

Mandates of the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the rights of indigenous peoples

REFERENCE:
AL OTH 10/2017

21 June 2017

Dear Mr. John S. Watson,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights defenders and Special Rapporteur on the rights of indigenous peoples, pursuant to Human Rights Council resolutions 25/18 and 33/12.

In this connection, we would like to bring to your attention information we have received concerning **the refusal of Chevron Corporation to implement the judgment rendered in 2013 by the National Court of Justice of Ecuador, concerning the case brought in 1993 on behalf of the indigenous peoples affected by the environmental damage caused by oil exploitation activities in the provinces of Orellana and Sucumbíos, leaving the communities still at risk and without access to reparation or redress measures.**

According to the information received:

Background

In November 1993, different community members and representatives of the Cofanes, Secoyas and Kichwas indigenous peoples of the provinces of Orellana and Sucumbíos in Ecuador filed a class action against Texaco Inc. before the Court of the Southern District of New York. The claim concerned the pollution of their territories and the harm to the health of the members of the communities concerned due to the lack of due diligence by the company in the extraction of crude oil from the Ecuadorian Amazonia from 1964 to 1990.

From 1993 to 2002, the company, which had merged with Chevron Corporation in 2000, successfully resisted the indigenous peoples' attempts to have the case heard in US Courts. However, the claims were admitted by Ecuadorian courts in 2003, resulting in a complex trial that generated a file of 220,000 pages, containing more than 100 expert reports, over 64,000 lab results taken at court-supervised inspections, and dozens of testimonies from different witnesses.

On 14 February 2011, the President of the Provincial Court of Justice of Sucumbíos rendered its judgment, finding that "natural water sources throughout the Concession have been contaminated by the defendant's hydrocarbon activities, and in light of the dangerousness of the discharged substances and all the possible methods of exposure, the contamination puts at risk the health and lives of persons in general and the ecosystem", and condemning Chevron to the payment of 9,5 billion USD in damages. A second-instance appeal was rejected by the Sole Chamber of the Provincial Court of Justice of Sucumbíos on 3 January 2012, confirming the damages awarded in first-instance.

On 12 November 2013, the National Court of Justice of Ecuador delivered its judgment on the third appeal filed by Chevron, confirming its liability on the environmental claims, and quashing only the punitive damages awarded by the lesser courts.

Chevron's "discovery" lawsuits in US courts

Starting in 2009, before the judgement on first instance was adopted by the Ecuadorian first-instance court, Chevron launched at least 25 "discovery" lawsuits under the Federal Rules of Civil Procedure against lawyers, organizers, scientists, and others who had assisted the Ecuadorian indigenous peoples in their environmental claims since 1993. The suits had the purpose of obtaining extensive access to the respondents' computers, files, and email accounts, and also requested that these individuals subject themselves to videotaped depositions.

These procedures required respondents to hire counsel to seek to quash the request at great personal expense, the cost of the litigation elevating in some cases to hundreds of thousands of dollars. It is reported that in many cases, legal personnel of Chevron would follow-up its filing with threatening phone calls telling the respondents that the only way to avoid the extensive expenses would be to hand over all their computers and files without judicial oversight.

Through these lawsuits, Chevron allegedly obtained thousands of confidential and attorney-client privileged documents and communications, as well as 600 hours of outtakes from a renowned documentary-filmmaker who had filmed the indigenous peoples and their representatives for a film released in 2008. This information was reportedly manipulated and used for building a narrative addressed to the public opinion suggesting that several parts of the process before Ecuadorian courts were fraudulent, and seeking to stigmatize the work of the lawyers and human rights defenders involved.

RICO (racketeering) litigation

In February 2011, Chevron filed civil proceedings in the US against the community members, representatives of indigenous peoples, as well as the lawyers and human rights defenders that had previously sued it in Ecuador, on the basis the Racketeer Influenced and Corrupt Organizations Act (RICO). The lawsuit alleged fraud and extortion in bringing the environmental case in Ecuador, calling the procedures "sham litigation", and ultimately purported to make the Ecuadorian ruling unenforceable in the US and elsewhere.

The case was resolved on first instance in March 2014, when a US District Court rendered a judgment favouring Chevron. An appeal was subsequently rejected by an appellate court, which affirmed the first instance judgement in all respects,

allegedly not seriously engaging with the jurisdictional and legal challenges presented in the appeal.

A number of concerns have been expressed regarding these procedures. On the one hand, the case was allegedly heard by a judge who had previously expressed open contempt for the cause of the Ecuadorian defendants. According to journalistic sources, the judge had openly stated that the Ecuadorian suit was a product of “the imagination of American lawyers” who wanted so much money they could “fix the balance of payments deficit” between the US and Ecuador, and that Chevron should be protected so that American consumers would not “pull (their) car into a gas station to fill up and find that there isn’t any gas because these folks have attached it in Singapore or wherever else”. This same judge granted a number of the discovery claims filed by Chevron referred to above, while at the same time refusing to allow them to the defence.

