

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes.

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Excellency,

We have the honour to address you in our capacities as Chairperson of the Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes pursuant to Human Rights Council resolutions 26/22, 24/5, 24/6, 25/18, and 27/23.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **alleged human rights violations posed by the improper management of lead in Mikindani, close to the Owino Uhuru community in Kenya.**

According to information received:

Metal Refinery Limited (MRL) operated from 2007 to 2014 and dealt with the smelting and refinery of lead in order to recycle lead-acid batteries. MRL appears to have stopped its operation in Mikindani in March 2014.

The residents of Owino Uhuru village and the former workers of the MRL continue to suffer from adverse effects due to the exposure to and accumulation of exceptionally high levels of lead in their bodies and in their immediate environment. Reportedly, the workers of the smelter working in toxic conditions had little or no protective gear despite they were consistently exposed to high levels of lead.

It is alleged that approximately 3,000 residents of Owino Uhuru village have been suffering from exposure to high levels of lead, resulting both from direct

contact with lead via the smelter, and from indirect exposure to lead-contaminated environment.

We received blood test results of twelve Owino Uhuru community members, of which four were children (under the age of 13) and five were former workers of the smelter. No safe blood lead level in children has been identified, according to the World Health Organization (WHO). Even low levels of lead in blood (as low as 5 µg/dl) have been shown to negatively affect human intelligence, the ability to pay attention, academic achievement. At significant levels of exposure, lead attacks the brain and central nervous system to cause a coma, convulsions and even death. And effects of lead exposure cannot be corrected. The test results we received were strikingly high ranging from 10 µg/dl to 32 µg/dl.

The alleged activities of the smelter and the improper management of lead by MRL also caused the deterioration of the environment. The level of lead in soil tested in 2008 remained at 4.73 ppm while the lead level in soil exponentially increased to 1656.63 ppm. The test of sample effluent water taken from the community recorded 23.63 ppm.

Allegedly, in May 2009, the Public Complaints Committee (PCC), a committee established under the Environment Management and Coordination Act (EMCA) to investigate the case, published a report which recommended that MRL's Environmental Impact Assessment licence be revoked and that it be re-issued upon consensus of all governmental licensing authorities. However, MRL continued to operate until March 2014.

It is alleged this PCC report was finalized in May 2009, but was deliberately withheld from the affected community until 2012.

On 25 April 2012, while affected community members were preparing a peaceful rally against the improper management of hazardous materials by MRL, seventeen activists – Ms. Phyllis Omido, Mr. Julius Musembi, Mr. Omari Mazera, Mr. Sudi Saidi, Mr. Katana Kitsao, Mr. Kaingu Charo, Mr. Wilfred Nkulu, Mr. Samwel Kesi, Mr. Nicholas Tondo, Mr. Daudi Charo, Mr. Samwel Mutabari, Mr. Saidi Hamisi, Mr. Kombo Mutho, Mr. Andrew Ngare, Mr. Nzuki Mutinda, Mr. Alex Mutinda and Mr. Ramadhan Abdala – were allegedly intimidated, threatened by the Kenyan authorities and charged with inciting violence and unlawful assembly under sections 96 and 79 of the Penal Code of Kenya, respectively. It is reported that the Magistrate's Court at Mombasa dismissed the case on the basis of insufficient information on 9 November 2012.

While we do not wish to prejudge the accuracy of these allegations, we are deeply concerned about the **rights to life and health** of the residents of the community, including those who were tested and those who have yet to be examined. We express particular concern with regard to the adverse impact on the health of **children**, who are exceptionally vulnerable to lead poisoning, as they have smaller body masses and their growing bodies absorb more lead. Lead poisoning can also affect the unborn child in pregnant women. Regrettably, according to information we

received, the affected individuals and community, including children, were not provided with adequate medical assessment or treatment.

We are concerned about the unlawful discharge of effluent from MRL into a trench that runs through the Owino Uhuru village and into the municipal drainage system. Although the Water Quality Regulation of 2006 of Kenya Part III, 11 stipulates that the allowed level of lead which can be discharged into the aquatic environment should not exceed 0.01 (mg/L), the test of sample effluent water taken from the community recorded 23.63 ppm (equivalent of 23.60 mg/L)

Improper management of lead, allegedly caused by the deliberate acts and omissions of MRL and the failure of the Government of Kenya to implement existing domestic laws, led to further human rights violations of the concerned population in the community. We express grave concern with regard to the affected community and individuals' **rights to a healthy environment and safe and healthy working conditions**. It should be duly noted that such rights are explicitly recognized in the Constitution and domestic environmental laws of Kenya as well as international and regional human rights instruments (see Annex).

