

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the situation of human rights in Cambodia; 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 promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the rights of indigenous peoples; and the Special Rapporteur on the human rights to safe drinking water and sanitation

REFERENCE:
AL OTH 49/2018

27 September 2018

Dear Mr. Xiang,

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 situation of human rights in Cambodia; 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 promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the rights of indigenous peoples; and Special Rapporteur on the human rights to safe drinking water and sanitation, pursuant to Human Rights Council resolutions 35/7, 36/32, 37/8, 34/18, 32/32, 34/5, 33/12 and 33/10.

We are sending this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received.¹ Special Procedures mechanisms can intervene directly with Governments and other stakeholders (non-state actors) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying the facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

In this connection, we would like to bring to your attention information we have received regarding the alleged deprivation and clearance of agricultural and forest lands from at least 946 families in 25 villages of Preah Vihear due to concession of their lands to

¹ Further information about the communication procedure is available at:
<http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>

the five Cambodian subsidiaries of a China-based sugarcane enterprise, Guangdong Hengfu Group, without consultation with affected community's members, including indigenous peoples. We would further more like to bring attention to information received concerning the alleged judicial harassments suffered by some communities' members for raising their concerns in this context.

According to the information received:

a) Context

From 1993 until 2012, the Government of Cambodia granted economic land concessions to private companies. These economic land concessions constitute long-term leases that allow the beneficiary to clear land in order to develop industrial agriculture, as stipulated by article 49 of the 2001 Land Law. Land concessions areas shall not be more than 10,000 hectares and the maximum duration is limited to 99 years, according to articles 59 and 61 of the Land Law.

As a result, out of 6.5 million hectares of arable land, about 2.7 million hectares of land are now under concession management

b) Granting of economic land concession

In 2011, 42,420 hectares of land in Preah Vihear Province were reportedly leased to five Cambodian sugarcane producers enterprises: Lan Feng International Company Limited, Rui Feng International Company Limited, Heng Non International Company Limited, Heng Rui International Company Limited and Heng You International Company Limited. These five companies are subsidiaries of a China-based enterprise, Hengfu Group Sugar Industry (hereinafter "Hengfu"). Hengfu is based in Guangdong, China. It is primarily owned by, and receives financing from, Chinese entities, both state-owned and private. It has also received loans from foreign banks, including BNP Paribas (France) and Korea Development Bank (Republic of Korea). According to the information received, the land concession was issued as follows:

- Lan Feng International Company Limited was granted an area of 9,015 hectares in Prame commune and To Su commune.
- Rui Feng International Company Limited was granted 8,841 hectares in Mlu Prey Muoy, Mlu Prey Pir and Sangke Pir communes.
- Heng Non International Company Limited was granted an area of 6,649 hectares in To Su, S'ang and Putrea communes.
- Heng Rui International Company Limited was granted an area of 9,160 hectares in To Su commune and Sang Pir commune.

- Heng You International Company Limited was granted an area of 9,111 hectares in Mlu Prey Muoy, Chhep Muoy, Cchep Pir and Sangke Muoy communes.

These lands account for a total of 42,422 hectares, which exceeds significantly the legal limit of 10,000 hectares for a single entity.

These economic land concessions reportedly encroach on agricultural, grazing and forest lands of members from 25 villages in Preah Vihear Province, accounting for at least 946 families and 23,000 individuals. 731 of these families have land certificates issued by commune authorities for individual land holdings. At least seven of the 25 villages are inhabited by people who self-identify as Kui indigenous peoples. Among these communities, three communities from the villages of Boh Thom, Sre Preang and Prame are in the process of securing collective land titling.

None of the community members were consulted prior to the issuance of the economic land concession, nor for the environmental impact assessment concluded in 2016, thus infringing the relevant provisions of the Land Law (2001), the Sub Decree on the Environmental Impact Assessment Process (1999) and the Sub-Decree on Economic Land Concessions (2005).

c) Clearance and contamination of agricultural and forest lands

As a result of the economic land concessions to Hengfu for sugarcane plantations, a minimum of 76.46 hectares of land used for cultivation by 946 families from 25 villages was cleared, including rice paddies, upland fields and forest lands. Consequently, these families have lost their livelihood and the access to non-timber forest resources. They have also reportedly suffered impact on areas of cultural and spiritual significance due to the destruction of ancient temples and the deforestation of sacred forests. Moreover, they have also suffered from the destruction of ponds² and the contamination of streams and rivers (O Preal, O Popoam and Stung Sen river) due, reportedly, to the waste and chemicals used on the sugarcane fields. These ponds and river were sources of water used for human consumption and water crops. The contamination of rivers and ponds has also led to the loss of fish and other aquatic life that people rely on for food. Moreover, health concerns have been raised, as people complain of itchiness after bathing in some places.

