherlands are parties to the main international human rights treaties of relevance to the mandate of the Special Rapporteur, as well as the above mentioned international conventions on hazardous wastes and the prevention of pollution from ships and, hence, are duty bound to implement and comply with their provisions.

16. As for human rights responsibilities of transnational corporations and other business enterprises, such as Trafigura, these can be derived from an evolving body of norms both within and outside the international human rights system. These include inter alia the so-called “protect, respect and remedy” framework developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. This framework emphasizes

“the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater access to effective remedy, judicial and non-judicial”.¹

17. A relevant source of reference outside the framework of international human rights mechanisms are the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises. These Guidelines are recommendations jointly addressed by governments to multinational enterprises, which call on enterprises to “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments”.

18. The Special Rapporteur considers that these principles and standards of good practice, as well as the “protect, respect and remedy” framework developed by the Special Representative of the Secretary-General, provide authoritative yardsticks for the assessment of Trafigura’s human rights responsibilities and fulfilment of the duty to protect by both Cote d’Ivoire and the Netherlands in relation to the movement and dumping of waste from the ‘Probo Koala’ in Côte d’Ivoire. In addition, the Special Rapporteur notes that Trafigura is bound by the domestic legislation of the country in which it operates and that such legislation may include rules and regulations implementing the provisions of the Basel Convention.

¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/11/13, 22 April 2009.

III. SUMMARY OF EVENTS PRIOR AND UP TO THE DUMPING OF WASTE IN ABIDJAN

19. The following account of events leading up to the dumping of waste in Abidjan in August 2006 is by no means exhaustive. The account merely serves as a basis for analysis of the effects of the incident on the enjoyment of human rights and related responses by relevant duty bearers and other stakeholders in line with their international human rights obligations and responsibilities.

20. As noted, the waste discharged in Abidjan originated from the vessel 'Probo Koala'. This type of ship generally transports ores, hydrocarbons or any type of bulk cargo. It has 2 slop tanks designed for the storage of cargo residues, tank purging water and hydrocarbon mixtures. Apart from hydrocarbons, the 'Probo Koala' was also authorized to transport liquid sodium hydroxide, otherwise known as caustic soda, which could be used for removing mercaptan from blend stocks and gasolines and for the cleaning and breakdown of fuel residue.

21. The Probo Koala, which sails under the Panamanian flag, was chartered by Trafigura in October 2004. Trafigura is one of the world's largest commodity trading enterprises in the energy sector. Its operations include every element involved in the sourcing and trading of crude oil, petroleum products, renewable energies, metals, metal ores and concentrates for industrial consumers. Trafigura employs 1,900 staff in 42 countries and had a turnover of 73 billion US dollars in 2008.

22. According to information received from Trafigura, gasoline blend stocks were transferred to the Probo Koala in the Mediterranean between April and June 2006. These blend stocks were treated with caustic soda in order to reduce the level of mercaptans, sulphur-containing organic compounds, which prevent blending of oil products into a tradable commodity. Trafigura reports that after this “onboard caustic washing”, the Probo Koala’s slop tanks contained a mixture of water, blend stock and caustic soda.

23. On 30 June 2006, on its way to the port of Paldiski in Estonia to unload part of its gasoline cargo, the Probo Koala docked at the Port of Amsterdam to refuel and to discharge the content of its slop tanks. On the night of 2 to 3 July 2006, a vessel operated by Amsterdam Port Services (APS), a specialised waste de-slopping company with expertise in the unloading and handling of a wide range of vessel-specific waste, including MARPOL slops, collected the first part of the waste from the Probo Koala’s slop tanks.

24. Strong odours emanating from the waste prompted APS to take a sample, which produced a significantly higher chemical oxygen demand than APS was permitted and able to process on its premises, in addition to a high quantity of mercaptans, which caused the foul stench. As this meant that treatment would be more complex and costly and that this could only be done in Rotterdam, APS offered Trafigura a new quotation reflecting the higher level of toxicity. Up from 20€ per m³ to 900€ per m³ after the sample analysis, Trafigura rejected the new figure and requested to reload the waste.

25. On 5 July 2006, APS proceeded to re-embark the waste, after which the Probo Koala set sail to Paldiski, Estonia, where it reportedly unloaded 3,300 metric tonnes of gasoline between 9 and 13 July and loaded approximately 26,000 metric tons of unleaded gasoline, bound for Lomé, Togo and Lagos, Nigeria.