We express our concern over the alleged denied right, of the affected population **to access to information** as the information we received indicated that the PCC report was deliberately withheld from the affected population for three years.

Moreover, although the charges against the protesters were dismissed, we express our concern on the Kenyan authorities' alleged attempt to interfere with the **human rights defenders** exercising their rights, as enshrined in the Kenyan Constitution and relevant international and regional human rights instruments (see Annex). Such attempt raises a serious human rights concern, especially with regard to the **rights to peaceful assembly and association**.

We remain deeply concerned about the alleged on-going human rights violations committed against the residents of Owino Uhuru village and the smelter workers. In particular, we express grave concern over the information received that the affected community and individuals have not received adequate **medical, legal or financial remedies** since 2007, nor has anyone been held **accountable** for the alleged human rights violations caused by the improper management of toxic substances affecting thousands of people, including children, over the past seven years.

In connection with above alleged facts and concerns, please refer to the Annex of the applicable international, regional human rights instruments and standards as well as domestic laws that we would like to recall.

Since it is our responsibility under the mandates provided to us by the Human Rights Council to seek to clarify all cases brought to our attention, we would be grateful for your cooperation and observations on the following matters:

1. Please provide any additional information and/or any comments you may have on the above-mentioned allegations.

2. Has the Government taken any measures to provide medical assessment and treatment to all residents of the affected community, especially children? If not, what steps does the Government plan to take to fulfil the right to health of the affected individuals?
3. Please provide information in detail the process and procedures MRL followed to receive a licence to operate. Please verify if MRL operated at any point without a valid Environmental Impacts Assessments licence?
4. What actions has the Government taken to remove lead contamination from homes and the environment in Owino Uhuru community? Please provide details on planning of the clean-up, including its completion date.
5. What measures has the Government taken to guarantee the right of access to justice and financial compensation for the victims and their families? Please provide the details of preventive measures that the Government plans to take to ensure non-recurrence.
6. Please explain why the PCC report was withheld from the affected community and provide details on what measures the Government has taken to make the information contained in the report available to public, especially to the affected community, in a timely, accessible, user-friendly and adequate manner? Please provide details on how the Government is raising awareness about the danger of the hazardous substances and wastes, in pursuit of fulfilling the right of the population's right to information.
7. Please provide details on how the Government plans to ensure accountability of those responsible for the alleged human rights violations.
8. What steps have been taken by the Government to implement the UN Guiding Principles on Business and Human Rights and how will these events inform their future implementation?
9. What measures including policies, legislation, regulations and adjudication, has the Government put in place to prevent, investigate, punish and redress human rights abuses by business enterprises within its territory and/or jurisdiction?
10. Please indicate if the Government has provided any guidance to business enterprises operating in Kenya on their expected human rights due diligence process? Such a process allows companies to identify, prevent, mitigate and account for how they address their impacts on human rights (as per the Guiding Principles on Business and Human Rights 17-21).

We would appreciate a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their recurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person responsible of the alleged violations.

We also wanted to bring to your attention that we may share this letter with MRL as well as India, the country of MRL's registration, in due course.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Michael K. Addo

Chairperson of the Working Group on the issue of human rights and transnational corporations and other business enterprises

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Special Rapporteur on the rights to freedom of peaceful assembly and of association

Dainius Pūras

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Michel Forst

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Baskut Tuncak

Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes

Annex

In connection with above alleged facts and concerns, we would like to draw your attention to applicable international human rights norms and standards, as well as authoritative guidance on their interpretation. These include:

- The Universal Declaration of Human Rights;
- The International Covenant on Economic, Social and Cultural Rights;
- The International Covenant on Civil and Political Rights;
- The Convention on the Rights of the Child, and;
- The UN Guiding Principles on Business and Human Rights.

We would like to recall the relevant international human rights obligations that your Excellency's Government has undertaken. In particular, the Universal Declaration of Human Rights, article 25, which recognizes the right of everyone "to a standard of living adequate for the **health and well-being** of himself and of his family, including food, clothing, housing and medical care" and article 19, which guarantees the right to "seek, receive and impart **information**".

Furthermore, we wish to draw the attention of your Excellency's Government to article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), acceded by your Excellency's Government on 1 May 1972, which enshrines the right of everyone to the enjoyment of the highest attainable standard of physical and mental **health**. General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights describes the normative content of article 12 and the legal obligations undertaken by the States parties to the Covenant to respect, protect and fulfill the right to health. In paragraph 11 of General Comment No. 14, the Committee interprets the right to health as "an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information."