It was reported that no or little compensation has been given to the affected families. The only compensation given was to families which already had titles to their land,

² (Trapeang Yaeng, Trapeang Antit Pouv, Trapeang Russei, Trapeang Beng, Trapeang Sangke Thom, Trapeang Ben Kandak, Trapeang Krakah, Trapeang Ampil, Trapeang Khtom Khang Lech, Trapeang Brey Thom, Trapeang Akheum, Trapeang Snao, Trapeang Popoul, Trapeang Pring, Trapeang Thmor, Trapeang Andong, Trapeang Chakrom, Trapeang Taduong, Trapeang Chrey, Trepeang Sangke Pen, Trapeang Sangke, Trapeang Kcheay, Trapeang Tram Sosor, and Trapeang Areak.)

but the compensation provided was reportedly inadequate, only a few hundred dollars per hectare of land taken. In virtue of the Leopard Skin policy, some social land concessions were granted to some communities in the Hengfu concession area. However, people who got their land titled were subsequently pressured by the company to sell it, or the company took it and then paid compensation.

Following this, in May 2014 and January 2015 the communities filed complaints before the Preah Vihear Provincial Court against the companies and submitted their cases to local commune and district authorities and Preah Vihear provincial authorities to resolve land disputes.

It was also reported that the company has ceased paying rent to 45 families in Prome village from whom it has been leasing land. In addition, land titles and lease agreements have not been returned to the villagers when requested. The company stated that payments have been delayed, due to the large number of people and the ensuing time required to work on the accounting, but that the rents would be paid in June 2018.

d) Indigenous peoples and collective lands

At least seven of the 25 villages self-identify as Kui indigenous peoples.

The Cambodian Government has made progress in adopting legislative and policy frameworks supportive of the rights of indigenous peoples, including the National Policy on the Development of Indigenous communities, adopted by the Government of Cambodia in 2009, which seeks to ensure that the cultures of indigenous peoples throughout the country are safeguarded and their living conditions are approved in a consistent manner across all sectors.

In terms of collective land rights of indigenous peoples, the 2001 Land Law contains provisions on the protection of indigenous peoples' lands and allows indigenous peoples to apply for collective land titles rather than individual titles, and prevents the sale and transfer of indigenous lands.

The Land Law Sub-Decree 83 establishes a three-step procedure that indigenous communities must follow in order to obtain collective land title. First, communities must apply to be recognized as indigenous communities with the Ministry of Rural Development (MRD); second, they must apply to be registered with Ministry of Interior (MoI) as legal entities; and third, they must apply to register their land collectively with the Ministry of Land, Urban Planning and Construction (MLMUPC).

In this framework, in 2010 members of the seven indigenous communities started the process of community land registration for the same pieces of lands subsequently granted to Hengfu. In 2013 the communities were all recognised as

being indigenous by the Ministry of Rural Development and were registered as legal entities by the Ministry of Interior. In 2014, three communities from the villages of Boh Thom, Sre Preang and Prame submitted their application for the community land registration with the Ministry of Land, Urban Planning and Construction. In 2016, they reached the final stage of collective land titling. However, the titles have not been given yet and their request for interim protection of their communal lands has been denied.

e) Freedom of expression and assembly

Since the beginning of the operation, the affected communities have tried to organize themselves to express their concerns about these concessions and the subsequent loss of their land, spiritual and economic resources. Since 2013, they have also organized various protests to raise their concerns and call on the government for actions. In 2014, in the absence of any support from local or national authorities, the community members decided to remain on the rice fields to prevent any further clearing of their lands and they seized bulldozers and sent these bulldozers to the commune office for a solution. Land rights defenders are constantly threatened through lawsuits filed by Hengfu subsidiaries and criminal charges are allegedly misused against them to discourage them, most typically accusing them of destruction of private property, intentional violence, defamation, disinformation and incitement to commit felony. Currently, at least 14 community leaders and environmental human rights defenders have been charged for these crimes.

While we do not wish to prejudge the accuracy of these allegations, we are deeply concerned about the alleged serious consequences on the affected communities of the concessions and loss of their lands, resources and spiritual sites without any consultation with affected communities or provision of adequate compensation, which your company and other Hengfu's Cambodian subsidiaries could have caused, contributed to or been directly linked. Serious concern is addressed to reports that your company is failing to meet its international human rights responsibility to protect the rights of the communities' members in the framework of your activities.

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.

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/or comment(s) you may have on the above-mentioned allegations.

2. Please provide information as to what human rights due diligence (including environmental impact assessment) has been undertaken by your company to prevent, identify and remedy the adverse human rights impacts of the activities of your business in accordance with the UN Guiding Principles on Business and Human Rights.
3. Please provide information on any steps taken to consult or seek feedback from potentially affected communities, including before the clearance of land, forest and cultural resources. In relation to indigenous peoples, please provide information on steps taken to seek their free, prior and informed consent on projects taking place on their lands, territories and resources.
4. Please provide information on steps taken by your company to provide for effective remedy or cooperate in remediation of adverse human rights impacts, which they have caused or contributed to, through legitimate processes, as set forth in the UN Guiding Principles on Business and Human Rights.
5. Please provide information on steps taken by your company to establish any company-level grievance mechanisms to address adverse human rights impacts caused by your company and to deal with the concerns of affected communities
6. Please provide detailed information about lawsuits filed against local communities.
7. Please provide further information as why you should not consider – consistent with your responsibility to respect all human rights – ending all legal proceedings against individuals, including human rights defenders and communities’ leaders, facing investigation, charges, or prosecution for engaging in legitimate activities protected by international human rights law?