26. On 19 August 2006, the Probo Koala berthed in Abidjan. Through its subsidiary, Puma Energy Côte d'Ivoire, and with the assistance of its shipping agent in Abidjan, WAIBS, Trafigura had arranged unloading and treatment of its slop waste with a newly created company, Tommy Ltd. Tommy Ltd. had made an offer of US\$ 30 per m³ for waste falling under the MARPOL Convention and US\$ 35 per m³ for so-called chemical slops, after which Trafigura instructed shipping agent WAIBS to make arrangements for the discharge of the waste and to coordinate this operation with Tommy Ltd.

27. Tommy Ltd. rented 12 trucks, which dumped the waste at various sites in the District of Abidjan between the evening of 19 August and the morning of 20 August 2006. Reports from a United Nations Disaster and Assessment (UNDAC) team, deployed upon request by the UN Humanitarian Coordinator in Abidjan, indicate that on the night of 14 – 15 September further dumping of the same hazardous waste may have taken place.²

28. According to the Ivorian Ministry of Health and Public Hygiene there were 18 dumping points in 8 sites. Additional sites have also been reported. None of the

² United Nations Disaster Assessment and Coordination (UNDAC), "Cote d'Ivoire – Urban hazardous waste dumping", 11-19 September 2006.

dumpsites had proper facilities to treat chemical waste. Suffocating odours originated from the dump sites.

IV. EFFECTS ON THE ENJOYMENT OF HUMAN RIGHTS

29. Residents in areas close to the dumping sites were directly exposed to the waste through skin contact and breathing of the volatile substances. In addition, secondary exposure reportedly occurred through contact with surface water, groundwater and eventually through consumption of foods grown or extracted from contaminated land and water.

30. On 20 August, thousands of individuals visited health care centres complaining of nausea, headaches, vomiting, abdominal pains, skin reactions and a range of eye, ear, nose, throat, pulmonary and gastric problems. Some residents were allegedly forced to flee their homes and many businesses forewent commercial earnings for a significant period of time following the contamination. Widespread public demonstrations were held in the district of Abidjan. During the visit to Côte d'Ivoire, non-governmental organisations informed the Special Rapporteur that these demonstrations were often dispersed violently.

31. According to official estimates, there were 15 deaths, 69 persons hospitalised and more than 108,000 medical consultations resulting from the incident.³ During the visit, non-governmental organisations informed the Special Rapporteur that these figures may well be higher, taking into account additional deaths and long-term health

³ Report of the International Commission of Inquiry on the discharge of toxic wastes in the district of Abidjan, 19 February 2007.

consequences that have been reported. An assessment by the Ministry of Health and Public Hygiene concluded that 63,296 were probable and 34,408 were confirmed cases of exposure to the waste from the Probo Koala. In this regard, the effects of dumping of the waste from the Probo Koala on the enjoyment of human rights mainly concern the right to life and the right to the enjoyment of the highest attainable standard of physical and mental health.

32. The Special Rapporteur considers that loss of life as a result of the movement and dumping of toxic waste constitutes a violation of the right to life. In interpreting the right to life under the International Covenant on Civil and Political Rights, the Human Rights Committee has stressed that “the expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.”⁴ In combination with the general legal obligation arising from article 2 of the Covenant, which requires States to “adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations” under the Covenant⁵, the Special Rapporteur argues that the right to life imposes on States a duty to adopt all appropriate measures to ensure the safe and sound management of toxic and dangerous products and wastes throughout their life cycle. In addition, failure by States Parties to take appropriate measures to prevent, investigate, punish and redress the loss of life caused by toxic and dangerous products and wastes would give rise to a violation of the right to life.

⁴ Human Rights Committee, general comment No. 6: The right to life (1982), paragraph 5.

⁵ Human Rights Committee, general comment No. 31: Nature of the general legal obligations imposed on States Parties to the Covenant (2004), paragraph 7.

33. In the view of the Special Rapporteur, similar State obligations would also arise in relation to the negative effects on human health of the movement and dumping of toxic and dangerous products and wastes. In this respect, the Committee on Economic, Social and Cultural Rights has emphasized that the improvement of all aspects of environmental and industrial hygiene, as a component of the right to health, “comprises, inter alia, the prevention and reduction of the population’s exposure to harmful substances, such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health”.⁶

34. The Special Rapporteur acknowledges that the existence of a causal link between the alleged violations of the rights to life and health, on the one hand, and the waste offloaded and dumped from the Probo Koala, on the other, has not yet been fully established. In this regard, he stresses once again that he does not in any way intend to prejudge future determinations by courts seized of this matter. While not being in a position to make conclusive inferences on the exact composition and toxic nature of the waste in question, the Special Rapporteur would nevertheless like to make the following observations:

- (a) First, the Special Rapporteur has taken note of information received from Trafigura stating that the characteristics of the waste from the Probo Koala could have resulted in a highly unpleasant smell, but could not have led to the widespread injuries, illnesses and deaths alleged.