Similarly, concern has been expressed in view of the fact that the judge denied the defence the right to have the case heard before an impartial jury by allowing Chevron to drop all its damages claims and still proceed with the suit. According to US federal procedural rules, all criminal and civil cases demanding less than \$20 USD are not required to be heard by a jury, and thus in the present case the judge was left with significantly increased discretion over the cause. Reportedly the judge allowed Chevron to reinstate a damages claim for \$32 million USD in attorney’s fees after the trial.

Other concerns have been expressed regarding the civil procedures followed under RICO. For instance, Chevron was allegedly allowed to submit over 2,000 exhibits only in a day. This placed the burden on the defence to have to object them individually in a maximum of four days, or have all objections considered waived. Given the size of the legal team representing the Ecuadorian parties, reviewing all the exhibits and objecting them was impossible. Similarly, the judge presiding over the case allowed Chevron to submit testimony from secret witnesses which were not scrutinized by the lawyers of the defence, and admitted testimony from a former Ecuadorian judge who had allegedly approached Chevron offering to sell his testimony to prove the corruption of the Ecuadorian judiciary. This testimony reportedly played a key role in the judge’s final findings.

Finally, with regard to the appeal procedures, it was informed that, because the Ecuadorian side chose to ground its appeal on the legal and jurisdictional issues of the procedures, the appeal court took the view that they had conceded the accuracy of the findings on fact by the first instance ruling.

Criminal proceedings brought in Ecuador

It is public that Chevron requested in 2010 and 2011 the prosecutorial authorities of Ecuador to open investigations against lawyers and human rights defenders involved in the legal defence of the Ecuadorian indigenous peoples for alleged falsification of

documents. While the Ecuadorian authorities have opened a file (Indagación Previa 235-2010) on the case and received testimony from some of the accused individuals, they allegedly have not received any information on the status of the investigations.

We express serious concern at the refusal of Chevron Corporation to abide by the judgment rendered by the Ecuadorian National Court of Justice in 2013 in the civil case brought against it for the environmental damage caused in the provinces of Orellana and Sucumbíos, harming several indigenous peoples that inhabit polluted territories. We similarly express our serious concern at the allegedly abusive litigation campaign pursued in the US and Ecuador seeking to have this ruling declared unenforceable. This legal strategy appears to ultimately have the purpose of using established legal procedures to demobilize the lawyers and human rights defenders who represented the affected communities, including indigenous peoples, in the Ecuadorian litigation, thus denying their rights to freedom of expression and participation in public affairs.

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 be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide information concerning the measures adopted by Chevron Corporation to comply with the final judgment rendered by the Ecuadorian justice in 2013 regarding the case brought against it by indigenous peoples concerning the pollution of their territories. In particular, please provide information concerning the measures adopted to ensure reparation to the affected communities of indigenous peoples and to redress the environmental harm provoked in the Ecuadorian provinces of Orellana and Sucumbíos. If no measures have been adopted so far, please inform the reasons why this is so.
3. Please provide your comments regarding the legal strategy pursued by Chevron Corporation in the US and in Ecuador, including the extensive use of one-sided discovery claims, the allegations of bias of the judge adjudicating the case brought under the RICO statute, the lack of an impartial jury taking part in the proceedings, the use of allegedly abusive testimony, and the criminal cases brought against lawyers and human rights defenders in Ecuador. In particular, please explain how these actions

are compatible with international human rights standards and specifically the indigenous peoples' rights to access to justice.

4. Please provide your comments regarding the allegations that Chevron has sought to demobilize human rights defenders by overwhelming them with the intensive litigation campaign pursued by Chevron in the US and Ecuador.
5. Please provide information about the measures that Chevron Corporation 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 will write to the Government of the United States to express our concern about and to request more information on the allegations described above.

Please accept the assurances of our highest consideration.

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 and principles

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); and
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).
- The United Nations Declaration on the Rights of Indigenous Peoples
- The Indigenous and Tribal Peoples Convention, 1989 (No. 169)
- The American Declaration on the Rights of Indigenous Peoples

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 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. Moreover, 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.

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 business responsibility to respect human rights, 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 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).

Finally, we would also like to draw your attention to the report of the Special Rapporteur on the rights of indigenous peoples (A/HRC/33/42) in which she recommends that “Investment dispute settlement bodies addressing cases having an impact on indigenous peoples' rights should promote the convergence of human rights and international investment agreements by: ... (h) Being cognizant of foreign corporations' contribution to violations of indigenous peoples' rights and the jurisdictional, financial, cultural, technical, logistical and political obstacles facing indigenous peoples when attempting to hold them to account”.