We would appreciate receiving a response within 60 days. Your response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please be informed that a letter on the same subject has also been sent to the Governments of China and Cambodia, and other companies involved.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged abuse 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.

Please accept, Mr. Xiang, the assurances of our highest consideration.

Dante Pesce
Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Rhona Smith
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David Boyd
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Clement Nyaletsossi Voule
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Michel Forst
Special Rapporteur on the situation of human rights defenders

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

Léo Heller
Special Rapporteur on the human rights to safe drinking water and sanitation

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your attention to the United Nations Guiding Principles on Business and Human Rights, which were unanimously endorsed by the Human Rights Council in its resolution (A/HRC/RES/17/31), after years of consultations involving governments, civil society and the business community.

The Guiding Principles have been established as the global authoritative norm for all States and companies to prevent and address the negative consequences related to companies on human rights. The responsibility to respect human rights is a global standard of conduct applicable to all companies, wherever they operate. It exists regardless of the ability and / or willingness of States to meet their own human rights obligations and does not reduce those obligations. It is an additional responsibility to comply with national laws and regulations for the protection of human rights.

"The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- (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).

To fulfill their responsibility to respect human rights, business enterprises should have in place:

- “(a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”(15 guiding principle)

The Guiding Principles also recognise the important and valuable role played by independent civil society organisations and human rights defenders. In particular, Principle 18 underlines the essential role of civil society and human rights defenders in helping to identify potential adverse business-related human rights impacts. The Commentary to Principle 26 underlines how States, in order to ensure access to remedy, should make sure that the legitimate activities of human rights defenders are not obstructed.

We also wish to draw your attention to article 25 of the Universal Declaration of Human Rights (UDHR) 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.” Furthermore, article 11.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) – which Cambodia ratified on 26 May 1992 - stipulates that States “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions” and requires them to “take appropriate steps to ensure the realization of this right.”

The Committee on Economic, Social and Cultural Rights, which monitors the implementation of the ICESCR, has further defined the core content of the right to food in its General Comment No. 12, along with the corresponding obligations of States to respect, protect and fulfill the right to food. The Committee considers that the core content of the right to adequate food implies, inter alia, availability of food which refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand, and accessibility of food which encompasses both economic and physical accessibility.

We furthermore recall the explicit recognition of the human rights to safe drinking water and sanitation by the UN General Assembly (resolution 64/292) and the Human Rights Council (resolution 15/9), which derives from the right to an adequate standard of living, protected under, inter alia, article 25 of the Universal Declaration of Human Rights, and article 11 of ICESCR. In its General Comment No. 15, the Committee on Economic, Social and Cultural Rights clarified that the human right to water means that everyone is entitled to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. Furthermore, the United Nations General Assembly in its resolution 70/169 of 2015 recognized that “the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use”, and that “the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living”.

We would like to also draw your attention to articles 9, 17, 19 and 22 of the International Covenant on Civil and Political Rights, ratified by Cambodia on 26 May 1992, which guarantee the rights to liberty and security of person, to not be subjected to arbitrary or unlawful interference with one’s family or home, to freedom of opinion and expression and to freedom of association.

We would like to refer to Human Rights Council resolution 13/13, which urges States to put an end to and take concrete steps to prevent threats, harassment, violence and

attacks by States and non-State actors against all those engaged in the promotion and protection of human rights and fundamental freedoms.

We would like to refer also to the Human Rights Council resolution 31/32 which in paragraph 10 underlines the legitimate role of human rights defenders in mediation efforts, where relevant, and in supporting victims in accessing effective remedies for violations and abuses of their economic, cultural rights, including for members of impoverished communities, groups and communities vulnerable to discrimination, and those belonging to minorities and indigenous peoples.

We furthermore wish to refer to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007. This instrument provides an authoritative statement of international human rights standards related to indigenous peoples. The UNDRIP elaborates upon existing binding rights in the specific cultural, historical, social and economic circumstances of indigenous peoples. Article 7 of the UNDRIP provides that indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. Article 26 states for the right of indigenous peoples to ‘the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired’ and for legal recognition of those rights ‘with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.’ Article 10 affirms that indigenous peoples ‘shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.’

Furthermore, the UNDRIP provides for the rights of indigenous peoples to redress for actions that have affected the use and enjoyment of their traditional lands and resources. In that regard, Article 28 states that ‘indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.’