⁶ Committee on Economic, Social and Cultural Rights, general comment No. 14: The right to the highest attainable standard of health (2000), paragraph 15.

(b) Second, the Special Rapporteur is aware that the analysis of samples taken in Amsterdam, when the Probo Koala docked there, and in Abidjan in the aftermath of the incident showed that the waste dumped from the Probo Koala was petrochemical waste. According to the United Nations Disaster Assessment and Coordination team that visited Côte d'Ivoire shortly after the incident, this kind of waste "can be harmful to humans and the environment if serious exposure takes place".⁷

(c) Third, the Special Rapporteur observes that a mission to Côte d'Ivoire, mandated by the Basel Convention Secretariat in response to a request for technical assistance from Côte d'Ivoire, concluded that "based on available information, the Probo Koala wastes exhibit the hazard characteristics of the Basel Convention".⁸

35. On the basis of these considerations and taking into account the immediate impact on public health and the proximity of some of the dumping sites to areas where affected populations resided, the Special Rapporteur considers that there seems to be strong prima facie evidence that the reported deaths and adverse health consequences are related to the dumping of the waste from the Probo Koala. Hence, there is sufficient basis to consider the actions of relevant stakeholders prior to, during and after the dumping through a human rights lens in addition to the consideration of

⁷ United Nations Disaster Assessment and Coordination (UNDAC), "Cote d'Ivoire – Urban hazardous waste dumping", 11-19 September 2006.

⁸ Open-ended Working Group of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Decision VIII/1 on Cote d'Ivoire, Note by the Secretariat, UNEP/CHW/OEWG/6/2, 2 July 2007.

relevant standards in relation to the movement of hazardous wastes and marine pollution.

V. RESPONSES BY THE NETHERLANDS, COTE D'IVOIRE AND TRAFIGURA

36. Given the alleged adverse effects on the enjoyment of human rights resulting from the dumping of the Probo Koala's waste, the Special Rapporteur considered the actions undertaken by the Netherlands, Côte d'Ivoire and Trafigura prior to, during and after the dumping in order to assess the fulfilment of relevant duties and responsibilities under international human rights law as described above.

A. The Netherlands

37. With regard to the Netherlands, the Rapporteur focused on two aspects: a) procedures followed during the aborted discharge of the waste and the subsequent permission for the ship to sail to Estonia; and b) actions undertaken by the Government after the dumping had taken place in Côte d'Ivoire, in particular in terms of determining the facts and putting in place measures to ensure future prevention of such incidents.

38. In relation to the former, the Special Rapporteur notes that national and European legislation is in place to implement the provisions of both the Basel Convention and the MARPOL Convention. The national laws concerned are the

Environmental Management Act and the Prevention of Pollution from Ships Act. The Environmental Management Act falls within the remit of the Ministry of Housing, Spatial Planning and the Environment and its Inspectorate. The Prevention of Pollution from Ships Act is part of the Ministry of Transport, Public Works and Water Management and its Inspectorate's competencies.

39. Relevant legislation at the level of the European Union (EU) includes Council Regulation (EEC) no. 259/93, as subsequently amended, on the supervision and control of shipments of waste within, into and out of the European Community, which transposes the Basel Convention obligations into the European Union legislation. The Special Rapporteur notes that regulations are binding in their entirety and directly applicable in all EU Member States without the need to be transposed into national law.

40. The circumstances surrounding the discharge of waste from the Probo Koala were unusual. Firstly, as mentioned in the summary of events, uncertainty arose over the exact composition and toxic nature of the waste after part of the Probo Koala's waste had been offloaded in the port of Amsterdam. Secondly, this engendered an extensive discussion amongst relevant authorities on the question whether Amsterdam Port Services was technically the holder of the waste and, hence, obliged to dispose of it in an environmentally sound manner. This was further compounded by the absence of agreement between Trafigura and Amsterdam Port Services on the higher cost for treatment of the waste following the analysis of a waste sample and the subsequent request made by Trafigura to reload the waste, a situation that may have created doubts as to the applicable legal framework.

41. Under these circumstances, inspection of the vessel and sample analysis to determine the origin and exact composition of the waste would have been necessary for a proper determination of the applicable legal framework. While the Special Rapporteur received information on hydrogen sulphide readings, which determined that there was no danger to human health, in addition to a sample taken by the Netherlands Forensic Institute, an inspection of the vessel by national police and measurements by a surveying company, it is his understanding that relevant inspectorates did not carry out any further inspections and that possibilities to detain the Probo Koala were not fully considered.