We would also like to draw your Excellency's Government's attention to article 7 of the ICESCR, enshrining the right of everyone to the enjoyment of just and favourable conditions of work, including **safe and healthy working conditions**. The above-mentioned General Comment No.14 holds that the improvement of all aspects of environmental and industrial hygiene comprises, inter alia, "preventive measures in respect of occupational accidents and diseases [and] 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". We would also like to stress that the right to work is a fundamental right, recognized in the ICESCR. As specified in General Comment No. 18 (2005) on article 6 of the Covenant, work must be "decent work", that is, "work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration."

We wish to draw your attention to article 6.1 of the International Covenant on Civil and Political Rights (ICCPR), acceded by your Excellency's Government on 1 May 1972, which states that "every human being has the inherent right to life. This

right shall be protected by law. No one shall be arbitrarily deprived of his life.” We would also like to call your attention on General Comment No. 6 (1982) of the Human Rights Committee on the **right to life**. According to the Human Rights Committee, the expression “inherent right to life” should not be interpreted in a restrictive manner. The protection of the right to life therefore requires States to adopt positive measures to implement this right, including measures to reduce infant mortality and increase life expectancy.

Additionally, we would also like to refer to your Excellency’s Government to article 19 of ICCPR, which stipulates the right to “seek, receive and impart **information**” as well as article 21, which provides that “[t]he right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

In addition, article 6 of the Convention on the Rights of the Child (CRC), which your Excellency’s Government ratified on 30 July 1990, recognises that every child has the inherent right to life and that requires that States Parties ensure to the maximum extent possible the survival and development of the child. It further requires State Parties to take all effective and appropriate measures to diminish infant and child mortality. Moreover, the Article 24 of the CRC recognizes the right of the child to the enjoyment of the highest attainable standard of **health** and to facilities for the treatment of illness and rehabilitation. The article 24, paragraph 2 (c) of the Convention specifically requires States to pursue the full realization of the right of the child to the enjoyment of the highest attainable standard of health taking into consideration the dangers and risks of environmental pollution.

We would also like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (otherwise known as the Declaration on **human rights defenders**), and in particular articles 1 and 2 which state that "everyone has the right individually or in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" and that “each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice”.

Finally, we would like to highlight the UN Guiding Principles on Business and Human Rights, which were unanimously endorsed by the Human Rights Council in its resolution (A/HRC/RES/17/31) in 2011. These Guiding Principles are grounded in recognition of:

a) “States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

b) “The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and

c) “The need for rights and obligations to be matched to appropriate and effective remedies when breached.”

All States have a duty under the international human rights legal framework to protect against human rights abuse by third parties. Guiding Principle 1 clarifies the State duty “to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.” This obligation requires that a State take appropriate steps to “prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.” In addition, this requires, inter alia, that a State should “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights...” (Guiding Principle 3). The duty applies to all internationally recognized human rights as set out in the International Bill of Human Rights and the fundamental labour rights as set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work. The Guiding Principles also require States to ensure that victims have access to effective remedy in instances where adverse human rights impacts linked to business activities do occur.

The Guiding Principles also clarify that business enterprises have an independent responsibility to respect human rights. However, States may be considered to have breached their international human law obligations where they fail to take appropriate steps to prevent, investigate and redress human rights violations committed by private actors. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures.

Business enterprises, in turn, are expected to carry out human rights due diligence in order to identify, prevent, mitigate and account for how they address their impacts on human rights. Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Similarly, where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible (commentary to Guiding Principle 19). Furthermore, business enterprises should remedy any actual adverse impact that it causes or contributes to. Remedies can take a variety of forms and may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome (commentary to Guiding Principle 25).

The African Charter on Human and Peoples’ Rights, to which Kenya is a state party, requires Kenya to respect and protect the rights of all people. In particular, we would like to draw your Government’s attention to the right to information (article 9), the right to free association (article 10), the right to assembly (article 11), the right to

work under equitable and satisfactory conditions (article 15) as well as the right to “a general satisfactory environment favourable to their development” (article 24).

We would like to refer to the Kenyan Constitution, which guarantees fundamental rights of the population as set out in articles 26 (right to life), 35 (right to access to information), 36 (freedom of association), 41 (right to fair and reasonable working conditions), 43 the (right to the highest attainable standard of health and rights to food, water, sanitation and housing) and 48 (access to justice). In particular, article 42 of the Constitution stipulates the right to a clean and healthy environment.