

Mandate of the Special Rapporteur on the situation of human rights defenders.

REFERENCE:
AL USA 9/2017

27 July 2017

Excellency,

I have the honor to address you in my capacity as Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 34/5.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning allegations of partiality and other procedural irregularities, including abusive strategies, in the judicial proceedings brought by Chevron Corporation before Federal courts against lawyers and human rights defenders representing the indigenous peoples involved in cases brought against this company in Ecuador for environmental damage caused by oil exploitation activities.

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's attempts to have the case heard in US Courts. However, the claims were admitted by Ecuadorian courts in 2003, resulting in complex litigation 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 first judgement was adopted by the Ecuadorian first-instance court, Chevron launched some 25 "discovery" lawsuits under the Federal Rules of Civil Procedure against lawyers, organizers, scientists, and human rights defenders 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 financial 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 communities concerned 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 the United States District Court for the Southern District of New York 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

substantially 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 Senior Judge of the above mentioned District Court who had previously expressed open contempt for the cause of the Ecuadorian defendants. According to different 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 similar claims 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 object them individually in a maximum of four days, or else 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 defence lawyers, 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, thus seriously hampering the outcome of possible appeals.

I wish to express serious concern at the allegations of partiality and other procedural irregularities, including passivity in face of abusive litigation, of the Federal courts dealing with the case brought by Chevron Corporation against the lawyers and

human rights defenders representing indigenous peoples affected by oil extraction in Ecuador. These allegedly non-equitable procedures and their final rulings seem to have the effect of obstructing the work of human rights defenders, stigmatising and silencing them, and more notably preventing Ecuadorian indigenous peoples from receiving redress for the serious environmental damage suffered in their territories during several decades.

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.

It is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention. I 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 allegations of abusive use of “discovery” claims against different persons, including human rights defenders, who had assisted in the different stages of this case. In particular, please provide information on the measures taken, if any, by the Federal courts hearing these claims to ensure that the principle of equality of arms between the parties was respected.
3. Please provide information on the reasons not to disqualify the judge hearing the case brought by Chevron Corporation under the RICO statute who publicly expressed contempt for the defence’s cause. In particular, please explain how these procedures were compatible with the standards of judicial impartiality set by article 14 of the International Covenant on Civil and Political Rights (ICCPR), in view of the above mentioned allegations.
4. Please provide information regarding the decision by the United States District Court for the Southern District of New York to allow Chevron Corporation to drop all its claims on damages, with the implication of denying the defence’s right to have the case heard before an impartial jury. In particular, please explain how these facts are compatible with the obligation to equitably secure the guarantees of due process under article 14 of the ICCPR.
5. Please provide information concerning the allegations of acceptance of some 2,000 exhibits submitted by Chevron Corporation in only one day, with a deadline for objection of four days for the defence, and how this is compatible with the guarantee of equality under article 14 of the ICCPR.

6. Please provide information on the allegations of admission of testimony from secret witnesses in the legal procedures brought under the RICO statute by Chevron Corporation, which were not subjected to scrutiny by the defence, and how this is compatible with article 14 of the ICCPR. Similarly please provide information concerning the allegations of admission of testimony by a former Ecuadorian judge suspected of corruption, and the measures adopted to guarantee that these concerns were duly addressed during the assessment of the depositions.
7. Please provide information on the overall measures taken to ensure that established procedures of law are not used to accomplish illegitimate and rights-depriving ends affecting human rights defenders, such as the alleged use of abusive strategic litigation by Chevron Corporation to silence and demobilise environmental defenders in the case referred to in this communication.

I 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>.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

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

I would like to inform Your Excellency that I have addressed, together with other Special Rapporteurs, a similar communication to Chevron Corporation, sent on 21 June 2017 (case OTH 10/2017) to express my concern about and to request more information on the allegations described above. A reply by Chevron was received on 6 July 2017, briefly addressing the merits of the allegation but announcing that a more detailed answer will be provided in August.

Please accept, Your Excellency, the assurances of my highest consideration.

Michel Forst
Special Rapporteur on the situation of human rights defenders

Annex

Reference to international human rights law

In connection with above alleged facts and concerns expressed, I would like to refer your Excellency's Government to Article 14 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States on 8 June 1992, and which establishes the guarantee of equality before the courts and tribunals as well as the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. I would similarly like to remind your Excellency's Government of Article 19 of the ICCPR, which establishes the right to freedom of expression.

Reference should also be made 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, also known as the UN Declaration on Human Rights Defenders. Of particular relevance are articles 1 and 2 of the Declaration which state that everyone has the right 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. Similarly, article 12, (1) and (3), provides for the right to participate in peaceful activities against violations of human rights and fundamental freedoms, as well as for the right to be protected effectively under national law in reacting against, or opposing, through peaceful means, activities and acts that result in violations of human rights and fundamental freedoms.

In this vein, I would like to remind your Excellency's Government that the UN Basic Principles on the Independence of the Judiciary stipulate that "the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason" (Principle 2). Moreover, the Bangalore Principles of Judicial Conduct determine that "a judge shall perform his or her judicial duties without favor, bias or prejudice" (Principle 2.1); that "a judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary" (Principle 2.2); and that "a judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer" (Principle 3.1).

I would also like to refer your Excellency' Government's attention to the United Nations Declaration on the Rights of Indigenous Peoples which was adopted by the General Assembly on 13 September 2007, endorsed by your Government on 16 December 2010, and in particular to Article 7 which refers to the rights to life and physical and mental integrity of indigenous individuals. I would also like to refer your Excellency' Government to article 40 which refers to the right to access to just and fair procedures with States or other parties, with due consideration to the customs and traditions of indigenous peoples.

Regarding the use of strategic litigation against human rights defenders, I would like to recall that the Special Rapporteur on the situation of human rights defenders, in his report to the General Assembly of 3 August 2016 (A/71/281), expressed his view that “the use of strategic litigation against public participation in lawsuits silences defenders, effectively denying them their rights to freedom of expression and participation in public affairs” and that “defenders require support in their defence against such lawsuits, the financial and psychological burdens of which are often so great that they distract and demobilize defenders”.