42. The Environmental Management Act and Council Regulation (EEC) no. 259/93 did nevertheless offer possible grounds to prevent the return of the waste already offloaded and the departure of the ship. In particular, the Environmental Management Act prohibits discarding industrial or hazardous waste by transferring it to another person who has not been authorised to receive it in accordance with Section 10.37, paragraph 2, of the Act. This clearly hinges upon the question whether Amsterdam Port Services had accepted the offloaded part of the waste and whether reloading it would constitute a transboundary movement under Council Regulation (EEC) no. 259/93. In addition, Council Regulation no. 259/93 only allows the movement of hazardous waste to another EU Member State if consent is given, whilst exportation to countries that are not members of the Organization for Economic Co-operation and Development (OECD) is prohibited.⁹

⁹ Council Decision 97/640/EC concerned the approval, on behalf of the Community, of the amendment to the Basel Convention, as laid down in Decision III/1 of the Conference of the Parties. By that amendment, all exports of hazardous waste destined for disposal from countries listed in Annex VII

43. The Prevention of Pollution from Ships Act obliges the captain of a ship to deliver the residues of certain categories of noxious substances specified in Annex II of the MARPOL Convention to a port reception facility.

43bis. Although the Special Rapporteur accepts the complexity of the legal framework, as well as the uncertainty as to its proper application in the case of the Probo Koala, he regrets that none of these provisions were ultimately invoked to prevent the reloading of the waste and the departure of the Probo Koala, particularly considering that the captain was alleged to have made conflicting claims about the nature of the waste.

44. In relation to remedial action undertaken by the Government after the dumping had taken place in Côte d'Ivoire, the Special Rapporteur has taken note of several fact-finding initiatives undertaken at the level of both the local and central government. These include inter alia an inquiry conducted by the so-called Hulshof Commission, set up by the Municipality of Amsterdam; a factual account and summary of relevant legislation prepared by the Inspectorate of the Ministry of Housing, Spatial Planning and the Environment and an advisory opinion issued by the Dutch parliamentary counsel.

45. The Special Rapporteur welcomes initiatives taken by the Government to set up an inter-ministerial working group to coordinate follow-up to the Probo Koala case.

(Parties and other States which are members of OECD, EC and Liechtenstein) to the Convention to countries not listed therein were prohibited, with effect from 1 January 1998.

According to information received by the Rapporteur, such initiatives include the preparation of a protocol on “unusual situations”, which would clarify responsibilities and decision-making processes, and a study on better harmonisation of the different legal frameworks. The Rapporteur also appreciates efforts to improve cooperation and coordination between different inspectorates in this context.

46. As financial considerations appear to have played a key role in the decision to reload the waste back on to the Probo Koala, the Special Rapporteur would like to encourage the Netherlands to consider creating a fund or another financing mechanism in the implementation of its follow-up initiatives. The availability of such a funding tool would ensure the proper discharge and treatment of toxic and hazardous waste in the Netherlands in situations where disagreement over payment arises, where the carrier of the waste is unwilling to pay for the environmentally sound disposal of such waste and where inaction could determine a serious risk of serious or irreversible damage to human health and the environment. Upon judicial determination of liability, the carrier of the waste would later be obliged to reimburse the costs incurred.

47. The Special Rapporteur is, nevertheless, satisfied that improved measures have been put in place to avoid the recurrence of such incidents. In this regard, the Rapporteur was informed that a similar incident occurred in 2007 with another vessel allegedly chartered by Trafigura. In this case, the inspectorate of the Ministry of Housing, Spatial Planning and the Environment took samples and the waste was processed in a plant for toxic waste after the results of the analysis from the samples taken by the inspectorate had become available and permission was given by the local

authorities to process the waste. In addition, this time the waste collector and Trafigura agreed on the processing of the waste.

48. The Special Rapporteur also notes the investigation conducted by the Public Prosecutor, which has resulted in judicial proceedings against Trafigura, the captain of the Probo Koala, Amsterdam Port Services and the municipality of Amsterdam. These proceedings are currently ongoing.

49. At the international level, the Special Rapporteur is aware of the support provided by the Netherlands to the deployment of the United Nations Disaster Assessment and Coordination team in the aftermath of the dumping in Côte d'Ivoire in 2006. The Netherlands has contributed financially to a project implemented by the United Nations Environment Programme (UNEP) with counterparts from the Côte d'Ivoire Ministry of Environment, Water and Forests. This project focuses on the preparation of a hazardous waste management plan for the district of Abidjan and capacity building in respect of the waste management regime in the port of Abidjan, including the transfer of technology to strengthen technical capacity of the Ivorian Anti-Pollution Centre (CIAPOL).

