

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the rights of indigenous peoples

REFERENCE:
AL OTH 9/2017

21 June 2017

Dear Mr. Rigterink,

We have the honour to address you in our capacities as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on the rights of indigenous peoples, pursuant to Human Rights Council resolutions 26/22, 28/11, 34/5 and 33/12.

In this connection, we would like to bring to your attention information we have received concerning the lack of follow-up to the announcement by the Dutch Development Bank (FMO) of the withdrawal of its participation in the Agua Zarca Hydroelectric Project in Honduras, a project owned and operated by Desarrollos Energéticos S.A. (DESA), as well as information concerning the process through which civil society actors could input to the review of FMO's Sustainability Policy and the adoption of its Human Rights Position Statement.

The murder of human rights defenders Berta Cáceres and Nelson García, as well as subsequent threats and campaigns of discredit against the members of civil society organizations in relation to the Agua Zarca Project, were the subject of communications sent to the Government of Honduras on 8 March 2016 (case HND 2/2016), on 18 March 2016 (case HND 3/2016), on 27 May 2016 (case HND 4/2016), and on 3 November 2016 (case HND 9/2016), which were made public in the Communications Reports of the Special Procedures of the Human Rights Council A/HRC/33/32 and A/HRC/34/75, of September 2016 and March 2017, respectively.

According to the information received:

On 9 March 2016, FMO announced the withdrawal of their investments from the Agua Zarca Hydroelectric Project. The decision followed the murder of Ms. Berta Cáceres, a prominent environmental and indigenous human rights defender in Honduras, a week earlier, in which persons associated with DESA, the company that owns and operates the project, were allegedly involved. The announcement also acknowledged the mounting evidence pointing to the involvement of the company in the root causes of the violence afflicting the community, and the alleged corruption that has taken place in the implementation of the Agua Zarca Project.

On 21 July 2016, Ms. Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples, presented a report on her mission to Honduras from 2 to 10 November 2010, where she noted that “the investment banks in this case must be aware of their responsibilities having had commercial relations with a company involved in acts that constitute crimes and serious violations of human rights”, and regretted that, despite “the threats, acts of aggression and deaths committed by military agents, people linked to the company or project sympathizers (...) the investment banks never saw any reason to question their support for the project” (A/HRC/33/42/Add.2).

On 7 September 2016, an independent fact-finding mission commissioned by FMO issued a report on the social, environmental and human rights impacts on local communities of the Agua Zarca Project in Honduras. Among other things, the mission found that even if “the policies and procedures of FMO to prevent conflicts in the field were relevant and timely (...), the reports from the independent consultants warned of weaknesses in the capacity of DESA, particularly in terms of strategic planning of community relations in the project zone”. The report further noted that “those who oppose (the Agua Zarca Project) need to have their concerns addressed in good faith and measures taken to respond to grievances and rebuild trust”, and claimed that “a re-engagement process could have the unintended consequence of raising intra-community tensions”. However, the report also claimed that “there is clear evidence that the project has a good deal of support from directly affected communities and brings substantial social benefits” and that should the project not continue “it can be expected that the communities will return to a poverty cycle of living subsistence”. In its recommendations, the independent mission recommended that FMO engage with the communities to explain its decision to withdraw from the project, and consult with them to see how some of the expected local projects can be honoured”.

On 22 September 2016 FMO’s management replied to the report, saying that “our decision about the responsible exit will reflect all of the above findings”, and that being the situation as complex as it is, “all parties involved must be heard, including all local communities, the client (DESA), the other lenders and international NGOs”.

Despite these repeated commitments by the FMO for over a year, it remains unclear how and when it will withdraw from the Agua Zarca Hydroelectric Project, and what guarantees will be adopted to prevent adverse human rights implications of their withdrawal.

In the process of reviewing its Sustainability Policy for ensuring that it has greater safeguards in place to avoid negative human rights impacts in future financing, FMO decided to invite stakeholders from civil society to participate. This led to a joint statement by 32 NGOs demanding that the policy includes measures to prevent and address reprisals against human rights defenders related to the projects which the FMO finances. Although in January 2017 the FMO explained that it would seek to include such provisions in its forthcoming Human Rights

Position Statement to be issued during the summer of 2017, stakeholders claim that it remains unclear how the process for developing such statement is being conducted and whether it will include the concerns expressed by the NGOs.

While we acknowledge FMO's commitment to responsibly withdraw its participation from the Agua Zarca Hydroelectric Project, we express our concern at the lack of information on how and when it will be implemented. Furthermore, we express our concern at the lack of clear indication by the FMO of how the drafting process of its Human Rights Position Statement has taken into account and will reflect the concerns of the different NGOs consulted, as well as how it will seek to address the issue of reprisals against human rights defenders in relation to the projects financed by the company, preventing the non-repetition of the circumstances which led to the murder of Berta Cáceres and other human rights defenders in Honduras.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations. The full texts of the human rights instruments and standards are available on www.ohchr.org or can be provided upon request.

As 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 therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information concerning the implementation of FMO's commitment to ensure a responsible withdrawal of its participation in the Agua Zarca Hydroelectric Project, including the way this withdrawal will take place, and the timeline it will follow.
3. Please explain how the review of the FMO's Sustainability Policy and the development of its Human Rights Position Statement has taken into account the concerns expressed by the different NGOs involved in the process, and how these instruments will seek to prevent and address the issue of reprisals against human rights defenders and guarantee the non-repetition of the circumstances which led to the murder of Berta Cáceres and other human rights defenders.
4. Please provide information about the measures that the FMO has taken, or is considering to take, to ensure that its human rights position and further policies will be in line with the UN Guiding Principles on Business and Human Rights.