50. The Basel Convention Regional Centre for French-speaking Countries in Africa, based in Senegal, is also implementing a regional component of the UNEP project with the aim of building institutional capacity in Côte d'Ivoire and other countries. This includes technical assistance to develop norms and regulations to fill the loopholes at national level with the overall objective of enhancing capacity to monitor and control transboundary movements of hazardous waste and chemicals.

51. Further assistance by the Government of the Netherlands, in particular in the form of technical expertise, to help the Government of Côte d'Ivoire deal with outstanding health care, decontamination and other issues would be useful and necessary.

B. Côte d'Ivoire

52. The scope of the visit to Côte d'Ivoire included a review of procedures followed prior to and during the dumping of the waste from the Probo Koala and an assessment of remedial action undertaken by the Government after the incident had taken place. The latter included issues, such as decontamination, access to health care, compensation, and access to justice, which the Special Rapporteur considers essential for the realisation of the right to an effective remedy and reparation for victims of the dumping.

53. Articles 19 and 28 of Côte d'Ivoire's Constitution guarantee the right to a healthy environment. The importation of wastes and hazardous wastes into Côte d'Ivoire is prohibited by law No. 88-651 of 7 July 1988 and framework law No. 96-766 of 3 October 1996. Under these laws the unauthorized importation of hazardous wastes and noxious substances is a criminal offence.¹⁰

54. Despite these legal safeguards, the dumping of the waste from the Probo Koala revealed a weakness of and disregard for administrative procedures to prevent

¹⁰ Report of the International Investigation Committee on Toxic Waste discharged in the district of Abidjan, 19 February 2007, page 69.

unauthorised importation of hazardous waste. As for the discharge of waste in the port of Abidjan, noted flaws include the granting of a licence to Tommy Ltd. to operate in the port without a rigorous assessment and scrutiny of its application. With regard to the inspection of ships, the authorities did not verify the nature of the waste and its potential impact on human health and the environment prior to the discharge of the waste. In this regard, the Rapporteur notes that the Ivorian Anti-Pollution Centre (CIAPOL) does not have a permanent presence in the port of Abidjan and is not in a position to conduct systematic controls of ships docking in the port.

55. In terms of remedial action after the dumping, a crisis committee was set up led by the Ministry of Environment, Water and Forests and an official announcement was made to the public about the exact coordinates of the polluted sites, the need to stay away from these sites and the availability of health centres for checkups. The Minister of Environment, Water and Forests also contacted the Basel Convention Secretariat, an Inter-Ministerial Committee on toxic wastes was created, and a national toxic waste abatement plan was launched to address urgent health, environmental and economic issues. The crisis, and the enormous social unrest that this caused, led to the resignation of the Government on 6 September 2006.

56. In relation to health care, the Special Rapporteur notes information received from the Government that free medical treatment was provided in approximately 50 access points, including public and private health institutions, as well as mobile units. During the visit, the Special Rapporteur was informed that these access points often lacked proper equipment and medication to treat patients. In addition, many people, especially those living close to the dumping sites, are still experiencing health

problems. Adverse effects on childbirth and child health, including miscarriages and stillbirth, have also been reported. Hence, monitoring of long-term effects on human health and care for the most vulnerable remain necessary.

57. As for decontamination, clean-up operations were assigned by the Government to Séché, a French group that intervened through Tredi International, its subsidiary. Tredi extracted 9,300 tons of contaminated soils and liquids from the district of Abidjan, which were shipped to France and incinerated at a special factory owned by Trédi.¹¹ The Special Rapporteur was told that 8 sites were decontaminated in this manner. Full decontamination has, however, not yet taken place.

58. In relation to the issue of compensation, the Government called on victims to register on an official list to receive compensation. However, there have been disputes about the accuracy of this list. The list was based on information provided by State hospitals, while many people were not registered as they sought medical care in clinics that were not certified by the State or through traditional healers. In addition, some victims could not register because they did not have official identity cards.

59. During the visit, the Special Rapporteur was told that some victims have been compensated. Others have not received any or only limited compensation. Affected businesses, in particular in the Vridi industrial area, also claimed to have received inadequate compensation. The slow pace of the process, a lack of transparency, and limited recognition of victims and acknowledgement of their suffering appear of particular concern in this context.

¹¹ Ibid.

60. In February 2007, the President of Côte d'Ivoire signed an out-of-court settlement with Trafigura. On the basis of this settlement, Trafigura paid US\$ 198 million to cover damages suffered by the State of Côte d'Ivoire, reimbursement for decontamination costs and compensation for victims. The State of Côte d'Ivoire agreed to indemnify directly any individual claiming to have suffered harm. Victims' associations appear not to have been consulted before this agreement was signed. This is a matter of serious concern, in particular as the settlement obliged the State of Côte d'Ivoire to waive all current or future action for liability and damages. The Special Rapporteur also received complaints about inequitable distribution and an overall lack of clarity on the subsequent use made of the settlement payment.

61. With regard to access to justice, the Public Prosecutor conducted an investigation into the incident, which led to the prosecution of several individuals. However, in March 2008, the Court of Appeal ruled that there was insufficient evidence to pursue criminal charges against Trafigura. In October 2008, the owner of Tommy Ltd. and a representative from shipping agent WAIBS did receive prison sentences of 20 and 5 years respectively for their role in the incident. 7 other individuals were acquitted. Personal injury group litigation is still ongoing before the High Court of Justice in the United Kingdom. In this class action, over 20,000 victims allege they were injured by exposure to the waste from the Probo Koala as a result of actions by Trafigura.

62. In relation to the verification of facts and the disclosure of the truth about the incident, the Special Rapporteur has taken note of the reports issued by both the

national and international commission of inquiry on the toxic waste in the district of Abidjan and encourages the Government to follow-up on their recommendations. The Special Rapporteur notes that these reports have not been widely disseminated.

63. Some measures have been taken with a view to preventing the dumping of waste in the future. In particular, the Special Rapporteur welcomes the initiative to prepare a hazardous waste management plan for the district of Abidjan in the context of the above mentioned project carried out with the assistance of UNEP. Further capacity building of relevant institutions in this area, is necessary. At the same time, effective prevention can only be realised if these initiatives are accompanied by institutional reform and a strengthening of independent supervisory powers in the area of waste management.

C. Trafigura

64. The focus of the Special Rapporteur's review of the role of Trafigura in the dumping of the waste from the Probo Koala was on the company's responsibility to respect human rights.

65. The OECD Guidelines for Multinational Enterprises emphasise that companies are expected to comply with national laws and to respect the principles of relevant international instruments. The policy framework for business and human rights developed by the Special Representative of the Secretary-General on human rights and transnational corporations provides that in addition to compliance with

national laws, the baseline responsibility of companies is to respect human rights.¹² This responsibility exists independently of States' duties¹³ and even where national law is absent.¹⁴

66. The exercise of this responsibility requires due diligence – a process whereby companies not only ensure compliance with national laws, but also become aware of, prevent and address adverse human rights impacts. The scope of due diligence is determined by the country context in which business activities take place; the impact business activities may have on human rights within that context; and the extent to which relationships associated with these activities might contribute to abuse.¹⁵

67. The Special Rapporteur considers that the due diligence test in the Probo Koala case rests on the question whether Trafigura took all the necessary precautions to prevent any possible adverse human rights impacts of the discharge of its waste and whether it could have reasonably known that its actions or omissions would contribute to a human rights violation. In the view of the Rapporteur, these precautions needed to be particularly stringent in the case of Côte d'Ivoire given the prevailing climate of insecurity and weak rule of law in the country as a result of the crisis, which started in 2002. Several political agreements seeking to resolve this crisis have been signed and implemented, the latest of which is the March 2007 Ouagadougou Political Agreement.

¹² The policy framework was welcomed by the Human Rights Council, which emphasized that corporations have a responsibility to respect human rights, HRC resolution 8/7.

¹³ Ibid., paragraphs 54 and 55.

¹⁴ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7 April 2009, paragraph 23.

¹⁵ Ibid., paragraph 25.

68. Within this framework, the Special Rapporteur has identified the following specific elements of due diligence in relation to the dumping of the waste from the Probo Koala in Abidjan:

- (a) Full disclosure and clarity on the composition of the Probo Koala's slop tanks and destination for disposal prior to the unloading of the waste;
- (b) Evaluation of port reception capacities and waste disposal facilities in terms of environmentally sound waste treatment prior to the unloading of the waste;
- (c) Remedial action after the dumping of the waste.

69. In relation to the first element, the Special Rapporteur notes alleged inconsistencies in the way the Probo Koala and its shipping agent communicated the content and nature of the slops to port authorities in Amsterdam. According to information received by the Rapporteur, various qualifications were used to describe the content of the Probo Koala's slop tanks, including as a "mixture of tank washing, petrol and caustic soda", as "oily tank washings and cargo residues" and also as "watery cleaning liquids" and "waste from steam degreasing".¹⁶ The Special Rapporteur also notes that at a later stage, after having left Amsterdam and upon berthing in Abidjan, Trafigura characterized the waste as "chemical waste water" as opposed to "MARPOL waste water".