We would appreciate receiving a response as soon as possible. Your response will be made available in a report to be presented to the Human Rights Council for its consideration and publicly available at the following website in due course: <http://www.ohchr.org/EN/HRBodies/SP/Pages/CommunicationsreportsSP.aspx>.

We would like to inform you that we have written to the Government of Honduras and to Desarrollos Energéticos S.A. sent on 17 May 2017 (case HND 4/2017) to express our concern about, and to request more information on, the allegations described above.

Please accept the assurances of our highest consideration.

Michael K. Addo
Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises

John H. Knox
Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Michel Forst
Special Rapporteur on the situation of human rights defenders

Victoria Lucia Tauli-Corpuz
Special Rapporteur on the rights of indigenous peoples

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to take this opportunity 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 (UDHR);
- The UN Guiding Principles on Business and Human Rights;
- The UN Global Compact Principles;
- International Code of Conduct for Private Security Service Providers
- The International Covenant on Economic, Social and Cultural Rights (ICESCR);
- The International Convention on the Elimination of All Forms of Racial Discrimination;
- The International Covenant on Civil and Political Rights (ICCPR); The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- The United Nations Declaration on the Rights of Indigenous Peoples; and
- Indigenous and Tribal Peoples Convention, 1989 (No. 169) from International Labour Organization.

In particular, would like to bring to your attention the UN Guiding Principles on Business and Human Rights (contained in A/HRC/7/31), which the Human Rights Council unanimously adopted in 2011 following years of consultations with Governments, civil society and the business community. The Guiding Principles have been established as the authoritative global standards for all States and businesses with regard to preventing and addressing the risk of business-related human rights impact.

The Guiding Principles clearly outline that private actors and business enterprises have a responsibility to respect human rights, which requires them to avoid infringing on the human rights of others to address adverse human rights impacts with which they are involved. The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. Furthermore, it exists over and above compliance with national laws and regulations protecting human rights.

The corporate responsibility to respect human rights covers the full range of rights listed in the UDHR, the ICCPR and the ICESCR. In this regard, we would like to remind you that everyone has the right to life and the protection of their physical and mental integrity as well as the right to be free from torture or cruel, inhuman or degrading treatment or punishment. These rights are set forth, inter alia, in the UDHR, the ICCPR and the CAT. Furthermore, we would like to recall that the UDHR and ICCPR also guarantee the rights to freedom of opinion and expression and freedom of association, respectively.. Moreover, we wish to refer to article 25 of the UDHR 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 medical care. This right is further elaborated in article 12 of the ICESCR, which guarantees the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The Guiding Principles 11 to 24 and 29 to 31 provide guidance to business enterprises on how to meet their responsibility to respect human rights and to provide for remedies when they have caused or contributed to adverse impacts.

In this connection, we recall that the Guiding Principles have identified two main components to the responsibility to respect human rights for business enterprises, which require that “business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and] (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts” (Guiding Principle 13). This dual-requirement is further elaborated by the requirement that the business enterprise put in place:

1. A policy commitment to meet their responsibility to respect human rights;
2. A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights. The business enterprise should communicate how impacts are addressed; and
3. Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute (Guiding Principle 15).

Each of these is elaborated below.

Policy Commitment:

The first of these requirements, a policy commitment, must be approved by the company’s senior management, be informed by human rights expertise (internal or external) and stipulate the human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services. The statement of policy must be publicly available and communicated internally and externally and reflected in operational policies and procedures necessary to embed it throughout the business enterprise (Guiding Principle 16).

Human Rights Due Diligence:

The second major feature of the responsibility to respect is the “human rights due-diligence”, the procedures for which have been deemed necessary to “identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships” (Guiding

Principle 18). Adequate human rights due diligence procedures must include “meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation” (Guiding Principle 18).

To prevent and mitigate against adverse human rights impacts, the findings of the human rights impact assessment should be effectively integrated across the relevant internal functions and processes of a company (Guiding Principle 19). Responsibility for addressing such impacts should be assigned to the appropriate level and function within the business enterprise, and internal decision-making, budget allocations and oversight processes should enable effective responses to such impacts.

Any response by a company to address its adverse human rights impacts should be tracked to ensure that it is effective. Tracking should be based on appropriate qualitative and quantitative indicators, and drawing on feedback from internal and external sources including affected stakeholders (Guiding Principle 20). In addition, information about activities taken to address any adverse human rights impacts, and how effective those actions have been, should be communicated externally (Guiding Principle 21).

Remediation:

The Guiding Principles acknowledge that “even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent”. Where a company identifies that it has “caused or contributed to adverse impacts” it “should provide for or cooperate in their remediation through legitimate processes” (Guiding Principle 22).

Business enterprises should establish or participate in operational-level grievance mechanisms “to make it possible for grievances to be addressed early and remediated directly” (Guiding Principle 29). Operational-level grievance mechanisms should reflect eight criteria to ensure their effectiveness in practice, as outlined in Guiding Principle 31: (a) Legitimate, (b) Accessible, (c) Predictable, (d) Equitable, (e) Transparent, (f) Rights-compatible, (g) A source of continuous learning, and (h) Based on engagement and dialogue. Lastly, operational-level grievance mechanisms must not be used to preclude access by individuals and communities to judicial or other non-judicial grievance mechanisms (Guiding Principle 29).

We would finally like to draw your attention to the United Nations Declaration on the Rights of Indigenous Peoples and the Indigenous and Tribal Peoples Convention, 1989 (No. 169) from International Labour Organization which gather under two documents, one of which (the Convention) has been ratified by the Government of Honduras, which embody the human rights framework for indigenous peoples, including their right to be consulted, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to proposed measures which impact their rights, territories and resources.