¹⁶ Report by the Commission of Inquiry established by the Municipality of Amsterdam on the events related to the arrival, stay and departure of the Probo Koala in July 2006 in Amsterdam (Hulshof Commission), page 11.

70. In addition, the high chemical oxygen demand was apparently not known when the Probo Koala docked in Amsterdam and only detected on the basis of the sample taken by Amsterdam Port Services. Similarly, a lack of clarity reportedly also arose over the destination for the discharge of the waste from the Probo Koala after its stop in Amsterdam. In this regard, the terms “next convenient opportunity” and “to sea for orders” were used, whilst initially “Paldiski, Estonia” had been indicated. While the Special Rapporteur acknowledges that this may not be uncommon in such transactions, the discretion with which different qualifications were employed appears wide and not conducive to transparent decision-making on the treatment of potentially toxic waste.

71. In terms of evaluating appropriate port reception facilities, the analysis carried out after the vessel berthed in Amsterdam revealed that the waste could not be treated there and that only the port of Rotterdam had adequate treatment facilities. Under these circumstances, the Special Rapporteur considers that it would fall on Trafigura to show in what way the port of Abidjan would be equally or better equipped to process the waste.

72. In this respect, the Special Rapporteur is aware of Trafigura’s assertion that the port of Abidjan is widely regarded as an appropriate location to discharge slops falling under the MARPOL Convention. According to information received from Trafigura, approximately 30,000 tonnes of hydrocarbon residues and waste waters were discharged from ships in Abidjan between 1 January and 6 September 2006.

73. The Special Rapporteur observes that Trafigura's claims on this issue are not supported by the findings of the above mentioned technical assistance mission to Côte d'Ivoire mandated by the Basel Convention Secretariat, which found that the "the Abidjan port is not equipped with the necessary facilities for the offloading and treatment of wastes covered by the MARPOL Convention. The mission was unable to confirm whether the port was in fact authorized to receive such wastes".¹⁷

74. In addition, at the time of the events, the port of Abidjan reportedly had only one experienced de-slopping service provider, a company named ITE (Ivoirienne des Techniques des Energies). While it is not unusual for a commodity trader, such as Trafigura, to work with several companies for the discharge and treatment of its waste, the exercise of due diligence would seem to suggest that ITE was the only viable option in this particular case.

75. As for the decision to contract Tommy Ltd. to discharge the waste, the Special Rapporteur acknowledges information received from Trafigura that its subsidiary Puma Energie contacted shipping agent WAIBS, which in turn identified Tommy Ltd. as being able to deal with the slops. Reportedly the port of Abidjan confirmed that Tommy was registered and copies of relevant licenses and authorizations were provided to Puma. In addition, WAIBS and Tommy were informed of the composition of the waste, including its chemical oxygen demand. In this context, Tommy Ltd. stated that it would assume full responsibility for the operation.¹⁸

¹⁷ Open-ended Working Group of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Decision VIII/1 on Cote d'Ivoire, Note by the Secretariat, UNEP/CHW/OEWG/6/2, 2 July 2007.

¹⁸ Report of the National Commission of Inquiry on Toxic Waste discharged in the district of Abidjan, 19 February 2007, page 27.

76. In the view of the Special Rapporteur these elements do not amount to a full evaluation of reception capacities in the port of Abidjan aimed at ensuring environmentally sound waste treatment. In this regard, further information at the Rapporteur's disposal suggests that Tommy Ltd. was only created shortly prior to the arrival of the Probo Koala and had neither previous experience with waste treatment, nor adequate facilities, equipment and expertise to treat waste. It is of concern to the Rapporteur that these shortcomings do not appear to have been taken into consideration by Trafigura.

77. At a minimum, the exercise of due diligence should have triggered additional inquiries into Tommy Ltd.'s capacities to treat waste in an environmentally sound manner. This is all the more so, as Tommy Ltd. informed Trafigura it would discharge the waste from the Probo Koala "in a place out of the city, called Akouédo, which is properly equipped to receive any type of chemical product".¹⁹ The Special Rapporteur had the opportunity during his visit to Abidjan to visit Akouédo. It is a municipal waste dump existing alongside poor communities living on subsistence farming and in extremely precarious conditions. Nearby residents live on recycling garbage for personal use or re-selling. Akouédo was not in any way equipped to treat the waste from the Probo Koala.

78. With regard to the third element of due diligence, the Special Rapporteur notes that Trafigura sent two senior executives, in addition to a team of medical experts, a geologist and a refining engineer to Abidjan in the immediate aftermath of the

¹⁹ Ibid.

incident to conduct an impact assessment and to assist with the handling of the crisis. Trafigura also declared that it would fully cooperate with the Ivorian Government and the UNDAC team investigating the incident.

79. In November 2006, Trafigura commissioned an independent inquiry into the events, which led to an interim report, but was not concluded in order not to prejudice the outcome of legal proceedings in the United Kingdom.²⁰ In the context of the above mentioned settlement agreement, an environmental audit was also carried out. In April 2008, Trafigura agreed to pay an additional 7.6 million € for remedial work and other healthcare, education and environmental projects.

80. While the Special Rapporteur generally welcomes these efforts by Trafigura to provide redress, he encourages Trafigura to continue to fund and support outstanding remedial work. In addition, the Rapporteur views with great concern reports that the company has filed or threatened to file libel lawsuits against various civil society and media institutions that have reported on the Probo Koala incident in a critical manner. Such lawsuits may have the effect of stifling independent reporting and public criticism. In this regard, the Special Rapporteur considers that Trafigura, as a public figure in this case, should show restraint.

VI. RECOMMENDATIONS

For the consideration of the Government and relevant State actors of the Netherlands:

²⁰ For more information on this inquiry, please refer to www.probokolainquiry.com

81. Harmonize and strengthen existing legislation on the prevention of marine pollution and environmental management in order to ensure more rigorous inspection and, where necessary, the detention of ships for a reasonable period of time, in particular in cases of inconsistent or incorrect declarations regarding cargo and waste on board.

82. Consider the creation of a financial mechanism, which would ensure the proper discharge and treatment of toxic and hazardous waste in the Netherlands. Such a financial mechanism would need to be developed in accordance with the “polluter pays” principle and presuppose reimbursement by the carrier of the waste upon a judicial determination of liability.

83. Continue to provide support to the Government of Côte d’Ivoire to enable the latter to effectively monitor and address possible long-term human health and environmental effects of the incident.

For the consideration of the Government and relevant State actors of Côte d’Ivoire:

84. Engage in a broad consultative process, including relevant civil society actors and specifically seeking the views of victims, families of victims and victims’ associations on outstanding issues and measures required to address possible long-term human health and environmental effects of the incident.

85. Allocate sufficient resources and seek financial and technical assistance to ensure full decontamination of all remaining dumping sites as soon as possible.

86. Undertake further action to protect the right to life, the right to the enjoyment of the highest attainable standard of physical and mental health, including the right to a healthy environment of all affected victims and their families, inter alia by conducting a health survey in affected areas and a mapping of outstanding health issues and by providing adequate medical assistance to victims, including treatment of new and long-term manifestations of illnesses as a result of the dumping.

87. Take additional measures to intensify the dispensation of compensation to all victims and to complete this process as a matter of urgency in a clear and transparent manner.

88. Implement structural reforms to improve waste treatment capacities in the port of Abidjan and to strengthen monitoring and supervision by relevant environmental agencies in order to ensure waste is treated in an environmentally sound manner.

89. Ensure full access to information for those affected on measures taken to address possible long-term adverse effects on health and environment of the incident.

For the consideration of Trafigura:

90. In relation to the Probo Koala incident, continue to provide financial assistance to the Government of Côte d'Ivoire in order to address outstanding issues related to decontamination, healthcare and compensation, as well as to support structural reforms to strengthen capacities to manage hazardous waste in an environmentally sound manner.

91. In its overall operations, ensure that timely and reliable information is disclosed regarding its activities and the nature and composition of the waste these activities generate.

92. Provide adequate and timely information on the potential environment, health and safety impacts of its activities and systematically ensure waste treatment in an environmentally sound manner, including by rigorously assessing appropriate port reception facilities and balancing commercial interests with human rights and environmental requirements.

93. Develop a corporate accountability and human rights policy and management framework, including annual reporting on social, environmental and economic impacts.

For the consideration of the international community, including United Nations entities, and donors:

94. Continue to provide support to the Government of Côte d'Ivoire and relevant State actors in addressing possible long-term human health and

environmental effects of the incident with a particular focus on decontamination, health care and compensation and promoting the rights of victims.

95. Continue to assist the Government of Côte d'Ivoire and other countries, as appropriate, both in terms of financial and technical assistance, to strengthen capacities to monitor and control both transboundary and domestic movements of toxic and dangerous products and wastes.
